**<u>SUPREME COURT OF NOVA SCOTIA</u>**
**Citation:** *Carson v. R.,* 2021 NSSC 370

**Date:** 20220408
**Docket:** *Bridgewater*, No. 504119
**Registry:** Halifax

**Between:**

Glen Carson

*Appellant*

v.

Her Majesty the Queen

*Respondent*

**Restriction on Publication: s. 486.4**

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| **Judge:** | The Honourable Justice Diane Rowe |
| **Heard:** | July 26, 2021, in Bridgewater, Nova Scotia |
| **Oral Decision:** | November 19, 2021 |
| **Counsel:** | Thomas Singleton and Leora Lawson, for the Appellant<br>Keavin Finnerty, for the Crown Respondent |

**s. 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

**By the Court:**

**Overview:**

[1] Mr. Carson appeals the decision of the Honourable Judge Paul Scovil, made October 13, 2020, convicting Mr. Carson of sexual assault of Ms. Y, contrary to s. 271 of the *Criminal Code*, RSC 1985, c. C-46.

[2] The Appellant and the complainant had formerly worked together in a restaurant, operating as “The Best Little Oar House in Nova Scotia”, for a period of six (6) months.

[3] Ms. Y’s complaint was that Mr. Carson had touched her buttocks and breast, without consent, while she was working at the restaurant. The touching was in a manner that was regular and intentional, and made concurrent with comments to dissuade her from complaining.

[4] Mr. Carson’s response was a denial, disputing that there was intent but rather an accidental touching, if any had occurred, due to the narrowness of the restaurant counter and kitchen.

[5] The Judge's oral decision was brief. It contains a summation of the law concerning credibility and sexual assault, and reference to points of evidence, concluding with a finding that Mr. Carson was guilty of sexual assault.

[6] In his written submission to the Court, Mr. Carson focused his appeal on four grounds concerning the summary conviction as follows:

> 1. The trial judge made an error in law in making findings of fact not supported the evidence.
> 2. The trial judge erred in law by failing to direct himself, or apply, proper legal principles when assessing the credibility of the complainant and the reliability of her evidence in the following ways:
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>    (a) By making a finding that the complainant's credibility was supported by facts not in evidence;
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>    (b) By failing to consider frailties in the complainant's testimony in considering its reliability; and
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>    (c) By failing to assess the credibility and reliability of other witnesses at trial and failing to note or consider inconsistencies between the complainant's evidence and that of other witnesses.
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> 3. In committing the above errors of law, the appellant submits that the trial judge rendered an unreasonable verdict based on a misapprehension of the evidence and resulting in a miscarriage of justice; and
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> 4. The trial judge did not provide sufficient reasons to allow for meaningful appellate review.

[7] The Respondent Crown's submission challenges each of the grounds put forward by Mr. Carson. The Crown maintains that the standard of review in a summary conviction appeal requires this Court to determine whether the findings of the trial judge are unreasonable or cannot be supported by the evidence, absent

an error of law or miscarriage of justice. The Crown submits the trial judge made findings of fact supported by the evidence, and applied proper legal principles in assessing the credibility of the complainant. Finally, the Crown states the trial judge did not misapprehend the evidence, and that the reasons for decision, while brief, were sufficient for appellate review.

**Standard of Review for Summary Conviction Appeal Court:**

[8] In *R. v. Nickerson,* 1999 NSCA 168, Cromwell, J.A., as he then was, wrote at paragraph 6:

> [6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 1981 CanLII 3294 (NS CA), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. **In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.** [emphasis added]

[9] Farrar, J.A. restated this principle in *R. v. Pottie* 2013 NSCA 68 at para 15-16:

> [15] In the recent decision of *R. v. Francis*, 2011 NSCA 113, Fichaud, J.A. considered the standard of review to be applied in an appeal pursuant to s. 839(1)(a) of the Criminal Code. In summary, there are two standards of review at play in summary conviction matters; the first is the standard of review to be applied by the SCAC judge when reviewing the trial decision; and the second being the standard we apply to the decision of the SCAC judge.
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> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is **entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.** [emphasis added]

[10] More recently, the Nova Scotia Court of Appeal considered the application of the principles in its review of a summary conviction appeal, in *R. v. Stanton*, 2021 NSCA 57. This decision highlighted the standard of review regarding questions of law, specifically in regard to the Crown's obligation on the burden of proof of an offence, to be proven beyond a reasonable doubt.

[11] In *Stanton*, the accused appealed a summary conviction appeal decision in the context of a sexual assault, when, as is similar in this appeal, questions of credibility are to be determined by the trier of fact. As was noted by Derrick, J.A. at paragraph 65 of the decision:

> … The trial judge had to be correct in his approach to assessing if the Crown had discharged its burden of proving beyond a reasonable doubt that AR did not consent…

[12] And further, at paras 66-67, she writes:

[66] A trial judge will have erred in law if their decision, read as a whole, discloses a "chain of reasoning from credibility to guilt without recognition that the ultimate issue is not credibility but reasonable doubt" (*R. v. Mah*, 2002 NSCA 99, para. 46). A judge's approach to the evidence must be correct in law "so as to ensure that the final step in the process, the weighing of the evidence, is not flawed" (*R. v. B.(G.)*, 1990 CanLII 115 (SCC), [1990] 2 S.C.R. 57, para. 38). That final step is the weighing of the evidence in its totality to determine whether there is reasonable doubt.

[67] Before embarking on an assessment of the trial judge's reasons to determine whether he committed legal error, I set out below the legal principles relevant to appeals where credibility is pivotal:

- 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 CanLII 711 (SCC), [1999] 1 S.C.R. 330, para. 61).

> - "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).
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> - 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).
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> - 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).
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> - "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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> - 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)

[68] In *G.F.*, the Supreme Court of Canada has recently warned against the parsing of a trial judge's reasons, particularly as they relate to the assessment of credibility. An appellant must be able to show actual error or, due to insufficient reasons, the frustration of appellate review. The appellate 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" (para. 79).

[69] The Court in *G.F.* acknowledged the particular challenges faced by judges assessing credibility in sexual assault trials:

> [81] As *Slatter* [*R. v. Slatter*, 2020 SCC 36] demonstrates, a trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence,

> and articulating reasons for findings of credibility can be more challenging. Mindful of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the accused is found not to be credible, or why the evidence does not raise a reasonable doubt.

**Analysis:**

[13] The Appellant's submission was that the trial judge erred in law by making findings of fact not supported by the evidence, and that the judge went further to support his findings on the credibility of the complainant based on a misapprehension of the evidence.

[14] Further, the Appellant submits that the trial judge failed to direct himself, or apply legal principles, when assessing the credibility of the complainant and the reliability of her evidence and did not provide sufficient reasons to allow for a meaningful appellate review of the credibility and reliability assessments.

[15] As was noted by the Appellant, Beveridge, J.A. in *R. v J.P*. 2014 NSCA 29, incorporated Doherty, J.A. at para 83 of *R. v. Morrissey*, 1995 OJ No. 639, where it is noted:

> …a misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence…

[16] And again, in the authorities relied upon by the Appellant, the Nova Scotia Court of Appeal in *R v N.M.*, 2019 NSCA 4, at para 27, incorporated by reference Justice Watt in *R. v. Doodnaught* 2017 ONCA 781, which would indicate that:

> 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.

[17] Mr. Carson submits that the trial judge made findings of fact in the decision that were not supported by the evidence, specifically:

> (a) That Mr. Carson “insisted” his employees refer to him as RD (short for “Rugged Dude”).
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> (b) That on one occasion the witness Garrett Schwartz saw Mr. Carson elbow Ms. Y’s breast and say “oops, better call the Labour Board”, which is a factual error.
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> (c) That the trial judge enhanced Ms. Y’s evidence by referring to Garrett Schwartz’s observation of Mr. Carson elbowing Ms. Y’s breast, with the comment of “boobed ya”, which is a factual error.
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> (d) The trial judge found there was “no doubt” Mr. Carson had brushed his hands across the buttocks of Ms. Y, which is an error of fact-based on the appellant’s review of Ms. Y’s evidence and his understanding of the legal principles required of the trial judge for a credibility finding
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> (e) That Ms. Y was certain the touching of her buttocks was intentional and not accidental, without referring to the basis for the certainty
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> (f) That the email to the co-owner of the Best Little Oar House, Ms. Raaymaker, did not specify that sexual assault was at issue when requesting a meeting to discuss problems at work concerning R.D.

> (g) That Ms. Y's evidence concerning the timing of her disclosure of the assaults, and her responses to the assaults while they occurred to "joke" about them, and contact with the Labour Board was not considered by the trial judge in determining credibility, or given any weight.
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> (h) That the trial judge found that the potential for personal contact ranged from occurring regularly to occurring seldomly, which is inaccurate based on the evidence of all the witnesses. The personal contact was found to be "for the most part" backs and shoulders as a finding of fact by the trial judge, which is disputed by Mr. Carson.

[18] I will address these as follows.

[19] First, there is evidence in the record that Mr. Carson required employees to refer to him as "RD", found in the Employee Manual submitted to the Court, at the final page with his phone contact number. In any event, this is not a material fact.

[20] To continue, in my review of the record, it does appear that the Judge was incorrect in attributing either "oh boobed ya" or "oops better call the Labour Board" to Garrett Schwartz's testimony concerning his observation of Mr. Carson elbowing Ms. Y's breast, however, his evidence on the record was that Mr. Carson said a "snappy comment" at the time. This was further clarified that he was not saying Mr. Carson said those words at that instant, but that a phrase like "you better call the Labour Board" was not an unusual response.

[21] The Judge's inaccuracy in his oral decision in regard to what Mr. Schwartz may have heard did not lead to an unreasonable finding of a material fact at issue concerning the touching of Ms. Y's breast or buttocks.

[22] On a review of the record, it appears that six out of the seven defence witnesses, and both of the Crown witnesses, gave evidence that Mr. Carson regularly made this specific “joke” during work at the Best Little Oar House. The cumulative evidence before the trial judge was that this “joke” was typically made by Mr. Carson when his body touched other employees in the course of work.

[23] While the trial judge was inaccurate in recounting Mr. Schwartz’s evidence in his decision, it was not so inaccurate as to make the content unreliable as Mr. Schwartz did also witness touching on the breast and supported Ms. Y’s direct evidence of being touched on the breast by Mr. Carson’s elbow at work, and that a sarcastic or snappy comment followed with that touch.

[24] Further, the submission that there was not a basis in the evidence for the trial judge to express “no doubt” that Mr. Carson touched the buttocks of Ms. Y touches on two grounds of the appeal, specifically that the trial judge’s findings on credibility were in error and challenging the sufficiency of the trial judge’s reasons for decision.

[25] This finding, as in the findings of the meaning of the email to Ms. Raaymaker, the timing of disclosure, the call to the Labour Board, the response in real time to being touched at work by Ms. Y, and the nature of the personal contact

all are connected to the Appellant's submission that the trial judge failed to adequately apply the legal test for credibility findings.

[26] In reviewing the trial judge's decision, I note that the Judge began by referring to the restaurant's name as linked to the movie "The Best Little Whore house in Texas", depicting "a brothel in Texas".

[27] In reviewing the record, it is evident from the evidence of Ms. Raaymaker that this was the intention of the co-owners Mr. Carson and Ms. Raaymaker. Further, this was an element of the Crown's theory of the case concerning the environment of the restaurant in its closing submission to the Court.

[28] This indicates that the trial Judge was fully attuned to the elements of the matter before him. This also reflects the discourse between the judge and Crown in its closing submission concerning the current law of sexual assault and the consideration of the impairment of a victim's sexual integrity, which now underpins the law.

[29] In the portion of the decision, headed "Facts", the trial judge set out his findings of fact concerning the Crown's evidence of Ms. Y's complaint of breast touching and buttocks touching at the workplace. He notes the corroboration of

Mr. Schwartz of at least one instance of her breast being elbowed by Mr. Carson with a sharp comment following.

[30] The trial judge balanced his consideration by referring to Mr. Carson's defence that "any touching that may have occurred was accidental" and discusses the defence witnesses evidence of close working space. He counterbalanced this with the evidence of Ms. Y and Mr. Schwartz that the area was ample enough to be able to stay out of each other's way and notes Mr. Schwartz's agreement on cross examination that bumping into coworkers may have occurred when the restaurant was busy.

[31] The Judge then finds that the defence witnesses indicate personal contact was "occurring regularly to the contact as described occurring seldom." On my review of the record, with the transcripts of all of the witnesses, that is a reasonable conclusion for the trial judge to make.

[32] A hand drawn plan of the restaurant was reviewed in the decision, as well as photos of a person standing in the area. The Judge describes the width of the space, and weighs the evidence in this regard, making a finding that there were close work quarters but with sufficient space to pass without touching. This finding is also reasonable, based on the evidence before him.

[33] Prior to entering into a further analysis, the trial judge referred to the applicable law and states that:

> …judges must remind themselves that the fundamental rule of hearing matters before them is that the burden of proving the guilt of the accused rests solely with the prosecution. Before an accused can be convicted of any offense, the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the elements of the offense. These principles of reasonable doubt apply to issues of credibility, as well as they do to facts.

[34] This indicates to this Court that the trial judge did turn his mind, correctly, to the legal burden of the Crown and his duty concerning the finding of reasonable doubt. It is not required for a trial court judge to recite *R. v. W.D.* [1994] 3 SCR 521 in every instance when, on a review of the decision, it is clear that the principles are being applied. In this matter, the trial judge then entered into a discourse on credibility findings, and cites *R. v. D.D.S.*, 2006 NSCA 34 a leading case of the Nova Scotia Court of Appeal on credibility.

[35] He notes that the judge is entitled to accept all, some or none of a witness' evidence. He also cites *R. v. Filion* 2003 CanLII 517 (ONSC), setting out a series of factors for credibility assessments.

[36] Then, before setting out his analysis of the matter before him, the trial judge refreshes his mind on the current jurisprudence concerning the offence and the

elements of the offence that the Crown must prove. He notes pertinent cases in which touch of the body by another person, absent consent occurred, and stated:

> A person has a required mental state or *mens rea* of the offense when she or he knew that the complainant was not consenting to the sexual act in question or was reckless or wilfully blind to the absence of consent.

[37] This is correct.

[38] The Judge informed himself on the law that it is clear that the part of the body touched does not have to be a sexual organ, citing *USA v. English* 2007 BCCA 169 He also notes *R. v. JA* 2011 SCC 28, in which Justice McLachlin stated that:

> A conviction for sexual assault requires proof beyond a reasonable doubt of the *actus reus* and *mens rea*. The actus is committed when a person touches another in a sexual way without consent, which is defined as subjective consent in the mind of the complainant at the time of the activity.

[39] The trial judge specifically refers then to the matter of *R. v. Burnier*, 1997, 119 SCC (3rd) 467 in which the accused was found to have *mens rea* when he touched the complainant's breast "in the context of joking where a reasonable person would view the sexual integrity of the complainant as having been violated".

[40] Following this then, in the latter section of his decision, headed “Analysis”, he applies the law concerning the burden of proof and the elements of the offence, weighing the totality of the evidence and making credibility findings.

[41] The trial judge begins with a credibility assessment of Ms. Y, the Crown’s witness. He counterbalances his own impressions of her as a witness (conscious of the law concerning credibility) by noting that the defence brought to his attention discrepancies in Ms. Y’s evidence. The trial judge did consider these discrepancies. Upon balancing these elements he states that “examining the whole of Ms. Y’s testimony” he finds that there were two types of touching. The record indicates that the “two types of touching” is an acceptance of the Crown’s theory of the case, as it was made in the Crown’s closing submission on the nature of the evidence before the trial judge. It indicates that he was alive to the issues and made a considered weighing of the evidence, including the discrepancies, and made a finding of fact that there was touching of the breast and buttocks on numerous occasions.

[42] As referenced before, he indicates that Ms. Y’s credibility on this element is supported by Mr. Schwartz’s evidence.

[43] He then concludes “having heard all of the evidence I am left in no doubt” that Mr. Carson did brush Ms. Y’s buttocks with his hands, which is an inference based on the evidence, and her breasts with his elbows.

[44] He then turns to the defence that the brushing was unintentional. He finds that the evidence of “the other workers”, which would include Mr. Schwartz and the six other employees who gave evidence, was that touching was mainly “shoulders and backs”. Upon my review of their evidence, the trial judge was neither inaccurate or unreasonable in this finding of fact.

[45] None of the other witnesses indicated that there was a breast touching occurring, many indicated that their experience of touch was shoulders and back. The trial judge noted that the map, photos, and evidence of the witnesses all allude to a small space but one that is navigable.

[46] The Appellant asks that the Court consider whether the trial judge erred in not critically reviewing the credibility and reliability of each witness, as well as engaging with a critical review of the evidence of the complainant. In reviewing the record, it is apparent that this was done.

[47] The defence witnesses were varied, both in their work experiences and roles at the restaurant. At least one never worked with the complainant. Their evidence

was offered to support the defence and that accidental touching was the norm in the restaurant. However, the evidence of eight of the nine witnesses who gave oral testimony was that sarcastic comments were made regularly by Mr. Carson in the workplace, in the context of touching. Further, the touching that the other workers experienced was not on the buttocks or breast.

[48] The trial judge did properly consider the totality of the evidence before him, offered by both the Crown and defence, on this point before then making a finding that the repeated touching of Ms. Y's buttocks and breast in the workplace was not done in the normal course. This was a reasonable finding of fact, with a rational inference that, as avoidance of other employees buttocks and breasts was usual, that touching of these areas for Ms. Y was unusual and noteworthy. Her direct evidence of such touch was supported by the direct evidence of Mr. Schwartz, whose evidence was accepted by the trial judge.

[49] As Judge Scovil noted "It is hard to imagine accidentally raising an elbow to another individual's breast followed by the admission of: "Ha boobed ya" as anything other than a sexual assault. Here it is overwhelmingly clear that it was meant to violate Ms. Y's sexual integrity." Ms. Y's evidence was that she did not consent to this touching by Mr. Carson.

[50] While this was a concise decision, there is no indication that the trial judge was solely engaged in a credibility contest between the complainant and the accused. The brevity of the decision is not a factor in considering the sufficiency of reasons, for the purposes of this appeal. The Appellant submits that the reasons for decision are insufficient, and it is not possible for an appellate court to determine whether the trial judge properly applied the law.

[51] As Mr. Carson cites *R. v. N.M.* regarding sufficiency of reasons at paragraph 26:

> [26] The following principles relate to the sufficiency of reasons in the context of a *W.(D.)* analysis:
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> - If the trial judge's reasons are such that an appellate court cannot determine whether the trial judge properly applied the burden of proof and principle of reasonable doubt to credibility, intervention is warranted (*R. v. Sheppard,* 2002 SCC 26 at para. 68; *R. v. Graves*, 2000 NSCA 150 at para. 23);
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> - In terms of the adequacy of reasons, a bare rejection of the accused's evidence will be found to be sufficient, provided that the trial judge has undertaken a "considered and reasoned acceptance" of the complainant's evidence. In *R. v. R.D.*, 2016 ONCA 574, Justice Laskin explained:
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>> [18] The sufficiency point: the bare rejection of an accused's evidence will meet the two important purposes for giving sufficient reasons – explaining why the accused was convicted, and permitting effective appellate review – provided that the bare rejection is based on a "considered and reasoned acceptance" of a complainant's evidence. Implicitly, the bare acceptance of a complainant's evidence and the bare denial of an accused's evidence ("I accept the complainant's evidence; therefore I reject the accused's evidence") are unlikely to amount to sufficient reasons. A trial judge who relies on the formulation in *J.J.R.D*. should at least give grounds for accepting a complainant's evidence.
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>> [19] In *J.J.R.D.*, Doherty J.A. placed his point about the sufficiency of reasons in the context of the evidence as a whole and the reasonable doubt standard. The accused's denial in that case, when "stacked beside" the complainant's evidence and her diary entries, "did not leave the trial judge with a reasonable doubt." And so Doherty J.A. explained that "an outright rejection of an accused's evidence" may be "based on a considered and reasoned

> acceptance beyond a reasonable doubt of the truth of conflicting credible evidence…" (emphasis added). In doing so, he addressed the need for the trial judge to be convinced that the conflicting credible evidence established the accused's guilt beyond a reasonable doubt.
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> [20] The burden of proof point: a trial judge who says only "I reject the accused's evidence because I accept the complainant's evidence" risks being held by an appellate court to have chosen which of the two parties to believe and failed to determine whether, on all the evidence, the accused's guilt had been proved beyond a reasonable doubt. That risk is what Cronk J.A. cautioned about in *O.M.* But, as *O.M.* also shows, a trial judge can still reject an accused's evidence because either the complainant's evidence or other evidence establishes the accused's guilt beyond a reasonable doubt. Thus, *J.J.R.D.* and *O.M.* are entirely consistent.

[52] The trial judge's decision demonstrates that he did correctly turn his mind to the law concerning the Crown's burden of proof, and was attuned to the issue of reasonable doubt. He also applied correctly the law concerning credibility, while noting its difficulties in expression. Ms. Y's evidence was weighed accordingly, with discrepancies considered. This was consistent with his consideration of all the witnesses' testimony, and other evidence, brought before him.

[53] As was noted in *R. v. N.M.,* intervention is required when the trial judge's reasons are such that an appellate court cannot determine whether the trial judge properly applied the burden of proof and principle of reasonable doubt to credibility. In this matter, in reviewing the decision, I am able to determine that the trial judge properly applied the burden of proof and principle of reasonable doubt to credibility. I would therefore not disturb his findings on credibility, in deference.

[54] It is evident that he considered the whole of the evidence presented to him in the context of the s. 271 sexual assault case before him in making his decision, as it

was presented by both the Crown and the defence. I note that the trial judge did not expressly state that he rejected the accused's evidence of accidental touching, but on the record, and in the decision, it is apparent that it was considered and weighted accordingly. It is evident that he found that the elements of the offence were proven, on the evidence, beyond a reasonable doubt.

**Disposition of Appeal**

[55] In conclusion, in considering the totality of the record before me, I find that there is no reviewable error in the decision made by the trial judge on the grounds advanced by the Appellant.

[56] I have reviewed the approach in considering the evidence before the trial judge and his findings in the decision. I am informed by the arguments of the Appellant and Crown Respondent on appeal and, again, note that deference is to be shown by a summary conviction appeal court to the trial judge concerning findings of credibility, in the absence of an error of law or miscarriage of justice.

[57] For the foregoing reasons, I dismiss the appeal.

Rowe, J.