SUPREME COURT OF2025 NOVA SCOTIA
Citation: *R v. Jaggi*, 2025 NSSC 267

Date: 20250820
Docket: *Hfx* No. 527019
Registry: Halifax

Between:

Navneet Kumar Jaggi

v.

His Majesty the King

Summary Conviction Appeal
DECISION

Judge: The Honourable Justice Christa M. Brothers

Heard: February 26, 2025, in Halifax, Nova Scotia

Counsel: Trevor McGuigan, for the Appellant
William Mathers and Sara Adams, for the Crown

By the Court:

Overview

[1] The appellant was convicted of sexual assault at trial. He did not testify. The appellant is a taxi driver, and the complainant was his passenger on February 8, 2020. The Crown led an out-of-court statement made by the appellant to his supervisor which the Crown argued was inculpatory. Portions of the statement were exculpatory with the appellant denying the allegations of sexual assault. The appellant appeals his conviction on the ground that the trial judge, the Honourable Marc Chisholm, erred by failing to properly assess the exculpatory statement in accordance with the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

In reviewing the transcript and applying the legal principles, I agree with the appellant. For the reasons that follow, I allow the appeal and return the matter to provincial court for re-trial before another judge.

Background

[2] The trial took place over two days. Identity was not in issue. For clarity, Crown and defence counsel on appeal were not the counsel at trial.

[3] The Crown called three witnesses: the complainant, the accused's supervisor, and Dt./Cst. Gillis. The complainant's testimony was scrutinized by the trial judge. He considered, among other things, any inconsistencies in her evidence, how her alcohol consumption may have affected her recall, and other factors.

[4] The complainant testified as follows. On the night of the alleged assault, the complainant attended a party. Before leaving for the party, she drank three mixed drinks. At the party, she drank three additional mixed drinks, along with one shot and one beer. At 11:50 pm, she called Bob's Taxi. She described herself as "completely intoxicated". The complainant initially testified that the taxi was a burgundy van. When shown photographs, however, she agreed that the van was silver, not burgundy. She had planned to take the taxi to her boyfriend's home in Porter's Lake to pick him up before continuing to her home.

[5] The complainant testified that during the drive, the appellant told her that he wanted to take her on a date. She advised him that she had a boyfriend. She testified that after they passed Exit 19, the appellant pulled over and asked her for a hug.

According to the complainant, after they hugged, the appellant kissed her without her consent. The GPS records indicate that the taxi drove in the wrong direction, turned around and stopped for about a minute. The complainant testified that the vehicle stopped for 5-10 minutes.

[6] There was evidence that a text was sent from the complainant's phone at 12:34 am to the appellant's phone which said, "Hey it's A.". She did not recall sending this message. When they arrived at her boyfriend's home, they waited for him to come out. The complainant called and texted him. The complainant testified that while they waited for her boyfriend, the accused took off his seat belt, turned around and began touching her legs. She said she pushed his hands away and told him that she was uncomfortable and shy. She testified that she exited the taxi and went to the door to get her boyfriend. The two then got into the taxi together and continued to her home without incident. The complainant said she received texts from the appellant that night and the next day.

[7] The complainant reported the sexual assault to her mother, who called Bob's Taxi. Alain Michaud, the appellant's supervisor, arranged to meet with the appellant one week after the complaint. The appellant denied the sexual assault and told Michaud that he was outside the cab hugging the complainant and the boyfriend's mother was there as well. He said that he and the complainant had exchanged numbers and planned to go on a date. He said he texted her, but she did not respond. The appellant's version that his only physical contact with the complainant was a hug in the presence of the boyfriend's mother was never put to the complainant in cross-examination.

[8] At trial, the defence argued that the complainant was unreliable and that her evidence could not establish proof of the offence beyond a reasonable doubt. The Crown agreed that there were errors and inconsistencies in the complainant's evidence. The Crown asserted, however, that these inconsistencies were limited to inconsequential matters, while the evidence regarding the alleged sexual assaults was clear, consistent, reliable and credible.

[9] The defence argued that the appellant's decision to return from India to face trial added credibility to his denial. The Crown argued that there was "no evidence" of a denial by the appellant on the record. The defence did not correct this inaccurate assertion and did not mention the exculpatory statement by the appellant to his supervisor.

[10] In the course of his decision, the trial judge stated as follows about the appellant's statements to his supervisor:

> [14] The second issue of admissibility relates to a matter that was raised with Counsel after hearing closing submissions, and that is a statement, according to the evidence of Mr. Michaud, made by the accused to him, in relation to the events of the night in question where, according to Mr. Michaud, Mr. Jaggi indicated that while at 80 Old Post Office Road, that they were outside in the yard and he was hugging the lady. Mr. Michaud testified that the accused denied the alleged sexual assault, but also reportedly said they were outside in the yard and he was hugging the lady, and that the boyfriend's mother was there, too.
>
> [15] On the statement of the accused and the evidence of the complainant, the only women present at 80 Old Post Office Road at that time were the complainant and her boyfriend's mother. The accused's statement, as testified to by Mr. Michaud, differentiated between the lady he was hugging and the complainant's boyfriend's mother.
>
> [16] The Court is satisfied beyond a reasonable doubt that the reference to the lady was a reference to the complainant. The Court found the evidence of Mr. Michaud credible and accepted his evidence. The Court will detail his evidence later in these reasons.
>
> [17] Based upon the evidence of Mr. Michaud, the Court finds that this statement was made to him by the accused.
>
> …
>
> [93] Mr. Michaud testified that the accused denied the sexual assault allegation. The accused told Mr. Michaud that he hugged the lady. These statements relate to different points in time and different locations. The statement of hugging the lady was not viewed by the Court as an admission of misconduct by the accused, and no negative inference was drawn by the Court against the accused arising from this evidence. Both of the accused's statements to Mr. Michaud differ from the complainant's evidence of the events of that night, and both of them were considered in assessing the credibility and reliability of the complainant's evidence. The Court has commented already on the complainant's evidence of the events in the taxi. In relation to the accused's statement of hugging the complainant in the yard of 80 Old Post Office Road, such allegation was not put to the complainant directly. She was not given an opportunity to respond directly to that point. She did testify that the accused stayed in the taxi and called her several time while she was at the door attempting to arouse someone inside. All of this evidence was considered in assessing the credibility and reliability of the complainant's evidence.

> [94] The stop at 80 Old Post Office Road was 11 minutes long approximately. The Court considered the details of the complainant's evidence as to the events of those 11 minutes. The complainant stated that the accused stopped on the road, not in the driveway. She said he turned off the car. As 12:42 a.m. on February 8th of 2020 there was no evidence as to the weather. The complainant didn't recall the weather. The complainant said she again tried to text or call her boyfriend but that he didn't respond. She said the accused told her he didn't think the boyfriend was coming. The complainant said this non-consensual contact occurred after which she got out and went to the door. There was no evidence of the complainant that the accused got out of the car. There was no indication in his statement to Mr. Michaud why he got out of the taxi or why he was hugging the lady. On such points there is no onus on the accused to say or prove anything. The burden of proof rests upon the Crown.

[11] Despite mentioning the denial, the trial judge did not engage with the statement again in his reasons. As discussed below, neither the defence nor the Crown acknowledged the exculpatory statement.

Standard of Review

[12] As noted in *R. v. Coburn*, 2021 NSCA 1, "[a]n allegation that a trial judge did not properly apply *R. v. W.(D.)*, [1991] 1 S.C.R. 742 raises a question of law and is to be reviewed on the standard of correctness" (para. 27). Of course, if the challenge is to the credibility assessments, the trial judge's findings are entitled to considerable deference (*R. v. Dinardo,* 2008 SCC 24 and *R. v. Young* 2025 NSCA 41) .

Law and Analysis

[13] The only issue on appeal is whether the trial judge erred by failing to apply the *R. v. W.(D.)* principles to the evidence of the appellant's out-of-court statements to his supervisor.

[14] The defence argues that the failure to consider and apply the principles in *R v. W.(D.), supra,* is an error of law that cannot be cured by the curative *proviso* in the *Criminal Code*. The Crown argues that the language of *R. v. W.(D.), supra,* is not sacrosanct. The Crown says the out-of-court statement was considered and implicitly rejected by the trier of fact. However, the Crown also acknowledged in its factum at p. 6:

> Trial counsel for both the Appellant and the Crown failed to properly appreciate the Appellant's out-of-court statement. Trial counsel for the Appellant recalled there was some "shutting down" of that line of questioning of Mr. Michaud and

> that he had been "getting ready to object." He had no notes of the "hug" statement and argued the evidence was "not particularly relevant." Instead of relying on the out-of-court statement, he argued that the Appellant could have just "stayed in India forever" to avoid trial and that by coming back to face the allegation he was therefore "adamant" in denying it.
>
> Similarly, trial Crown argued that there was "no evidence of the defence…" and "nothing to the court to suggest… denial or anything of that nature."
>
> Neither counsel referenced *W.(D),* nor advanced any argument as to how the principles contained therein applied.

[15] Trial counsel's failure to appreciate the out-of-court statement laid the groundwork for the trial judge's reasons. There is no debate that a trial judge's reasons need to be reviewed in a functional way and that deference is afforded to all credibility findings. However, the appellant is entitled to know why the trial judge was not left with a reasonable doubt (see: *R. v. Dinardo*, *supra*; *R. v. Sheppard*, [2002] 1 S.C.R. 869, and *R. v. Gagnon*, [2006] 1 S.C.R. 621). Unfortunately, the trial judge was not properly briefed by counsel concerning all of the live issues in the trial. The exculpatory portion of the appellant's out-of-court statement was an important live issue which was neither addressed by counsel nor ultimately contended with by the judge.

[16] The Supreme Court of Canada's decision in *R. v. W.(D.)*, *supra*, explained how the standard of proof applies where there are issues of credibility. *R. v. W.(D.), supra,* is routinely cited when a trial judge is ensuring that the principles of reasonable doubt are correctly applied to the issues of credibility when an accused testifies. The relevant portions are:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R Challice* (1979), 1979 CanLll 2969 (ON CA), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R v. Morin, supra*, at p. 357.
>
> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused,
>
> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.
>
> Nonetheless, 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. (pp. 757-758)

[17] The application of the test in *R. v. W.(D.), supra,* is not limited to cases where the accused testifies in court. In *R v. Sanhueza,* [2020] B.C.J. No. 2310 (C.A.), the accused, who did not testify, was convicted of sexual interference and sexual assault. At trial, the Crown led exculpatory out-of-court statements made by the accused to the complainant and his mother which included a denial of the allegations. Crown counsel asked the trial judge to assign the denial little or no weight. The defence suggested that the denial be given enhanced weight. On appeal, it was argued that the trial judge failed to properly consider these exculpatory utterances in accordance with the legal principles set forth in *R. v. W.(D.), supra*.

[18] On appeal, the court held that the trial judge was required to apply the principles in *R. v. W.(D.), supra*, to the accused's out-of-court statements:

> 32 Consistent with the approach accepted in other jurisdictions, I agree with the appellant that the application of *W.(D.)* is not restricted to cases in which the accused testifies. In *R. v. Smits,* 2012 ONCA 524, for example, the Crown introduced out-of-court statements from the accused that contained exculpatory evidence relevant to an element of the offence. On appeal, it was argued that the judge committed reversible error by failing to consider those statements in accordance with *W.(D.)* (at para. 36). The Court of Appeal for Ontario found no error, but accepted that the *W.(D.)* framework applies even where an accused does not give evidence:
>
> > [37] ... where there are credibility findings on a vital issue to be made between conflicting evidence arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in

> a way that makes it clear that it is not necessary for the trier of fact to believe the evidence favourable to the defence on that trial issue. Rather it is sufficient if viewed in the context of all the evidence, the conflicting evidence leaves the trier of fact in a state of reasonable doubt as to the accused's guilt. In that event, the trier of fact must acquit.
>
> …
>
> [39] Trial judges in a judge alone trial do not need to adhere slavishly to the *W. (D.)* formula. It should, however, be clear from an examination of the reasons that at the end of the day the trial judge has had regard for the basic principles underlying the *W.(D.)* instruction.
>
> [Emphasis added; internal citation omitted.]

33 This same approach was endorsed in *R. v. B.D.,* 2011 ONCA 51 at para. 114. There, the principles underlying *W.(D.)* were described as having:

> [114] … a broader sweep. Where, on a vital issue there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if - viewed in the context of all of the evidence - the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt …. In that event, they must acquit.
>
> [Emphasis added; internal citation omitted.]

See also *R v. Cuthill,* 2018 ABCA 321 at paras. 93-104 (and the cases cited therein), leave to appeal to the SCC ref'd, 38504 (23 May 2019); *R. v. Baksza,* 2019 ABCA 237 at para. 12, *R. v. R.S.L.,* 2006 NBCA 64 at para. 100.

34 Specific to jury trials, I note that the application of *W.(D)* principles to out-of-court statements by the accused has been specifically incorporated into the template instruction for "Out-of-Court Statements of Accused (General Instruction)", as found in *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Carswell, 2015), at 308-09:

> [5] Some or all of the statement(s) may help *[(name of accused)*] in his/her defence. You must consider those remarks that may help (*NOA*), along with all of the other evidence, even if you do not believe them, unless you are satisfied that s/he did not make them. In other words, you must consider all the remarks that might help (*NOA*) even if you cannot decide whether s/he said them, or whether you believe them.
>
> [Emphasis in original]

[19] In *R. v. Roche-Garcia,* 2024 BCCA 298, the court was clear that when the Crown elects to adduce out-of-court statements by an accused, including exculpatory statements, they are admissible in favour of the accused and the accused is entitled to the advantages of that statement (para. 131. See also *R. v. Graham,* [1974] S.C.R. 206).

[20] The court in *Roche-Garcia, supra,* also explained that it was "settled law" that even where an accused elects not to testify, the principles in *R. v. W.(D.), supra*, apply to exculpatory evidence adduced by the Crown (para. 131). In the present case, there was no dispute at trial that the appellant's out-of-court statements to Mr. Michaud, led by the Crown, were substantively admissible. Moreover, the trial judge embarked on an analysis of the admissibility of the appellant's statement that he had hugged the "lady" and found it to be admissible. The trial judge was "satisfied beyond a reasonable doubt" that the reference to the “lady” was a reference to the complainant. Later in his reasons, he expressly found that the statement was not an admission of guilt. Importantly, the trial judge only spent time assessing the portion of the statement where the appellant admitted to physical contact – the hug. There is no assessment or discussion of the appellant’s denial of the allegation of sexual assault.

[21] Mr. Michaud testified that he confronted the appellant directly with the accusation that he had committed sexual assault and that he "denied it" and said "it did not happen"; the appellant then provided Mr. Michaud with a version of events that differed from the complainant's testimony -- that he and the complainant had exchanged phone numbers and were planning to go on a date and that they hugged while outside in the yard at 80 Post Office Road.

[22] A proper application of the legal principles derived from the caselaw required the trial judge to analyze the appellant’s utterances in accordance with the principles in *R. v. W.(D.).* The trial judge needed to assess whether he believed the appellant's exculpatory statements or even if he did not, did they raise a reasonable doubt.

[23] The trial judge made no express findings with respect to whether the appellant's exculpatory statements were true or whether they raised a reasonable doubt. His analysis focused exclusively on the credibility and reliability of the complainant's evidence. The extent to which the trial judge considered the appellant's out-of-court statements was limited. He considered whether the appellant's comment that he and the complainant hugged amounted to an admission of guilt. He concluded that it did not.

[24] It was, of course, proper for the trial judge to assess the complainant's evidence in the context of the rest of the evidence, including the appellant's out-of-court statements. However, the use to be made of those statements was not merely as a counterweight in the assessment of the complainant's evidence. The statements themselves needed to be substantively assessed relative to the burden of proof.

[25] The language used by the trial judge reflects a lack of appreciation that the appellant's out-of-court statements needed to be considered in relation to whether they were capable of raising a reasonable doubt. While he addressed the fact that the out-of-court statements were not put to the complainant, he did not assess them on their own. This is not surprising given former Crown counsel stated the following at p. 280 of the transcript:

> … My friend had argued in his submissions that there's a denial by Mr. Jaggi, however, I respectfully submit to the court that there is no evidence of the defence, of a position at all that the defence has put the crown to the burden of proof that the crown must prove beyond a reasonable doubt that the offence occurred, but there's nothing to the court to suggest mistaken belief of consent argument or denial or anything of that nature, so him putting that before the court, I would respectfully submit is improper as we don't have evidence of such. It's not his obligation to or requirement to deny or confirm anything, however, we can't say to the court that there is a denial because there has been no evidence from the defence, so I just respectfully note that.

[26] This statement was not contradicted by defence counsel.

[27] *Sanhueza, supra,* provides a helpful comparison. In that case, the accused did not testify but made statements to his mother and to the complainant that were exculpatory in nature. The statements were introduced by the Crown at trial. Certain aspects of *Sanhueza, supra,* make the error in the present case even clearer. First, the out-of-court exculpatory remarks were more ambiguous in that case -- the trial judge found the remarks "capable of different interpretations" (para. 19). Second, the trial judge had wrestled with the value of the statements, finding that she could not "place great weight" on them (para.19). Even with the trial judge expressly assigning little weight to the accused's denial, the Court of Appeal found that she did "not take the logical (and required) next step and ask herself whether the possibility that the appellant was responding truthfully to a false accusation, viewed in the context of the evidence as a whole, raises a reasonable doubt" (para. 38).

[28] The court found that it was "not clear from a review of the judge's reasons that she appreciated the need to consider the evidence of the meeting with the bishop in

accordance with the *W.(D.)* framework" (para. 35). The court was concerned, among other things, about the trial judge's comment that she had been "asked to consider" the out-of-court statements:

> 37. … Casting the issue in this way, as a request for consideration, raises a serious question about whether the judge understood that the out-of-court denial, once tendered by the Crown, functioned as exculpatory evidence in the same way as evidence provided directly by an accused. As a result, the judge was *obliged* to consider and assess that evidence in her credibility determinations, applying *W.(D.)* principles. If the evidence was accepted, it raised a reasonable doubt about the appellant's guilt, or the judge did not know whom to believe because of the evidence, the appellant was entitled to an acquittal.

[29] Similarly, in the present case, the manner in which the trial judge approached the appellant's out-of-court statements suggests that he did not appreciate that the exculpatory evidence functioned in the same way as evidence provided directly by the accused. The trial judge's approach was consistent with the Crown's erroneous submission that there was "no evidence" of a denial by the appellant on record. The trial judge relegated the statements to pieces of evidence that he "considered in assessing the credibility and reliability of the complainant's evidence." As in *Sanhueza, supra*, the trial judge failed to take the next legal, and necessary step and ask himself whether the exculpatory version raised a reasonable doubt.

[30] The Crown argued that the *W.(D.)* findings, though not expressly made, were implicit. In other words, the Crown submitted that a functional and contextual reading should cure the decision's deficits. This is often the argument advanced by the Crown in cases where an appellant challenges the correctness of a trial judge's analysis. Indeed, the Crown in *Sanhueza, supra,* argued that the trial judge understood and applied the standard of proof; the trial judge considered the accused's denial; a judge is not required to spell out why she is not left with a reasonable doubt; a trial judge is presumed to know the law; and the *W.(D.)* formula need not be formulaically applied. The court in *Sanhueza, supra,* addressed these arguments as follows:

> 47 1 have considered the points raised by the Crown. I appreciate that the "functional approach" to analyzing reasons for judgment allows for a finding that *W(D.)* principles have been respected, even where those reasons are sparse and the judge neither references *W.(D.)*, nor explains in any detail why exculpatory evidence does not raise a reasonable doubt: *Vuradin* at paras 12-13; *R.E.M*. at para. 66; *Dick* at paras. 23-25. I also appreciate that in some circumstances, an out-of-court denial by the accused, limited in detail and untested through cross-

> examination, may attract considerably less weight than testimony. This is an individualized assessment, necessarily informed by the evidential foundation of each case.
>
> 48 However, this is a circumstance where the reasons reveal an acceptance of the complainant's testimony on a material element of the charged offences without any apparent substantive consideration of the out-of-court statement and its exculpatory value. There is also a realistic possibility, gleaned from language used in the reasons, that the judge did not appreciate she was obliged to give the appellant the whole of the exculpatory advantages arising from the out-of-court denial, consistent with *W.(D.)* principles. Most importantly, she found that the appellant's conduct and denial in the presence of the bishop was equally consistent with innocence, as guilt. That finding should have caused her to ask whether the denial raised a reasonable doubt, viewed in the context of the totality of the evidence, even if she did not believe it was true.

[31] A functional and contextual reading of a trial judge's decision may ameliorate problematic statements of law or imprecise analysis, but it cannot create a nonexistent analysis. It is well understood that the *W.(D.)* formula is not meant to be a "magic incantation", and that it is the substance of the test that must be respected. However, the trial judge's decision cannot be interpreted as respecting the substance of the *W.(D.)* principles. There is nothing in the language used by the trial judge to indicate that he asked himself the essential question of whether the exculpatory remarks, when viewed in the context of the rest of the evidence, raised a reasonable doubt. Furthermore, the reasons, considered alongside the arguments of trial counsel and their discussions with the court make it clear that no one was alive to the issue.

[32] I do not accept that this case is similar to that in *R. v. Coburn*, 2021 NSCA 1. In that case, the accused testified, and the trial judge discussed the principles in *R. v. W.(D.), supra*. This did not occur in the case before me. There is a difference between failing to explain a conclusion and failing to address an issue at all (*R. v. M.(R.E.)*, 2008 SCC 51).

[33] In *R. v. Vuradin*, 2013 SCC 38, the court said the following about the application of principles and explanation in reasons:

> 25 In my view, the trial judge was merely articulating general principles of law that may be used in assessing the evidence of the accused. Further, in assessing the Crown's case, the trial judge referred explicitly to the appellant's denial: "... notwithstanding [the appellant's] denial, I have no reasonable doubt that the [appellant] did commit the acts which [the complainant] described".

> 26 I conclude, therefore, that the trial judge properly applied the burden of proof. Although a trial judge is not required to outline the *W. (D.)* steps, the trial judge here referred to *W. (D.)* and the dangers that it addresses: "... the potential for simply comparing stories and for shifting the onus to the accused". In my view, the trial judge's reasons for finding the appellant guilty on counts 1 and 2, read in the context of the reasons as a whole, do not reveal an incorrect application of the principles outlined in that decision.

[34] In that case, the trial judge expressly held that *notwithstanding the denial*, he had no reasonable doubt. That is a very different factual context than before me.

[35] In the present case, the court detailed the evidence of Mr. Michaud and the denial of the accused at pp.16-17:

> …Mr. Michaud testified that he asked Mr. Jaggi directly if he did it, and that Mr. Jaggi responded that he denied it and it did not happen.

[36] The trial judge stated in his decision that he found the evidence of Mr. Michaud "both credible and reliable and accepted his evidence". It follows that he accepted that the appellant denied the allegations to Mr. Michaud. Despite this, the trial judge did not assess its exculpatory value.

[37] In analyzing the evidence, the court stated at para. 71:

> [71] The determination of whether or not the Crown has proven beyond a reasonable doubt that the accused committed a sexual assault in his taxi on the early morning of February 9th of 2020 depends to a very large degree on the Court's assessment of the credibility and reliability of the complainant' s evidence.

[38] While the court stated the following at para. 73, there was no express or implied connection made to the denial:

> [73] It is to be remembered that if on any individual aspect of the evidence, the Court is left with a reasonable doubt with respect to the elements of the offence, the accused must be found not guilty. And further even if there is no individual evidentiary concern to raise reasonable doubt if on the totality of the evidence the Court is left with a reasonable doubt, the benefit of that doubt must be given to the accused.

[39] The court then addressed the accused's denial at para. 93 and said it was considered when assessing the complainant's evidence:

> [93] Mr. Michaud testified that the accused denied the sexual assault allegation. The accused told Mr. Michaud that he hugged the lady. These statements relate to different points in time and different locations.
>
> …
>
> Both of the accused's statements to Mr. Michaud differ from the complainant's evidence of the events of that night and both of them were considered in assessing the credibility and reliability of the complainant's evidence.

[40] It is not appropriate to juxtapose the denial with the complainant's evidence in a contest. The denial should have been addressed on its own. Was it believed? Even if it was not believed, did it raise a reasonable doubt? This was never expressly or implicitly done.

[41] It is also interesting that the court engaged in a consideration of the defence of honest but mistaken belief in consent despite the evidence of the appellant having denied the alleged physical contact. By engaging in an analysis of this defence, it is clear that the court was not considering nor analyzing the evidence of the denial.

[42] Having found that the trial judge erred in law, I must consider whether the curative *proviso* should be applied to cure the error.

The Curative *Proviso*

[43] Section 686(1)(b)(iii) of the *Criminal Code* allows an appellate court to dismiss an appeal where, despite the error, there was no substantial wrong or miscarriage of justice. The Crown bears the onus to show that without the legal error, the verdict would necessarily have been the same. The *proviso* can only be invoked with respect to errors of such a minor nature that they had no impact on the verdict, or serious errors which would justify a new trial but for the fact that the evidence was so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice.

[44] This is not a case where reliance on the *proviso* can be justified. The exculpatory evidence was a complete denial of the accusations. The probative value was high. Had the evidence been properly considered, an acquittal was, as a matter of logic, a reasonably available verdict. An error of this nature cannot be considered "harmless".

[45] The second aspect of the *proviso* test requires that the case against the appellant be so overwhelming that the trier of fact would necessarily convict. The British Columbia Court of Appeal in *Roche-Garcia, supra*, described the exceedingly high standard for invoking this branch as follows:

> 181 The standard for invoking the second branch of the curative proviso is "substantially higher" than "the ordinary standard in a criminal trial of proof beyond a reasonable doubt": *Trochym* at para. 82.

[46] The nature of the evidence in this case cannot meet this high standard. The evidence capable of establishing the essential elements of the offence came from a single witness, the complainant. Despite inconsistencies in her evidence, the trial judge nonetheless found that the complainant's evidence was credible and reliable. However, had the appellant's exculpatory out-of-court statements been properly considered, the trial judge might have had a reasonable doubt. The appellant's exculpatory remarks to Mr. Michaud included that he and the complainant had exchanged phone numbers. The complainant's text to the appellant's phone "Hey, it's A." could corroborate the appellant's version. The trial judge's acceptance that the complainant may have sent that text by accident occurred in the absence of a substantive consideration of the appellant's statements relative to the standard of proof.

[47] Moreover, a denial can "yield persuasive evidence of innocence" (*Sanhueza, supra* para 27). On the other hand, "an out-of-court denial by the accused, limited in detail and untested through cross-examination, may attract considerably less weight than testimony." (*Sanhueza, supra* para 47). The weight to be assigned to the out-of-court statements, and a determination of whether it raised a reasonable doubt, is necessarily an individualized assessment based on the evidence and a proper application of the law. To apply to the *proviso* in these circumstances would require the Court to speculate as to what the analysis would have been after the exculpatory evidence was properly assessed. Reliance on the *proviso* is not appropriate.

Conclusion

[48] I cannot summarize my conclusion better than by adopting the following statement of the court in *R. v. Sanhueza, supra*:

> 39. These aspects of the reasons for conviction, in their cumulative effect, leave me unsure whether the trial judge properly related the concept of reasonable doubt

> to conflicting evidence on a vital issue arising from an out-of-court statement favourable to the defence.

[49] As stated in *R. v. M. (R.E.)*, *supra*, the reasons must be assessed in context:

> 37 As we have seen, the case law confirms that the trial judge's reasons should not be viewed in isolation, as a stand-alone whole. The sufficiency of the reasons depends not only on what the trial judge said, but on what he said in the context of the record, the issues and the submissions of trial counsel. The question is whether, by reading the reasons in their entire context, it is possible to discern the basis for the trial judge's findings — the "why" of the verdict. If so, the reasons for judgment serve their purpose. The parties know the basis of the decision. The public knows what has been decided and why. And the appellate court can determine whether the trial judge went down the wrong path and erred. The case law and the authors agree on this point.

[50] The context here is that neither counsel nor the judge turned their minds to the exculpatory aspects of the denial, focusing instead on the potential inculpatory statement by the appellant that he and the complainant hugged. With this context in mind, the reasons do not apply the principles of *R. v. W.(D.)* in relation to the exculpatory statement, as required.

[51] As the court noted at para. 27 in *R. v. Dick*, 2018 BCCA 343:

> What matters is that the principle of reasonable doubt is clearly respected and there is no risk that the burden of proof was shifted unintentionally. In some circumstances, this may be apparent even in the absence of an explanation for the rejection of an accused's testimony, particularly where that testimony involves a bare denial and credible contradictory evidence is accepted: see, for example, *R.E.M.* and *Vuradin*. However, in other circumstances, an articulated explanation of why the testimony of an accused is disbelieved and why it does not raise a reasonable doubt may be necessary for the pathway to the verdict to be discerned: see, for example, *S.J.D.* and *L.(C.J.)*.

[52] I find that in the present case, with trial counsel and the court all blind to the denial, it cannot be successfully argued that the principles of reasonable doubt have been respected. I am persuaded that the trial judge did not assess the out-of-court denial in accordance with the principles espoused in *R. v. W.(D.), supra*.

Brothers, J.