NOVA SCOTIA COURT OF APPEAL
Citation: R. v. T.E.H., 2011 NSCA 117

Date: 20111215
Docket: CAC 341395
Registry: Halifax

Between:

T. E. H.

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Section 486.4 of the Criminal Code

Judges:	Hamilton, Farrar, and Bryson, JJ.A.
Appeal Heard:	October 5, 2011 in Halifax, Nova Scotia
Held:	Appeal is dismissed per reasons for judgment of Hamilton, J.A.; Farrar and Bryson, JJ.A. concurring.
Counsel:	Tim A.M. Peacock, for the appellant Jennifer A. MacLellan, for the respondent

486.4 (1) **Order restricting publication – sexual offences –** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

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

Reporting of this proceeding in any manner that would identify the name of any individual whose name is covered by the ban is strictly prohibited without leave of the court. The intent of the foregoing is to protect the welfare of any children or victims referred to in the proceeding and/or avoid prejudice to any persons facing criminal charges.

Reasons for judgment:

[1] The appellant, T. E. H., appeals his convictions, by Provincial Court Judge Claudine MacDonald, of sexual interference with a person under the age of 16 (s. 151(a)) and invitation to sexual touching involving a person under the age of 16 (s. 152(a)). He also applies for leave to appeal, and if granted, appeals his total sentence of sixteen months' incarceration. Other ancillary orders were made, but are not challenged on appeal. The judge also found Mr. H. guilty of sexual assault (s. 271(1)(a)), on which she entered a conditional judicial stay.

[2] At the time of the offences in August 2009, Mr. H. was 51 and a friend of the family of the male victim, 15 year old DB. On two occasions during that month, Mr. H. took DB and his sister, SB, to Crystal Falls, a secluded public swimming hole in Kings County, with a waterfall and an area beside the waterfall described as a natural hot tub. The evidence was that the natural hot tub can be seen from some, but not all, parts of the beach.

[3] In the judge's twelve-page oral decision, she noted the charges against Mr. H. and referred to the photographs of Crystal Falls that were introduced into evidence and dealt with at some length during the trial. She outlined DB's testimony about what happened on the first visit to Crystal Falls, incorrectly stating he testified that Mr. H. touched his buttocks when he was trying to climb on a **raft**, when his evidence was that this happened when he was trying to climb a rock:

> [2] ...The complainant said what happened was that at one point Mr. H. was trying to talk him into or trying to convince him to show him his penis. Made the statement to him, "well, we're men and we all do this, or we all have one", or words to that effect. According to the complainant, he did not respond to this. Instead he got dressed and quickly went to the area where his sister was.
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> [3] He testified further concerning an incident that, according to him, happened a while later. This was while they were swimming in an area of Crystal Falls. What happened was that the complainant was trying to climb on a **raft** and he said that Mr. H. was and again, in the words of the complainant, "grabbing my butt". Further, he gave evidence with respect to incidents that he said happened in the waterfall area. Again, this area is shown in photographs that were introduced into evidence. The evidence of the complainant was in fact that the accused touched him for a sexual purpose and in fact, again in the words of the complainant, "squeezed his penis a few times". While this was happening, the

> sister of the complainant was swimming and was otherwise occupied, jumping off the waterfall. (Emphasis added)

[4] The judge correctly summarized Mr. H.'s explanation of DB's testimony that he squeezed DB's penis and grabbed his buttocks during the first visit:

> [13] ...Mr. H. testified about reaching out and grabbing the complainant's upper thigh, that this was . . . not for a sexual purpose. He testified that they were climbing to face the waterfalls. That the complainant's sister got up first. That the complainant was ahead of him and the complainant was losing his balance and as result of this, Mr. H. reached up and in the words of Mr. H., "pushed against [DB's] bum to keep him from falling, that there was no sexual intention."

[5] The judge reviewed DB's testimony of what happened on the second visit:

> [5] Insofar as this incident goes, what the complainant testified to was as follows: he said that Mr. H. explained to him how one can go about getting a massage in the waterfall; talked to him about allowing the water to flow over his penis and in fact according to the complainant, Mr. H. demonstrated and, further, opened his, that is the complainant's shorts. What happened soon thereafter, according to the complainant, was that Mr. H. performed oral sex on him and then requested that he, the complainant, perform oral sex on Mr. H., to which the complainant complied. He described it as the accused performing oral sex on him and then that this went 'back and forth', according to the complainant. After this happened, he stayed there for a minute "wondering what had just happened"; and that Mr. H. asked him "to promise not to tell anyone", or again in the words of the complainant, "they would both get in trouble".
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> [6] The complainant also testified that at one point Mr. H. rubbed his penis with a towel as if drying off his penis. And, upon the request of Mr. H., the complainant did this to the person of the accused, as I said upon the request of the accused.

[6] She recited Mr. H.'s explanation of the towel incident that DB testified took place during the second visit but did not refer to Mr. H.'s denial of oral sex:

> [14] Dealing next with what I'll refer to as the towel incident, here's what Mr. H. said about that. He said "after our swim, we're behind some rocks and he dropped his shorts down to his..., he lost his balance, I reached my arm out to steady him so that he would not hurt himself". The complainant then fell inwards into the face of that boulder and the forest around is all hemlock. And when [DB] lost his balance, he leaned in and when he regained his balance I said, "you have hemlock needles over your penis". And again, according to Mr. H., he wiped the

> towel, and actually he demonstrated in Court, made a swiping motion with his arm. He did this with the towel, on the complainant's penis. He testified that they finished getting changed and then went home. ...
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> [15] He later gives more information on this particular incident. What he says happened was that as the complainant fell forward towards the rock that the complainant tried to stop himself. Mr. H. testified that he "reached out and grabbed his clavicle to steady him" and the complainant still fell into the rock. And that he fell into the rock and he got needles on himself and that, you know, it was only the mid-section of the complainant that actually went up against this rock. And in the words of Mr. H., "the complainant was...like spaghetti man and lost his balance". Mr. H. testified that the complainant had the hemlock needles on his penis and that he told the complainant, twice in fact, told him that he had to get those "needles off or he would be in a world of hurt". Mr. H. testified that the complainant did indeed try to remove them but they weren't coming off. The complainant was using his bare hand at this time and then tried with a towel. Mr. H. testified that he bunched the towel and then swiped at the hemlock needles with the towel.
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> [16] And, further, these are the exact words, verbatim from Mr. H., "I was as naked as a jaybird and wanted to get out of there. I was worried about people coming". Again he was asked, why not just put on your clothing? And he said "well, it's not fair to the complainant to have these hemlock needles" and he felt that it would be improper for him to touch the 15 year old complainant. That he used his bare hand, so he gave brush offs, two quick brush offs and this was strictly to get the hemlock needles off the complainant's penis. ...

[7] In her reasons the judge referred to DB's refusal to answer a question put to him during cross-examination as to whether SB had to change into her swimsuit. Defence counsel did not press the matter by asking the judge to instruct DB to answer the question. He proceeded with his questioning, to which DB responded.

[8] She correctly stated the burden of proof (¶ 11 and 17) and reminded herself of the need to follow the law set out in **R. v. W.(D.)**, [1991] 1 SCR 742:

> [12] ...in a case such as this, where credibility is important, I have to be mindful of the **W.D.** case. And I have to be mindful that a criminal trial is not a credibility contest. It's not just a question of saying which version do I prefer and making a decision based on that. So for example, even if I were to reject completely and totally the evidence of Mr. H., I would still have to look at all of the evidence, all of the relevant and admissible evidence and determine whether

> or not the Crown had in fact met the burden of proof, proving the essential elements of each offence beyond a reasonable doubt.

[9] The judge generally rejected Mr. H.'s evidence concerning sexual contact with DB, specifically rejected his explanations of the towel incident, pushing on DB's buttocks and grabbing DB's upper thigh and went on to consider all of the evidence:

> [17] I listened carefully to all of the evidence. I am mindful of the heavy burden of proof that the Crown has. I'm going, **I think it's important to say, that I do reject the evidence of Mr. H.. I find the evidence to be incapable of belief.** And when I say I reject his evidence, of course I accept some portions of his evidence. You know, clearly he was at Crystal Falls. . . . He was there with the complainant and the complainant's sister. This was in August 2009. There was fishing, there was swimming and what have you. But insofar as the sexual touching goes, the sexual contact goes between Mr. H. and the complainant here, I am satisfied that the Crown has met the heavy burden of proof with respect to, in fact, the three charges that are before the Court here today.
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> [18] **I reject the evidence of Mr. H., for example with respect to the ..., to what I just referred to, that the touching with the towel was to remove pine needles from the penis of [DB].** [DB], the complainant, gave evidence with respect to what happened with the towel and drying off each other and what have you. The explanation put forward by Mr. H., not only do I reject it, I find it is absolutely incapable of belief. It makes no sense at all.
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> [19] It makes no sense, especially when one looks at the entire context here. That context includes Mr. H. by his own evidence having some concern with respect to the complainant being quick to report things to the school guidance counsellor. Mr. H. testified about the discussion that had arisen as a result of that. Not only that but part of the context here is Mr. H. in his evidence and this part of his evidence I accept, was that there was some question or some concern as to whether or not in fact the complainant was, in the words of Mr. H., "taken with him". So, here's Mr. H. on this outdoor trip and saying that any touching that happened, it was for a non-sexual purpose. **I'm referring specifically to the grabbing by the buttock and the grabbing of the upper thigh or pushing on the buttock, I suppose I should say and the grabbing of the upper thigh.** And that what happened behind the rock area, that was really touching, again that was for a purpose of removing the hemlock needles, not for a sexual purpose. It absolutely makes no sense whatsoever.

> [20] But that doesn't mean that Mr. H. is guilty of the charges because his evidence doesn't make sense and because I don't believe his evidence with respect to, for example, the incident that I just set out in some length. I have to look at all the evidence. (Emphasis added)

[10] Noting that she had considered all of the evidence, the judge concluded that Mr. H. did engage in sexual activity with DB, including reciprocal oral sex, and found him guilty of the three charges against him:

> [21] ...When I consider all of the evidence and I realize and just before leaving that, I realize then that insofar as some of the incidents go when trying to for example to look at the whole picture and to do, really a chronological sequence of which incident followed immediately which incident, it's really difficult to do. And it's not because people are lying or what have you, sometimes it's just the way people remember, and the way they recall details and what have you. But despite that, the evidence is clear and I find as a fact that Mr. H. did engage in sexual activity with the complainant, who was underage back in August 2009. That sexual activity involved oral sex, him performing oral sex on the complainant and requesting the complainant do the same to him, a request with which the complainant complied. It also involved the activity as described by the complainant of, what I'll call, the fondling or the rubbing of his penis, as I said, as was described by the complainant.

Issues

[11] The issues raised in this appeal are whether the judge (1) misapprehended the evidence, (2) properly applied the law set out in **W.(D.)**, (3) failed to give adequate reasons or (4) imposed an improper, unfit or unduly harsh sentence in light of the offences and the offender.

Misapprehension of the Evidence

[12] The legal principles applicable to this issue are set out by Cromwell, J.A., as he then was, in **R. v. S.D.D.**, 2005 NSCA 71:

> [9] This Court may allow an appeal in cases such as this if persuaded that there has been a miscarriage of justice: see s. 686(1)(a)(iii) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. A trial judge's misapprehension of the evidence may result in a miscarriage of justice, even though the record contains evidence upon which the judge could reasonably convict.

> [10] What is a misapprehension of the evidence? It may consist of "... 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 ...": **R. v. Morrissey** (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at p. 218. ...
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> [11] Not every misapprehension of the evidence by a judge who decides to convict gives rise to a miscarriage of justice. A conviction is a miscarriage of justice only when the misapprehension of the evidence relates to the substance and not merely the details of the evidence, is material rather than peripheral and plays an essential part in the judge's reasoning leading to the conviction: see **Morrissey**, **supra**, at 221; **R. v. Lohrer**, [2004] 3 S.C.R. 732; S.C.J. No. 76 (Q.L.) at paras. 1-2.
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> [12] It follows, therefore, that to succeed on appeal, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence in that she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in her decision to convict.

[13] Mr. H.'s main argument is that the judge misapprehended the evidence by failing to give proper effect to the evidence that Crystal Falls is a public place and that the hot tub area, where DB testified the oral sex occurred, could be seen from some parts of the beach on which SB was waiting. He suggests that if the judge had given proper effect to this evidence, she would have concluded that Mr. H. would not have participated in oral sex for fear of being seen by SB or another member of the public. While everyone agreed Crystal Falls is a public place, the evidence was clear that no one but Mr. H., DB and SB were there at the relevant time. SB testified that DB and Mr. H. were out of her sight at the hot tub area for 20 to 30 minutes. Mr. H. testified this was the case for six minutes. DB testified that the oral sex was intermittent, with Mr. H. constantly checking to ensure no one was around. The fact the judge did not draw the inference from the evidence that Mr. H. advances does not indicate the judge failed to give proper effect to this evidence. It means she disagreed with Mr. H.'s argument.

[14] Mr. H. argues the judge misapprehended the evidence by failing to consider his denial of oral sex. The oral sex was by far the most serious of the activities about which DB testified. Mr. H.'s denial was clear. While the judge did not specifically refer to his denial in her reasons, she generally rejected Mr. H.'s

testimony as it related to sexual contact with DB (¶ 17). Her reasons indicate she considered the oral sex allegation as she specifically referred to DB's testimony concerning oral sex (¶ 5) and concluded it took place as he testified (¶ 21). In her reasons, she states that she considered all of the evidence. There is no reason to doubt her. I am satisfied the judge did not fail to consider Mr. H.'s denial of oral sex in reaching her conclusion.

[15] Mr. H. argues the judge misapprehended the evidence by failing to consider certain inconsistencies in DB's testimony, which affected her finding that DB's testimony was credible. The inconsistencies he points to are the purpose for each visit to Crystal Falls, fishing or swimming; the number of times Mr. H. squeezed his penis; the length of time DB spent in the water; the positions of DB and Mr. H. during oral sex, standing and sitting, and where DB sat in the truck en route to and from the visits. The judge states in ¶ 21 of her reasons that there was conflicting testimony concerning chronology, which I understand to be a reference to the conflicting testimony as to the reason for the visit to Crystal Falls on each occasion. She indicates that she is satisfied the witnesses were not lying about the purpose of each visit but simply did not correctly remember this detail. The purpose for the visits, the length of time DB was in the water and where DB sat in the truck were unimportant to the offences. It is understandable that DB may not remember the exact number of times Mr. H. squeezed his penis approximately one year after the incident. DB testified the oral sex was intermittent, so his evidence as to their positions is not inconsistent. Even if the judge failed to consider these inconsistencies, which I am satisfied she did not, as Mr. H. admits, these inconsistencies are not substantial or material in terms of the judge's decision to convict.

[16] Mr H. also argues the judge misapprehended the evidence by failing to give proper effect, in assessing DB's credibility, to DB's deportment during cross-examination. He argues the appropriate effect would have been to draw an adverse inference against DB's credibility. The record indicates an effective cross-examination of DB. He refused to answer a question, swore and was "testy" by times. The judge's reasons refer to DB's behaviour, indicating that she considered it in reaching her conclusion. While less than perfect deportment of a witness may negatively affect a trier of fact's assessment of that witness' credibility, it does not require a negative assessment. Here the question DB refused to answer had nothing to do with the essential elements of the offences. His other behaviour showed

impatience, annoyance and a quick temper. After considering the nature of DB's cross-examination, it was open to the judge to find as she did that DB was credible on the essential elements rather than draw an adverse inference.

[17] Finally, the appellant argues the judge misapprehended the evidence because in her reasons she incorrectly described DB's evidence as Mr. H. pushing on his buttocks while he was trying to climb on a raft, when DB's evidence was that this happened when he was trying to climb on a rock. The record indicates the judge was aware that DB's evidence was that this happened when he was trying to climb on a rock, because she repeated this evidence to him to be sure she had heard it correctly. I am satisfied her reference to a raft in her reasons was no more than a slip of the tongue which is not a reversible error; **R. v. Schrader**, 2001 NSCA 20, ¶ 6.

[18] I would dismiss this ground of appeal.

Did the judge fail to properly apply the law set out in **W.(D.)**?

[19] The appellant argues the judge failed to properly apply the law set out in **W.(D.)**, despite referring to the case in her reasons. In **W.(D.)** at p. 758, Cory J. prescribed a three step formula for assessing credibility where the accused testifies:

> First, if you believe the evidence of the accused, obviously you must acquit.
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> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
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> 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.

[20] The judge correctly reminded herself of the guiding principles in **W.(D.)**. She identified credibility as an important issue, but recognized that a criminal trial is not a credibility contest and that she had to consider all of the evidence to determine whether the Crown had proven all of the essential elements of each offence beyond a reasonable doubt (¶ 12 and 20). Her clear rejection of Mr. H.'s testimony satisfies the first and second steps of **W.(D.)** even though she did not

specifically state that she considered whether Mr. H.'s evidence raised a reasonable doubt, the second step. As set out in **R. v. R.E.M.**, 2008 SCC 51, the convictions themselves raise the inference that Mr. H.'s evidence failed to raise a reasonable doubt:

> [56] ...if, in a case that turns on credibility, a trial judge explains that he or she has rejected the accused's evidence, but fails to state that he or she has a reasonable doubt, this does not constitute an error of law; in such a case the conviction itself raises an inference that the accused's evidence failed to raise a reasonable doubt.

[21] With respect to the third step of **W.(D.)**, the judge specifically referred to the need to consider all of the evidence to see if it raised a reasonable doubt, indicated she considered all of the evidence and found no reasonable doubt. I am satisfied the judge properly applied **W.(D.)**.

[22] I would dismiss this ground of appeal.

Insufficient Reasons

[23] The appellant argues the judge's reasons are insufficient for a number of reasons – she did not adequately explain how she concluded these offences could take place at a public swimming hole with SB on the beach, why she rejected Mr. H.'s denial of oral sex or why she found DB's evidence to be credible and rejected his evidence.

[24] In **R.E.M.**, the Supreme Court of Canada considered the adequacy of reasons of a trial judge on the credibility of witnesses in a criminal trial, responding to many arguments similar to those raised in this appeal. It sets out the approach appellate courts are to take in reviewing a trial judge's reasons for adequacy:

> [35] In summary, the cases confirm:
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> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).

(2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.

(3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

. . .

[54] An appellate court reviewing reasons for sufficiency should start from a stance of deference toward the trial judge's perceptions of the facts. As decided in *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, and stated in *Gagnon* (at para. 20), "in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected". It is true that deficient reasons may cloak a palpable and overriding error, requiring appellate intervention. But the appellate court's point of departure should be a deferential stance based on the propositions that the trial judge is in the best position to determine matters of fact and is presumed to know the basic law.

[55] The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.

[56] If the answers to these questions are affirmative, the reasons are not deficient, notwithstanding lack of detail and notwithstanding the fact that they are less than ideal. The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law. Reasonable inferences need not be spelled out. For example if, in a case that turns on credibility, a trial judge explains that he or she has rejected the accused's evidence, but fails to state that he or she has a reasonable doubt, this does not constitute an error of law; in such a case the

> conviction itself raises an inference that the accused's evidence failed to raise a reasonable doubt. Finally, appellate courts must guard against simply sifting through the record and substituting their own analysis of the evidence for that of the trial judge because the reasons do not comply with their idea of ideal reasons. As was established in *Harper v. The Queen*, [1982] 1 S.C.R. 2, at p. 14, "[a]n appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. . . . Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."
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> [57] Appellate courts must ask themselves the critical question set out in *Sheppard*: Do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review? To conduct meaningful appellate review, the court must be able to discern the foundation of the conviction. Essential findings of credibility must have been made, and critical issues of law must have been resolved. If the appellate court concludes that the trial judge on the record as a whole did not deal with the substance of the critical issues on the case (as was the case in *Sheppard* and *Dinardo*), then, and then only, is it entitled to conclude that the deficiency of the reasons constitute error in law.

[25] The court reminds us of the difficulties of enunciating reasons for credibility findings:

> [28] In *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, this Court allowed a Crown appeal of an appellate decision in which an error of law had been found on the basis of insufficiency of reasons. The majority, *per* Bastarache and Abella JJ., found that the appellate court had ignored the trial judge's unique position to see and hear witnesses. It had instead substituted its own assessment of credibility for the trial judge's view by impugning the reasons for judgment for not explaining why a reasonable doubt was not raised. Bastarache and Abella JJ. observed, at para. 20:
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> > 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. That is why this Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

. . .

And later:

> [49] While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[26] Further, the court in **R.E.M.** makes it clear that a trial judge is not required to recite all of the evidence in his or her reasons, as long as he or she grappled with the live issues at trial, and that a trial judge's failure to explain why he or she rejected a denial of the charges is not necessarily a deficiency:

> [64] ...The foregoing discussion of the law establishes that a trial judge is not obliged to discuss all of the evidence on any given point, provided the reasons show that he or she grappled with the substance of the live issues on the trial. It is clear from the reasons that the trial judge considered the accused's evidence carefully, and indeed accepted it on some points. In these circumstances, failure to mention some aspects of his evidence does not constitute error. This also applies to the third objection, that the trial judge failed to make general comments about the accused's evidence. ...
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> . . .
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> [66] Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a

> reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt.

[27] When reviewing the judge's reasons for sufficiency, we are to proceed with deference. We are not to substitute our opinion for that of the trial judge. We are to take a functional approach and ask ourselves whether her reasons in their entire context, considered in light of the evidentiary record, the submissions of counsel and the live issues at trial, reveal the basis for the verdict reached. Do her reasons indicate that she seized the substance of the critical issues at trial? We are to ensure the judge dealt with material contradictions and any difficult or novel issues of law. We are to recognize the inherent difficulties in enunciating why one finds one witness credible and another not. We are to remember that the judge is not required to deal with all of the evidence in his or her reasons and that reasonable inferences need not be stated. We are to consider whether the reasons, in context, sufficiently inform the parties of the basis of the verdict, provide public accountability and permit meaningful appellate review.

[28] I am satisfied the judge's reasons, in context, reveal the basis for her verdict. They indicate she was seized with the substance of this short, simple, "he said-he said" trial. There were no difficult or novel issues of law. The judge recognized that the credibility of DB and Mr. H. were important issues and made clear findings of credibility. She accepted DB's evidence on the essential elements of the offences. She rejected Mr. H.'s testimony generally with respect to his sexual contact with DB, noting his explanations made absolutely no sense. She applied **W.(D.)** and found that neither Mr. H.'s testimony nor the other evidence at trial raised a reasonable doubt.

[29] The evidentiary record provides a basis on which she could find oral sex took place, despite the public nature of Crystal Falls and SB's presence on the beach. Her clear rejection of Mr. H.'s testimony where it conflicted with that of DB's evidence on their sexual contact, explains why she rejected Mr. H.'s denial of oral sex.

[30] Assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization; **R.E.M.**, ¶ 28 and 29. The judge's reasons give some indication why she disbelieved Mr. H.. She explained that she found his explanations of touching DB's person and genitalia, but without a sexual purpose, made no sense against the background of suspicion and paranoia Mr. H.

had about DB, given DB's propensity to report things to his guidance counsellor and DB's father's indication to Mr. H. in the Spring of 2009 that DB "was somewhat attracted" to Mr. H..

[31] The evidentiary record provides additional factors that may explain the judge's rejection of Mr. H.'s testimony. Mr. H. testified he looked at the school texts of DB and SB, which in Mr. H.'s opinion, instructed students "how to set somebody up with sexual charges". He tried to diminish DB's testimony by suggesting several times that DB was "slow". He testified that while he was alone with DB at the hot tub during the second visit, DB sat down beside him and indicated he had an erection – "He had this weird childish chuckle, like, Huh-huh-huh-huh, I got a woody". He testified about the massage incident, stating that when all three were together he encouraged both DB and SD to sit "in the face of the waterfalls" and get a "really wonderful massage". He had an innocent explanation for every sexual activity described by DB, except the oral sex. It would have been difficult to come up with an innocent explanation for that. The judge may have considered these explanations to be blatant attempts at justification by Mr. H., which type of justification the court in **R. v. Gagnon**, 2006 SCC 17 found supported the trial judge's assessment of credibility against the accused.

[32] I am satisfied the judge's reasons inform the parties of the basis of her verdict, provide public accountability and permit meaningful appellate review. The judge's reasons inform the parties of the basis of her decision – she accepted DB's testimony on the essential elements of the charges and it satisfied her of Mr. H.'s guilt beyond a reasonable doubt despite his explanations and denial. None of the other evidence raised a reasonable doubt. Her reasons provide public accountability, because a person reading her reasons can understand how she reached her verdict. The judge's reasons allow this Court to assure itself that the judge properly understood the relevant evidence, applied the proper legal principles to that evidence, particularly the burden of proof, made findings of credibility that were available to her on the evidence, and ultimately returned a verdict based on the evidence and the application of the relevant legal principles to that evidence.

[33] I am satisfied the judge's reasons are sufficient.

[34] I would dismiss the conviction appeal.

Sentence Appeal

[35] Mr. H. argues the judge erred in imposing consecutive rather than concurrent sentences, suggesting this was a single continuous offence, and by imposing a sentence that was harsh and excessive.

[36] This Court owes deference to the judge both in terms of the length of the sentences she imposed, **R. v. Adams**, [2010] NSCA 42, ¶ 15, and whether they should be served consecutively or concurrently; **R. v. McDonnell**, [1997] 1 S.C.R. 948, ¶ 46. In the absence of an error of principle, failure to consider a relevant factor, or overemphasis of the appropriate factors, this court is not to overturn a sentence unless it is demonstrably unfit; **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500, ¶ 90.

[37] When deciding whether sentences should be concurrent or consecutive, a judge should consider the time frame within which the offences occurred, the similarity of the offences, whether a new intent or impulse initiated each of the offences and whether the total sentence is fit and proper under the circumstances; **R. v. G.A.W.** (1993), 125 N.S.R. (2d) 312 (N.S.C.A.); **R. v. Naugle**, 2011 NSCA 33. I am satisfied the judge's decision to impose consecutive sentences met these criteria. The offences occurred on two separate days. DB's evidence was that the sexual activity on the first visit to Crystal Falls was the type which would fall under s.151, while that on the second visit would fall under both s.151 and s.152. The activity on the second visit was far more serious. Mr. H. renewed his illegal intentions on the second visit and engaged in escalated unlawful sexual activity. The judge specifically considered the totality principle in her sentencing decision. In the circumstances of this case, I am satisfied the judge did not commit reversible error by ordering that the sentences be served consecutively.

[38] The appellant acknowledges, as he did before the judge, that the cases display a significant range of sentence for offences such as these. The sentences in the cases referred to the judge ranged from 90 days intermittent to 18 months incarceration. The cases on range presented to this Court by the Crown, **R. v. Johnson**, 2010 ABCA 287, **R. v. Manjra**, 2009 ONCA 485, **R. v. C.P.S.**, 2010 ABCA 313, indicate sentences of 12, 17 and 27 months incarceration have been imposed for sexual interference by first time offenders. These cases indicate the total sentence imposed by the judge is within the range of acceptable sentences.

[39] The judge made no error of principle. She noted the need for denunciation and specific and general deterrence and found Mr. H.’s lack of remorse was not an aggravating factor. She considered that Mr. H. had no criminal record, had strong family ties with his daughters, was self-employed and had a middle-of-the- road presentence report. She took into account the victim impact statement, Mr. H.’s breach of trust and the significant impact Mr. H.’s actions had on DB. She noted the difference in the position of the Crown and defence on the appropriate length of sentence and the range of sentence for these types of offences. She fixed an eight-month custodial sentence for each offence, took the totality principle into account, and ordered that the sentences be served on a consecutive basis.

[40] I would grant leave to appeal sentence, but dismiss the sentence appeal.

Hamilton, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.