NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Snow*, 2019 NSCA 76

Date: 20190912
Docket: CAC 471286
Registry: Halifax

Between:

James Snow

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge: The Honourable Justice Duncan R. Beveridge

Appeal Heard: April 17, 2019, in Halifax, Nova Scotia

Subject: Criminal law: ineffective assistance of counsel

Summary: The appellant was convicted of a single count of exposing his genitalia to persons under sixteen years of age for a sexual purpose, contrary to s. 173(2) of the *Criminal Code*. The judge imposed the jointly recommended sentence of time served. The appellant filed a motion to adduce fresh evidence in support of his sole ground of appeal that trial counsel provided him ineffective assistance at trial. The proposed fresh evidence consisted of the appellant's affidavit which described an act of accidental exposure to the children caused by his re-attachment of a fallen curtain. Trial counsel's affidavit detailed the extensive consultation with the appellant, in concert with another lawyer, about testifying. That consultation ended with counsel's recommendation that the appellant not testify, but he advised the appellant that it was ultimately the appellant's decision. The appellant's instructions were that that he would not testify. Appellate

counsel argued that trial counsel's advice was incompetent because the trial judge, who did not hear evidence about the fallen curtain, called the theory speculative. Therefore, the conviction constituted a miscarriage of justice.

Issues: Has the appellant demonstrated ineffective assistance of counsel?

Result: Appellant's complaint that trial counsel's recommendation not to testify was incompetent is without merit. It is not the function of an appeal court to second guess or rebalance the considerations that underpinned trial counsel's advice. The factors that influenced counsel were relevant. Further, the trial judge did not reject the fallen curtain theory merely because he considered it to be speculative, but the theory was simply not plausible considering human experience and the evidence he had accepted. That evidence included the fact that the appellant, on two separate occasions, climbed up onto a table and engaged in an act of masturbation while the curtain was open.

The motion to adduce fresh evidence and the appeal are dismissed

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Judges:	Beveridge, Bourgeois, and Derrick, JJ.A.
Appeal Heard:	April 17, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Bourgeois and Derrick, JJ.A. concurring
Counsel:	Peter Planetta, for the appellant Glenn Hubbard, for the respondent

Order restricting publication — sexual offences

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

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 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).

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

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

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

INTRODUCTION

[1] The appellant seeks a new trial based on a complaint that trial counsel's incompetence caused a miscarriage of justice. There is no merit to this complaint.

[2] I would therefore dismiss the appellant's motion to adduce fresh evidence and the appeal. I will set out sufficient background information to provide the necessary context to the appellant's complaint and then turn to the fresh evidence.

BACKGROUND

[3] On February 14, 2017, a snowstorm led to the cancellation of school. Three young children decided to sled on the hill next to their apartment complex. They saw a naked man in an apartment window, touching his genitalia. While they did not use the term, their evidence described an act of masturbation. They told a responsible adult. Police were called. The appellant's arrest followed.

[4] The police immediately took videotaped statements from the three children. A single count information charged the appellant with exposing his genital organs to persons under sixteen years of age for a sexual purpose, contrary to s. 173(2) of the *Criminal Code*.

[5] The Crown proceeded indictably. The appellant elected trial in Provincial Court, with the trial to commence on May 12, 2017. Bail was denied.

[6] The sequence of the trial has some relevance to the appellant's claim his trial lawyer was incompetent. The trial proceeded over four days before the Honourable Judge Theodore Tax.

[7] Evidence was heard on May 12, July 20, August 23, and October 13, 2017. At the end of the Crown's case on October 13, defence counsel called the appellant's partner, Ms. Marion MacLellan, in support of the possibility that the appellant accidentally exposed his genitalia while trying to reattach the bedroom curtain. Submissions followed. The trial judge reserved.

[8] On November 21, 2017, the trial judge delivered a lengthy oral decision. It is unreported. I will set out some of his key findings later. For now, it suffices to make the following comments.

[9] Although the children could not identify the man in the window, the circumstantial and direct evidence satisfied the trial judge beyond a reasonable

doubt the appellant was that man. The judge accepted the children's evidence that the appellant twice exposed his genital organs while he masturbated. The exposure was for a sexual purpose.

[10] The same day, the Crown and defence proposed a joint recommendation of time served, in light of the 280 days the appellant had spent on remand. The trial judge accepted the joint recommendation. He also imposed three years' probation and made various ancillary orders for DNA, Sexual Offender Registry, and prohibited the appellant's attendance or proximity to schools and playgrounds.

THE APPEAL PROCEEDINGS

[11] On December 12, 2017, the appellant filed an inmate Notice of Appeal from conviction and sentence. The sole ground of appeal from conviction read as follows:

> The judge misapprehended the facts which shows an alternate plausible explanation for the indecent exposure: accidental exposure while replacing a faulty curtain after coming from the shower.

[12] The Notice of Appeal said nothing about how or why sentence was flawed.

[13] Counsel assumed carriage and filed an Amended Notice of Appeal on October 1, 2018. Again, it asserted the appeal was from conviction and sentence. The initial ground of appeal was withdrawn. In its place:

> The appellant had ineffective assistance of counsel;
>
> The trial judge misapprehended the facts and erred in applying the law to said facts;

[14] Again, the Notice contains no sentence grounds.

[15] The appellant's factum advances no argument about sentence or that the trial judge misapprehended the evidence or otherwise committed legal error.

[16] At the end of the day, the sole ground that we must address is the appellant's claim that trial counsel provided ineffective assistance. In support of this ground, the appellant filed a motion to adduce fresh evidence and his affidavit. The Crown responded with an affidavit by trial counsel, Alex Baranowski.

[17] I would admit the evidence provisionally to assess the merits of the appellant's complaint. There is no merit to the complaint. I will first describe the proposed fresh evidence, then the principles that guide this Court's assessment of ineffective assistance of counsel and how they apply.

The fresh evidence

[18] The appellant's affidavit sets out his exculpatory version of the events of February 14, 2017. The essence of it is as follows. He showered. Wearing just a towel, he went to the master bedroom where he finished drying. When he swung the towel over his back, it accidentally hit the curtain. It fell. While naked, he climbed up on the table and bed to reattach the curtain. He saw silhouettes of people outside, but did not take note of them. The appellant then put on shorts, and while applying moisture cream, the curtain fell again. He again reattached it. He did nothing for a sexual purpose and did not masturbate.

[19] The appellant's affidavit offers no criticism of trial counsel. The Crown passed on the opportunity to cross-examine the appellant.

[20] To understand the focus of Mr. Baranowski's affidavit, the appellant's January 25, 2019 factum initially suggested:

> [7] **Mr. Snow states Mr. Baranowski decided and advised him not to testify**, as there was ample reasonable doubt on the case.
>
> [. . .]
>
> [27] **The evidence of the Applicant is that his lawyer decided he was not going to testify and advised him of same**. In doing so Mr. Baranowski [indicated] there was ample reasonable doubt on the evidence and there was no need. It is respectfully submitted that a review of the trial transcripts show that there were some inconsistencies, but the Crown had clearly established their *prima facie* case. It was an instance where the accused clearly bore a tactical burden, but was advised otherwise by his counsel.
>
> [Emphasis added]

[21] The problem is that Mr. Snow's affidavit does not allege trial counsel decided the issue of the appellant testifying, nor even that counsel advised him not to testify. Mr. Baranowski's affidavit does acknowledge that he recommended the appellant not testify.

[22] Trial counsel's affidavit describes the active participation of Ms. Lisa Teryl, appellant's counsel on undisclosed civil proceedings. According to trial counsel, she attended virtually all meetings with the appellant. She prepared materials for trial, including a detailed draft trial book. She was actively involved in the assessment of evidence and trial strategy decisions.

[23] There are two paragraphs in trial counsel's affidavit that bear quotation. They are:

> 23. Throughout the course of the trial, I had many meetings with Mr. Snow and Ms. Teryl in cells at the Courthouse. During these meetings we discussed the prospect of Mr. Snow testifying in his own defence a number of times**. I expressed my opinion to Mr. Snow that his testimony should be avoided and indicated that I felt that based on the issues that were being raised in the testimony of the children, our primary strategy should be to highlight the shortcomings in the Crown's evidence and then simply use Mr. Snow's explanation as a possible alternative interpretation of the Crown's evidence**. It was my assessment that the evidence of the children had inconsistency and vagueness to it, and there were aspects of their testimony (either through their direct or the concessions they made on cross examination) that raised reasonable doubt about the sexual purpose of the exposure.
>
> …
>
> 27. Throughout my involvement in this matter, every time we discussed the prospect of Mr. Snow testifying, **I was very clear that I was merely offering him my recommendation, and that it was ultimately Mr. Snow's decision whether he would take the stand or not.** I told Mr. Snow that if he chose to take the stand, I would call him and that he could offer his version of events. **Mr. Snow's instructions were that he would not testify.**
>
> [Emphasis added]

[24] The appellant did not seek to file a reply affidavit from Ms. Teryl, nor did appellate counsel challenge any of these assertions in cross-examination.

Ineffective assistance of counsel principles

[25] There are now legions of cases that have found or dismissed allegations that trial counsel provided ineffective assistance. For a claim to succeed, the appellant must establish on a balance of probabilities that trial counsel's acts or omissions constituted incompetence and a miscarriage of justice resulted.

[26] Incompetence is to be determined by application of a reasonableness standard. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The conduct of counsel is not to be assessed simply with the clairvoyance of hindsight.

[27] If no prejudice can be demonstrated, it is appropriate to dispose of the claim on that basis and leave the issue of counsel's conduct or performance to the profession's self-governing body (see *R. v. G.D.B.*, 2000 SCC 22, at paras. 26-29).

[28] What is meant by prejudice? An appellant must satisfy the Court that the failings of counsel caused a miscarriage of justice. This requirement can be satisfied by different considerations. In a general way, an unfair trial, or one tainted by a serious appearance of unfairness, amount to a miscarriage of justice. In *R. v. Wolkins*, 2005 NSCA 2, Cromwell J.A., as he then was, discussed the broad scope of this nomenclature:

> [89] The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that, it is much easier to give examples than a definition; there can be no "strict formula ... to determine whether a miscarriage of justice has occurred": *R. v. Khan*, [2001] 3 S.C.R. 823 *per* LeBel, J. at para. 74. However, the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice: *Fanjoy, supra*; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 220-221. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice: *R. v. Cameron* (1991), 64 C.C.C. (3d) 96 (Ont. C.A.) at 102; leave to appeal ref'd [1991] 3 S.C.R. x.

(See also: *R. v. Joanisse*, [1995] O.J. No. 2883 at para. 67; *R. v. G.K.N.*, 2016 NSCA 29 at paras. 39-42.)

[29] There are numerous decisions an accused must make. Sometimes they are difficult. Counsel, when advising an accused on those decisions, often must balance multiple conflicting considerations. Frequently there is no one right answer.

[30] During the course of a trial, counsel need not get instructions on each issue that may present. But on at least two, they have a duty to advise and get instructions: whether to plead guilty and whether to testify.

[31] If counsel fails in this duty, procedural fairness and the reliability of the result can sustain a miscarriage of justice pronouncement (see: *R. v. G.D.B.*, *supra* at para. 34).

[32] Whether to testify can be of fundamental importance. Typically, it is the accused's only opportunity to convey their story to the trier of fact. Absent an order for a new trial, there are no do-overs. However, if counsel makes the decision rather than the accused, it is a short step to a miscarriage of justice conclusion and new trial order. Doherty J.A., for the Court, in *R. v. Archer*, 203 O.A.C. 56 explains:

> 139 While counsel owes an obligation to advise his client as to whether he or she should testify, the ultimate determination must be made by the client: *G.B.D.*, *supra*, at p. 300; M. Proulx & D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at pp. 114-30. If the appellant can show that it was trial counsel and not the appellant who decided that the appellant would not testify, and that the appellant would have testified had he understood that it was his decision, it seems to me that it must be accepted that his testimony could have affected the result, thereby establishing that a miscarriage of justice occurred: see *R. v. Moore* (2002), 163 C.C.C. (3d) 343 at 371 (Sask. C.A.). The crucial question becomes - who made the decision?

[33] Therefore, if counsel ignores his client's instructions or overrides them, a new trial is required (see: *R. v. Eroma*, 2013 ONCA 194 at para. 8).

[34] In addition, if counsel's advice not to testify is flawed by fundamentally incompetent advice, this can impact trial fairness and may lead to a new trial based on a miscarriage of justice analysis (see: *R. v. Ross*, 2012 NSCA 56 at para. 51; *R. v. Moore*, 2002 SKCA 30 at paras. 46-47, 51; *R. v. A.W.H.*, 2019 NSCA 40 at para. 40; *R. v. Finck*, 2019 NSCA 60 at para. 54).

[35] With these principles in mind, I turn to their application in these circumstances.

Application of the principles

[36] Initially, the appellant's factum suggested that there was a miscarriage of justice because trial counsel made the decision the appellant was not going to testify. As pointed out earlier, there is absolutely no evidence to support that suggestion. The appellant's affidavit does not avow that trial counsel made the

decision. It does not even say that he wanted to testify, and would have, but for counsel's intervention.

[37] Appellate counsel appropriately conceded that this was not an *Eroma* situation, where the client's instructions were ignored or overridden by trial counsel. Instead, appellate counsel shifted his focus to assert that trial counsel's advice or recommendation not to testify was incompetent.

[38] Appellate counsel uses strong language to suggest trial counsel's advice was patently incompetent. Since the trial judge rejected the fallen curtain alternative explanation as speculative, counsel argues:

> [29] The fact that there must be an evidentiary basis for inferences is not a surprise. It is settled and obvious law. It is something any competent lawyer would clearly be expected to advise their client's [*sic*] of. In this case we clearly see that trial counsel was alive to the theory of the case, laid some groundwork for it, and then advised his client not to testify. Yet, there is no chance this defence could succeed without evidence from the accused. That his trial counsel was not aware of this is appalling.

[39] As discussed above, fundamentally flawed advice whether to testify or not can support a finding of incompetence and, in certain circumstances, amount to a miscarriage of justice (see *R. v. Moore, supra*; *R. v. Ross, supra*; *R. v. Finck, supra*; *R. v. A.W.H., supra*).

[40] The criticism of trial counsel in this case is unwarranted. The advice given and accepted by the appellant was quintessentially strategic or tactical. It is not for an appellate Court to second guess or rebalance the considerations that underpinned that advice. Such an exercise risks being distorted by the perfect vision of hindsight, focussed by the harsh reality of a failed strategy.

[41] I accept that incompetence that causes trial unfairness resulting in a miscarriage of justice should not find a safe haven simply because it can be labelled a tactical decision.

[42] Here, trial counsel explained the primary strategy was to focus on the shortcomings in the Crown's evidence. That is, the Crown had not proven the allegation beyond a reasonable doubt. He would offer the appellant's fallen curtain theory if the judge could be satisfied beyond a reasonable doubt that it was the appellant in the window. That is, the appellant had not exposed his genitals for a

sexual purpose—the exposure was the result of the curtain having fallen and was simply being replaced.

[43] In trial counsel's view, the primary strategy bore fruit. His unchallenged evidence detailed the various inconsistencies he had brought out in the testimony of, and between, the Crown witnesses. Amongst other things, D.R. admitted it was possible that the man was simply trying to cover himself up by putting his hand over his crotch; K.C. only had a quick glance at the man in the window, and the cough she heard just sounded like an ordinary cough; the man's hand may not have been moving at all; K.R. testified that the man wasn't even wearing socks when it was impossible to see his feet, and that there was a curtain rod that was used by the man to close the curtain multiple times, when there was irrefutable evidence there was no curtain rod.

[44] Quite apart from some possibility of doubt of identity, on the key issue whether there was exposure for a sexual purpose, trial counsel listed the following in support of his view reasonable doubt existed:

> 24. On the particular issue of whether there was a sexual purpose for the exposure, I had noted the following from the Crown witnesses:
>
> a. the admitted brevity of each of their views;
>
> b. the concession from K. that the man could not have been moving his hand on his crotch at all;
>
> c. the concession from D. that the man may have been trying to cover himself up;
>
> d. the fact that Ms. B. and Ms. R. (both mothers) said D.R. told them he never saw any sort of masturbation at all;
>
> e. the different descriptions of how the curtain was closed and or the curtain rod holding it up (both of which were not possible with how it was held up);
>
> f. the disagreement between the children of how things unfolded (one said he was naked and masturbating both times, one said he was exposed/masturbating the second time but not the first, and the other said he was naked/masturbating the first time but not the second);
>
> g. the disagreement on how his face was covered (the children disagreed whether he covered his face with his own hand or whether his face was obscured by the top of the window);
>
> h. the disagreement about whether he had a towel on or not;

> i. the fact all the kids agreed the window had glare, the window was far away and the girls only had a fleeting glance at the man in the window (which made their descriptions of the variety of things that they saw unrealistic because they could not have possibly made all those observations in that short amount of viewing time);
>
> j. the fact that the children discussed what they saw with each other prior to going to tell their mothers, which I felt lent itself to the possibility that they inadvertently "got their story straight" to a degree; and
>
> k. that when you compared the three versions there were even further inconsistences.

[45] This assessment led him to offer his recommendation to the appellant not to testify. Trial counsel had concerns if the appellant were to testify. First, the appellant had a lengthy, although rather dated, criminal record (which he acknowledged could not be used for propensity). Second, trial counsel felt the appellant's explanation sounded somewhat convenient, and the judge would feel the same way. He was also wary of the appellant's view that the police had been feeding the child witnesses information because of his history with the police. If this came out in his testimony, counsel felt there was a risk that it would make the appellant sound like a conspiracy theorist and damage his credibility. Lastly, if he testified, it could fill in holes in the Crown's case.

[46] As has been repeatedly emphasized, there is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance (see: *R v. West*, 2010 NSCA 16 at para. 268). The things listed by trial counsel were all relevant considerations. As in *R. v. Archer*, *supra*, it is not for this Court to reweigh those considerations and determine what advice should have been given to the appellant (see: para. 152).

[47] Appellate counsel's criticism that it was patently obvious the appellant had to testify is unfounded. First, the primary defence strategy was to rely on the inconsistencies revealed in the Crown's evidence to argue reasonable doubt. There was no suggestion that in these circumstances the strategy was in any way unsound.

[48] Second, it was not necessary for the appellant to testify to advance the argument that the exposure was not for a sexual purpose, but perhaps to reattach a

fallen curtain. As noted earlier, counsel suggested that it is settled law that there must be an evidentiary basis for any inference to be drawn.

[49] As a general proposition, that is accurate. It is certainly so where the inference to be drawn is necessary to establish some element of an offence beyond a reasonable doubt. But in circumstances where an accused suggests an alternate explanation inconsistent with guilt, there is no obligation to call evidence to establish a factual basis for that alternate explanation.

[50] Appellate counsel's argument overlooks the direction from the Supreme Court in *R. v. Villaroman*, 2016 SCC 33 that conclusions, alternative to the guilt of the accused, need not be based on proven facts. Cromwell J., for the Court, explained:

> 35 At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. **Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence**. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
>
> 36 **I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence**. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
>
> 37 **When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt**: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I

> agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. **"Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.**
>
> [Emphasis added]

[51] Importantly, Justice Cromwell added, it is not always easy to differentiate between plausible theory and speculation:

> 38 Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[52] Trial counsel, as an alternate path to reasonable doubt, offered the fallen curtain theory. There was evidence that: the curtain in the bedroom was only attached with duct tape; it was prone to falling down without much provocation; to reattach, one had to stand on the table; the appellant had a shower around noon and went to the bedroom wearing only a towel; a Crown witness testified she saw the man with a bath towel on his shoulders. The theory could only benefit from the various concessions achieved in cross-examination.

[53] The trial judge did not just reject the fallen curtain theory because he considered it speculative—it was simply not a plausible theory in light of human experience and the evidence that he had accepted.

[54] Specifically, the trial judge, after finding that it was established beyond a reasonable doubt that the man in the window was the appellant, accepted the Crown witnesses' evidence that the appellant was masturbating—a finding glaringly inconsistent with reattaching a fallen curtain.

[55] The trial judge reasoned:

> I find that the suggestion made by defence counsel that the naked man, who I found to be Mr. Snow, climbed up on the table to attach the tape to the brown curtain to put it back in position to cover the window, presumably after it had fallen, is pure speculation **and not a plausible theory viewed logically in light of human experience and the evidence that I have accepted**.
>
> [Emphasis added]

[56] After reference to the children's evidence of the appellant making a fake coughing noise to draw their attention to his masturbation, the judge explained that it was highly unlikely anyone would act in a manner consistent with the fallen curtain theory:

> Since the window was open and the children were playing, it is highly likely that some noise from their play would have carried up to the open window. **In those circumstances, one would logically expect that, if someone had just come out of the shower, was naked, the window was open, and by sheer coincidence the duct taped curtain had happened to fall right at that moment, that they would not climb up on a table and refasten it when there were young children below that window playing in the snow.**
>
> [Emphasis added]

[57] The trial judge spent further time explaining why this alternate theory, inconsistent with guilt, did not raise a doubt. He repeated that the fallen curtain theory was inconsistent with the evidence he had accepted: the appellant had been playing with his penis while standing in that position; the children had described the curtain opening and closing, not that it had fallen; and, the appellant had played with his private parts on a second occasion:

> In my opinion, I find the defence counsel submission in this regard is based upon speculation or conjecture that Mr. Snow might have been replacing it or resecuring the tape on the curtain, and it is entirely inconsistent with the evidence of the children that I have accepted; that is, that he was playing with himself or playing with his penis or rubbing his body while he was standing in that position. The children's evidence was that the window and the curtain had opened and closed on a couple of occasions, but there was no evidence that the curtain had fallen down. Moreover, even if I was to conclude that it was possible that Mr. Snow had climbed onto the table on the first occasion to replace and resecure the tape on the curtain, I find that the evidence of children established that the naked man was in the window a few minutes later on a second occasion, also playing with his private parts.

[58] Although the trial judge repeatedly called the fallen curtain theory speculative, he rejected the alternate explanation because it was contrary to the evidence he had accepted, and did not accord with his view of logical human behaviour:

> In those circumstances**, I find that logic, human experience and common sense would dictate that, if the curtain had fallen on the second occasion a few minutes later, it would be logical for Mr. Snow to remain standing on the**

> **floor so that no genital organs would have been visible to anyone outside the building because the wall would have blocked the view of his genital organs.**
>
> Moreover, in those circumstances, it would simply have been a matter of closing the window or walking away from the area of the window to dry himself, if that was what he was doing, rather than exposing his genital organs to the children below by climbing up onto the table under the window on a second occasion.
>
> [Emphasis added]

[59] Just as trial counsel predicted, it is plain the trial judge viewed the fallen curtain explanation "somewhat convenient", to say the least.

CONCLUSION

[60] The criticism of trial counsel is unwarranted. Trial counsel weighed relevant considerations. He provided advice. The appellant accepted that advice and provided his instructions that he would not testify. It is easy for the appellant to say in hindsight that he should have testified.

[61] The appellant has not come close to demonstrating incompetence by trial counsel. There is no issue of trial unfairness or the appearance thereof, and hence, no spectre of a miscarriage of justice. I would dismiss the motion to adduce fresh evidence and the appeal.

Beveridge, J.A.

Concurred in:

Bourgeois, J.A.

Derrick, J.A.