NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. M.H.L.*, 2021 NSCA 74

Date: 20211028
Docket: CAC 502093
Registry: Halifax

Between:

M.H.L.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judge: The Honourable Justice Carole A. Beaton

Appeal Heard: September 9, 2021, in Halifax, Nova Scotia

Cases Considered: *R. v. Coburn*, 2021 NSCA 1; *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Stanton*, 2021 NSCA 57; *R. v. G.F.*, 2021 SCC 20; *R. v. Mah*, 2002 NSCA 99; *R. v. J.H.S.*, 2007 NSCA 12; *R. v. J.P.*, 2014 NSCA 29; *R. v. Jaura*, 2006 ONCJ 385; *R. v. Maharaj*, [2004] O.J. No. 2001; *R. v. Legace* (2003), 181 C.C.C. (3d) 12; *R. v. J.J.R.D.*, [2006] O.J. No. 4749 (leave to appeal to SCC refused [2007] S.C.C.A. No. 69); *R. v. Gerrard*, 2021 NSCA 59; *R. v. Evans*, 2021 BCCA 360; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Lyttle*, 2004 SCC 5

Subject: Burden of proof; Criminal; Criminal—sexual assault; Evidence—credibility; Evidence—cross-examination; Evidence—burden of proof; Sufficiency of reasons

Summary: The appellant was convicted of two counts of sexual assault. He appeals from conviction. The appellant argues the judge did not properly apply the framework for analysis prescribed

by *R. v. W.(D.)* to the evidence put before her. Furthermore, he says cross-examination of the complainant was curtailed by the judge in a manner that deprived him of his ability to make full answer and defence.

Issues: (1) Whether the judge erred in improperly shifting the burden of proof to the appellant?

(2) Whether the judge erred by improperly curtailing cross-examination?

Result: (1) The judge did not err in concluding that although the evidence of both the complainant and the accused was credible, she was persuaded beyond a reasonable doubt by the guilt of the accused. Her analysis did not have the effect of shifting the burden of proof to the appellant, despite not having applied the steps of the *R. v. W.(D.)* analysis in the prescribed order.

(2) The judge did not prevent the appellant from making full answer and defence when she exercised her ability to control the trial process.

The appeal is dismissed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 19 pages.

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Judges:	Beveridge, Bourgeois and Beaton JJ.A.
Appeal Heard:	September 9, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beaton J.A.; Beveridge and Bourgeois JJ.A. concurring
Counsel:	Terrance Sheppard, Q.C., for the appellant Erica Koresawa, 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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Reasons for judgment:

[1] The appellant M.H.L. was convicted in the Provincial Court of Nova Scotia on two counts of sexual assault contrary to s. 271 of the *Criminal Code*. The offences occurred in September and November 2019, and the complainant in both was the appellant's wife. The September incident involved the appellant engaging in unwanted intercourse with the complainant. The November incident involved touching of the complainant's breasts. Shortly thereafter, the complainant brought the matters to the attention of police. She then gathered information about custody and access, and subsequently made an application to the Family Court related to the parties' child.

[2] The Honourable Judge Jean Whalen ("the judge") delivered an oral decision on October 27, 2020. There were only two witnesses to the allegations, being the complainant and the appellant. As part of her analysis, the judge made credibility assessments of each party in weighing the evidence and coming to her conclusion the Crown had proven its case.

[3] The appellant says the judge erred in conducting her analysis of credibility in the context of the burden of proof. He also argues the judge erred by improperly curtailing cross-examination of the complainant.

[4] At trial the appellant testified the September incident involved consensual intercourse and the November incident, while it included the briefest of touching, did not occur in the manner described by the complainant. He challenged the credibility of the complainant, particularly with respect to her motivation for speaking to the police. He suggested to the judge the complainant had lodged her complaints to bolster her position concerning Family Court matters, and in particular, to ensure he would have no contact with the parties' child.

[5] During the course of cross-examination of the complainant, counsel for the appellant pursued a line of questioning about the Family Court proceedings. On the third occasion the topic was raised the judge directed the questioning to cease as the subject matter had at that point become irrelevant.

[6] The appellant's assertion the judge improperly shifted the burden of proof to him relates to an error of law, which attracts a standard of correctness: *R. v. Coburn*, 2021 NSCA 1 at para. 27. The second ground of appeal, that the judge

improperly curtailed cross-examination, also relates to an error of law, and attracts the same standard of correctness.

Issue No. 1—Was the burden of proof improperly shifted to the appellant?

[7] The first ground of appeal relates to the judge's treatment of the well-known instruction provided in *R. v. W.(D.),* [1991] 1 S.C.R. 742:

> [28] 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.
>
> […]

[8] The appellant says the judge did not properly apply the *W.(D.)* test. He says the judge erred by evaluating the credibility of the appellant and the complainant as a contest between them, rather than assessing the whole of the evidence to consider whether there existed a reasonable doubt. Specifically, the appellant maintains that because the judge found the complainant to be credible, but also found him to be credible, it was an error for the judge to then prefer the evidence of the complainant without providing any reason why the appellant's evidence, having been accepted, did not then raise a reasonable doubt.

[9] I am mindful consideration of the judge's decision should not become a microscopic examination; appellate review requires deference to the judge's analysis of the evidence and a holistic examination of the record (*R. v. Stanton*, 2021 NSCA 57 at para. 67).

[10] To give full weight to the appellant's argument it is important to consider how the judge characterized the evidence of the complainant and of the appellant. The judge said this:

> Mrs. [L] testified in a straightforward manner and she did not embellish her testimony, nor make derogatory comments about Mr. [L]. If she did not recall an answer she said so, and readily adopted her statement on several occasions when put to her by defence counsel.
>
> Mr. [L] testified as well in a straightforward manner. He always had an answer. There was never an, "I don't recall." […] events were consensual. […] Hearing the defendant's evidence on its own, there would be nothing about it that would be inherently believable, or unbelievable.
>
> Mr. [L]'s evidence must be contrasted with that of the complainant, Mrs. [L], to give it content. […]
>
> The second category of evidence is the evidence intended to undermine the credibility of the allegations, but made by Mrs. [R.L]. Mrs. [L] was – excuse me, first is Mrs. [L] was leaving Mr. [L] and intended to take the child without his permission. Second, Mrs. [L] had to come up with something to get back in the good graces of her parents, since they would be her support upon departure. And lastly, she went to the police because she wanted help to get out of the marriage, not because she was sexually assaulted. A motive to lie is not in itself evidence of a lie and I'll come back to that shortly.

[11] The appellant says the judge was clear about why she found both parties to be credible witnesses, and he does not challenge those conclusions. However, he takes umbrage with the judge's reasoning—accepting the evidence of both witnesses, but then preferring the complainant's evidence—which he says effectively shifted the burden of proof to him to explain away the complainant's evidence.

[12] The appellant submits in the absence of any reason to disbelieve either party, the judge was required to acquit him. He argues the judge did not articulate any reason to disbelieve him, yet failed to provide any reason why his evidence did not create a reasonable doubt. He maintains if the judge had no reason to discount the evidence of either of the two witnesses, it was improper to then reject his evidence in favour of that of the complainant.

[13] The sequence of the matters discussed by the judge in her decision, before reaching any conclusions about whether she had any reasonable doubt, can be broadly grouped as follows: identification of the competing positions, discussion of the principles of credibility assessment, discussion of the burden of proof, identification of the *W.(D.)* test, discussion of the dangers of impermissible reasoning, a review of the evidence of each witness and the judge's impressions of it, discussion of the factors supporting the complainant's credibility, discussion of

the argument challenging the complainant's credibility, and then her conclusions as to the appellant's credibility.

[14] The judge correctly instructed herself not to come to any conclusions concerning the "credibility, reliability, believability or acceptance" of the complainant's evidence until such time as all of the evidence had been considered. She cautioned against an analysis that amounted to a "contest" concerning credibility of the witnesses. The judge instructed herself on the relationship between credibility and reasonable doubt as follows:

> With respect to the credibility of the witnesses, the assessment of credibility is not a science, nor can it be reduced to legal rules or formula. However, proper credibility assessment is closely related to the burden of proof. For this reason an accused is to be given the benefit of reasonable doubt [in] credibility assessment. Credibility must not be assessed in a way that has the effect of ignoring, diluting, or, worse, reversing the burden of proof. **What must be avoided is an either or approach where the trier of fact chooses between the competing versions, particularly on the basis of mere preference of one over the other.**
>
> In assessing the credibility of any witness, including the accused, the existence of evidence that contradicts the witness is obviously highly relevant. Other factors such as, demeanor, contradictions within the witness's evidence itself, potential bias, or criminal record, are other factors to be considered. No witness is entitled to an assessment of his or her credibility in isolation from the rest of the evidence. Rather, his or her evidence must be considered in the context of the evidence as a whole. [Emphasis added]

[15] In concluding whether there was any reasonable doubt, the judge said this:

> I have tested his evidence against Mrs. [L], and all other evidence, and when tested in that way it cannot be accepted as raising a reasonable doubt. It's not merely a matter of finding her version of events to be more believable, neither is it a matter of not accepting it, or just not believing his evidence when it contradicts Mrs. [L]. The circumstances surrounding her disclosure, the contents of that disclosure, the manner in which she relayed it, have given me much confidence in the reliability of her evidence. That even in the light of Mr. [L]'s denial, her evidence replaces any reasonable doubt.

[16] The appellant asserts the judge's *W.(D.)* analysis should have commenced with consideration of the first branch of the test. The judge's positive assessment of the appellant's credibility should have ended the *W.(D.)* analysis at that point, as reasonable doubt was thereby established. Had the judge taken the proper

approach, says the appellant, there would have been no need to consider the balance of the *W.(D.)* instruction as an acquittal would result.

[17] The appellant says the judge's flawed application of *W.(D.)* rested in choosing to prefer the complainant's version of events without fully explaining why his contrary evidence did not raise a reasonable doubt. The appellant emphasizes the judge should have provided **some** reason to prefer the evidence of the complainant over his, other than to simply indicate she preferred it to his "clear and plausible testimony" and "unequivocal denial that any appropriate touching had taken place". He says this was particularly so as the judge recognized his evidence was not simply a "flat denial", which might otherwise have presented a reason to reject it.

[18] The respondent Crown argues the judge did not err in examining the complainant's credibility first, before looking at all the other evidence, even though doing so did not follow the sequential order of the *W.(D.)* direction, which instructs a trial judge to commence with an examination of the evidence of the accused. The Crown maintains that in applying the principles of the burden of proof and proof beyond a reasonable doubt, the judge performed the proper analysis, regardless of the order in which she approached the *W.(D.)* steps.

[19] The judge recognized the nuanced nature of the appellant's evidence. She discussed, for example, his explanation as to why he could remember certain dates and events in detail. Ultimately, the judge was satisfied none of the inconsistencies the appellant had identified in the complainant's evidence were of such a nature as to impact the reliability of that evidence. This was a conclusion open to the judge to make, and one to which deference must be shown. As the Supreme Court of Canada recently reminded in *R. v. G.F.*, 2021 SCC 20:

> [81] As *Slatter* demonstrates, a trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence, and articulating reasons for findings of credibility can be more challenging. Mindful of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the

> accused is found not to be credible, or why the evidence does not raise a reasonable doubt. But, as this Court stated in *Gagnon*, at para. 20:
>
> > 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.

[20] Proper application of the *W.(D.)* test must be evident in the judge's reasons. As Cromwell J.A. (as he then was) noted in *R. v. Mah*, 2002 NSCA 99:

> [41] The ***W.D.*** principle is not a 'magical incantation' which trial judges must mouth to avoid appellate intervention. Rather, ***W.D.*** describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternate versions and, having done so, convict if the complainant's version is preferred. …

(See also *R. v. J.H.S.*, 2007 NSCA 12 at para. 16; *R. v. J.P.*, 2014 NSCA 29 at para. 61; *R. v. Coburn*, *supra*, at para. 41.)

[21] I am not persuaded strict adherence to the order of steps of analysis set out in *W.(D.)* is necessarily required, although I add it is preferable. The *W.(D.)* test sets out a logical framework from which to organize reasons, but it is not a mandatory one. What is ultimately critical is that the judge attends to the proper principles in formulating reasons, and that those reasons permit an understanding of how and why the judge's conclusions were reached.

[22] The appellant also challenges the judge's application in her decision of the reasoning set out by the Ontario Court of Justice decision *R. v. Jaura*, 2006 ONCJ 385 when she concluded "[T]hat even in the light of Mr. [L]'s denial, her evidence replaces any reasonable doubt".

[23] The appellant says *Jaura*, which suggests a judge can reject the defendant's evidence solely on the basis of accepting the complainant's evidence, is contrary to earlier reasoning applied in *R. v. Maharaj*, [2004] O.J. No. 2001 by the Ontario Court of Appeal.

[24] As was the case here, *Jaura* dealt with the evidence of only two parties, the complainant and the accused. There the court concluded a conviction on the basis of the complainant's evidence was not improper if the trial judge "… also gives the evidence of the defendant a fair assessment and allows for the possibility of being

left in doubt, notwithstanding his acceptance of the complainant's evidence." (emphasis removed; para. 20). The Crown asserts the judge here did exactly that in assessing the evidence before her.

[25] In *Maharaj*, the trial judge had also considered the evidence of only two parties, the complainant and the accused. The Ontario Court of Appeal held the trial judge's failure to explain why the accused's evidence was rejected was an error of law that required appellate intervention. It said the appellant there "… was entitled to some analysis of his evidence, alone and in the context of the evidence as a whole: see *R. v. Legace* (2003), 181 C.C.C. (3d) 12 (Ont. C.A.). More importantly, he was entitled to know why his denials were disbelieved …" (para. 27).

[26] The appellant takes the view *Jaura* did not excuse the judge here from correctly engaging the *W.(D.)* analysis, nor did it permit her to engage in the "forbidden reasoning" discussed in *Maharaj*. The forbidden reasoning in *Maharaj* was in relation to the trial judge in that case having accepted the complainant's evidence and, because the accused's evidence differed on material matters, then rejecting the accused's evidence. This had the effect of shifting the burden to the accused. The appellant says the judge's reliance on *Jaura* is improper as *Maharaj* is more consistent with the principles of proof beyond a reasonable doubt and the burden of proof.

[27] The appellant argues the judge's decision reveals no other path to conviction than that she simply accepted the version of the complainant. He queries how it was consistent with the burden of proof that his evidence was rejected by the judge on the basis of having accepted the complainant's evidence, which he says amounted to the forbidden reasoning decried in *Maharaj*.

[28] The Crown posits the tension between the *Maharaj* and *Jaura* decisions is at the heart of this first ground of appeal. The Crown portrays the judge's decision as one which properly took into account the whole of the evidence before coming to the ultimate conclusion on the guilt of the appellant. The Crown relies on this passage from *Jaura* in support of its argument that the judge was entitled to conclude she had no reasonable doubt about the appellant's culpability because in reaching it she had conducted a proper weighing of the evidence:

> [20] In summary, it is my view that the case law establishes that, in a "she said/he said" case, the Rule is that **a trial judge can reject the evidence of an accused and convict solely on the basis of his acceptance of the evidence of**

> **the complainant, *provided* that he also gives the evidence of the defendant a fair assessment and allows for the possibility of being left in doubt, notwithstanding his acceptance of the complainant's evidence.**
>
> [21] Quite apart from case authority, there is ample reason to conclude that this must be the Rule. If it were otherwise, there would effectively be a legal corroboration requirement imposed in these cases and the undoing of years of reform in this area. Alternatively, the issue of guilt would turn on whether the trial judge could identify and articulate that little something extra over and above the complainant's evidence - that flaw in the accused's evidence or its presentation - that would become the additional crumb on which a conviction could be supported. Reasons for judgment would become an exercise in highly subjective nit picking of the accused's evidence, disingenuously disguising the real reason for its rejection. Finally, if the Rule was otherwise, it would be necessary for this to be explained to juries.

[29] I agree with the submission of the Crown that in *R. v. J.J.R.D.*, [2006] O.J. No. 4749 (leave to appeal to SCC refused [2007] S.C.C.A. No. 69) the Ontario Court of Appeal refined the distinction between the conclusions reached in *Maharaj* and in *Jaura*.

[30] In *J.J.R.D.* the accused was convicted of sexually assaulting his daughter. Her diary, found in his home, contained an entry describing the sexual assault. The accused denied any such contact with his daughter. As in this case, the trial judge there noted both witnesses were responsive to the questions put to them and neither had been impeached by cross-examination. Credibility assessments included a discussion of certain differences between the details of the victim's *viva voce* evidence and the descriptions contained in her diary.

[31] In dismissing the appeal from conviction, the Ontario Court of Appeal was satisfied the trial judge had not proceeded directly from conclusions about the victim's credibility to a finding that guilt had been proven beyond a reasonable doubt:

> [36] In focusing on **reviewability of the proceedings as the ultimate issue**, I do not diminish the significance of the absence of any discernible explanation for the rejection of an accused's seemingly plausible denial. The absence of any explanation may go a long way toward putting the reasons beyond the reach of meaningful appellate review: see *R. v. Maharaj* (2004), 186 C.C.C. (3d) 247 at paras. 26-29 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 340.
>
> [37] In some circumstances, a trial judge's failure to adequately explain the reasons for rejecting an accused's denial will make it impossible for the appellate

> court to satisfy itself that the conviction was based on an application of the correct legal principles to findings of fact that were reasonably open to the trial judge. There are several examples of circumstances in which this court has linked the absence of clear reasons for rejecting exculpatory evidence with the inability to engage in effective appellate review: see *R. v. Maharaj*, *supra*, at para. 29; *R. v. Lagace* (2003), 181 C.C.C. (3d) 12 at para. 44 (Ont. C.A.); *R. v. D.(S.J.)* (2004), 186 C.C.C. (3d) 304 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 365.
>
> [38] In other cases, the trial judge's failure to explicitly point to factors in the appellant's evidence justifying his or her rejection of that evidence does not foreclose meaningful appellate review: see e.g. *R. v. R.L.*, [2002] O.J. No. 3061 at para. 3 (C.A.); *R. v. S.(A.)* (2002), 165 C.C.C. (3d) 426 at paras. 33-34 (Ont. C.A.); *R. v. Tzarfin*, [2005] O.J. No. 3531 at para. 11 (C.A.). [Emphasis added]

[32] The emphasis by the court in *J.J.R.D.* on the ability to conduct a meaningful review of the trial judge's reasons was seen by it as the driving feature of the outcome that had been reached in *Maharaj*:

> [40] For example, in *Maharaj*, *supra*, Laskin J.A., after a review of the entirety of the reasons and the trial record, observed at para. 29:
>
>> Also, the absence of adequate reasons for rejecting the appellant's evidence makes meaningful appellate review problematic. <u>This court cannot be satisfied that the trial judge properly applied either the burden of proof or the principles underlying *W.(D.)*.</u>
>
> [41] As the court could not be satisfied that the fundamental principles applicable to the burden of proof had been followed in *Maharaj*, the reasons did not allow for appellate review and were so inadequate as to amount to an error in law.

[33] The court in *J.J.R.D.* saw no difficulty with the trial judge's analysis:

> [53] The trial judge's analysis of the evidence demonstrates the route he took to his verdict and permits effective appellate review. The trial judge rejected totally the appellant's denial because stacked beside A.D.'s evidence and the evidence concerning the diary, the appellant's evidence, despite the absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt. **An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.** [Emphasis added]
>
> [54] On the trial judge's reasons, the appellant knew why he was convicted. His daughter's evidence, combined with the credibility enhancing effect of the

> diary, satisfied the trial judge of the appellant's guilt beyond a reasonable doubt despite the appellant's denial of the charges under oath.
>
> [55] The trial judge's reasons allowed for effective appellate review. His reasons permitted this court to assure itself that the trial judge had properly apprehended the relevant evidence, applied the proper legal principles to that evidence, particularly the burden of proof, made findings of credibility that were available to him on the evidence, and ultimately returned a verdict based on the evidence and the application of the relevant legal principles to that evidence.

[34] I agree with the Crown that while the judge found there was nothing unbelievable about the appellant's evidence, that finding alone did not demand an acquittal. The judge was entitled to reject the appellant's evidence in the same manner as was done in *J.J.R.D.* because having assessed all the evidence, the appellant's evidence, despite an absence of flaws, did not leave her with a reasonable doubt. The judge was unequivocal in her statement that even in light of the appellant's denial, the complainant's evidence "replaces any reasonable doubt."

[35] The Ontario Court of Appeal recognized in *J.J.R.D.* the possibility that reasons that might permit appellate review in one case might not in another. It is key that a reviewing court be able to satisfy itself proper principles were applied by the trial judge. This hearkens back to the admonition in *Mah*, *supra*, for the trial judge to not merely state principles, but to actively apply them.

[36] *J.J.R.D.* reminds this Court the focus of appellate analysis must be within the more constrained role of a reviewing court:

> [32] The circumstances of the particular case will determine the adequacy of the reasons for judgment and the effect, if any, of the inadequacy of reasons or the outcome of the appeal. Reasons for judgment must be examined in the context of the entire proceeding, especially the nature of the evidence heard and the arguments advanced.

[37] Thus any apparent inconsistency between the reasoning in *Jaura* and in *Maharaj* was effectively settled in *J.J.R.D.*:

> [39] There is no jurisprudential difference of opinion underlying the different results reached in the cases referred to above. The different results reflect the functional and contextual assessments of the adequacy of reasons dictated in *Sheppard* and *Braich*. On that approach, a deficiency in the reasons will in some cases render the reasons inadequate, but that same deficiency will not have that effect in other cases where the context is different.

[38] The above passage suggests rather than evoking a challenge to the judge's reasoning process, what the appellant is really disputing is the sufficiency of the judge's reasons. That said, I am satisfied the judge's reasons, while not expansive in relation to rejection of the appellant's evidence, are sufficient to permit appellate review by this Court.

[39] In *R. v. Gerrard*, 2021 NSCA 59 this Court considered a similar argument regarding trial reasons where the victim's evidence was assessed first on the road to concluding the absence of reasonable doubt. The Court also had occasion to consider the trial judge's reliance on *Jaura*.

[40] In *Gerrard* the majority was satisfied the trial judge had properly instructed herself with respect to the principles of proof beyond a reasonable doubt, the presumption of innocence and the need to consider each witness's evidence in the context of the evidence as a whole. The majority concluded the trial judge had not assessed the complainant's credibility in a vacuum, nor had she shifted the burden of proof by rejecting the accused's evidence, having already accepted the victim's evidence. In effect, the Court in *Gerrard* was satisfied the trial judge's reasons permitted meaningful appellate review.

[41] The Crown submits the judge was not required to point to any particular aspect of the appellant's evidence to ground her rejection of it; rather, the judge responded directly to the defence argument the complainant was not credible in concluding beyond a reasonable doubt the truth of the complainant's evidence. The Crown maintains the appellant's insistence on a "tangible explanation" from the judge as to why his evidence was not accepted is not necessary. The judge examined all of the evidence put before her, as *W.(D.)* instructs. The judge was in the best position to assess the witnesses and draw conclusions, following a consideration of all of the evidence.

[42] Her decision satisfies me the judge correctly examined the complainant's testimony in light of the whole of the evidence, to properly attend to the burden of proof. The judge's ultimate conclusion was not reached before considering **all** the evidence. I agree with the written argument of the Crown that:

> [63] While an accused is entitled to know why the trial judge is left with no reasonable doubt, that does not require a trial judge to point to a particular aspect of the accused's evidence, find specific inconsistencies in the accused's evidence, or list some minimum number of elements of the accused's evidence that caused the evidence to be rejected and not raise a reasonable doubt. This is because of the

> inherent difficulty in articulating credibility assessments and the added challenge of explaining why a trial judge rejects an accused's evidence when there is nothing particularly noteworthy about it.

[43] In effect, what the Crown is advocating is the "functional and contextual" approach to assessment of a trial judge's reasons, most recently discussed in *R. v. G.F., supra*. There, appellate courts were reminded of their task:

> [69] This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient: *Sheppard*, at paras. 28-33 and 53 [additional citations omitted]. Appellate courts must not finely parse the trial judge's reasons in a search for error: *Chung*, at paras. 13 and 33. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. As McLachlin C.J. put it in *R.E.M.*, "The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded": para. 17. And as Charron J. stated in *Dinardo*, "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues": para. 31.

[44] I am satisfied the judge's reasons reflect that in examining all of the evidence put before her, she allowed for the possibility of reasonable doubt, but was ultimately satisfied it did not exist. In this way the judge demonstrated a proper application of the substance of the *W.(D.)* instruction. In concluding the guilt of the appellant, the judge stated:

> The level of confidence in the reliability of Mrs. [L]'s testimony, though of course short of some theoretical standard of absolute certainty, is sufficiently great that when Mr. [L]'s evidence contradicts hers, it cannot be accepted as raising a reasonable doubt. That level of confidence was not reached upon hearing her evidence, but only after considering her evidence in light of all of the other evidence at trial, including the evidence of the accused.

[45] The judge reached a conclusion that was open to her following a full consideration of the evidence. It is a conclusion that is entitled to deference. She found nothing in the whole of the evidence, including that of the appellant, that raised any reasonable doubt. I am satisfied the judge's reasons are sufficient to permit appellate review, and such review does not reveal any error of law by the judge.

Issue No. 2—Did the trial judge improperly curtail cross-examination?

[46] The second ground of appeal relates to the appellant's cross-examination of the complainant. The appellant asserts the judge erred in prohibiting him from putting certain questions to the complainant during cross-examination. Those questions related to Family Court proceedings involving the complainant and the appellant. The appellant says the line of questioning the judge prevented was integral to his defence to the charges.

[47] The appellant submits because he was curtailed in bringing forward relevant evidence that was key to an assessment of the complainant's credibility, it compromised his ability to explore the complainant's motives, and as such had the effect of denying him a fair trial.

[48] I agree with the appellant that cross-examination on matters pertaining to credibility was undoubtedly important to his ability to make full answer and defence. As stated in his written argument:

> 44. … Uncovering whether the complainant had ulterior motives, or whether the complainant stood to gain by Mr. [L]'s prosecution, was relevant, if not fundamental, to determining whether the complainant was a credible witness.

[49] The right to cross-examine is broadly construed, and counsel should be afforded considerable latitude (*R. v. Evans*, 2021 BCCA 360 at para. 27). Such an approach recognizes the role cross-examination plays in ensuring a fair trial (*R. v. Seaboyer*, [1991] 2 S.C.R. 577 at p. 608). However, that flexibility does not usurp the role of the trial judge, as was noted in *R. v. Lyttle*, 2004 SCC 5:

> 45 Just as the right of cross-examination itself is not absolute, so too are its limitations. Trial judges enjoy, in this as in other aspects of the conduct of a trial, a broad discretion to ensure fairness and to see that justice is done — and seen to be done. In the exercise of that discretion, they may sometimes think it right to relax the rules of relevancy somewhat, or to tolerate a degree of repetition that would in other circumstances be unacceptable. See *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 925.

[50] What was it that happened during cross-examination to which the appellant now objects? Counsel for the appellant questioned the complainant about Family Court proceedings at two junctures during cross-examination. The first of those exchanges was as follows:

> Q. Okay. So, you understood that Mr. – once you separated from Mr. [L] that he could take [the child]?
>
> A. Yes, I did understand that.
>
> Q. Okay. And when you were giving that statement to the police on November 15th, you expressed concern that Mr. [L] was going to say, "Hand – hand [the child] over." In other words, hand [the child] over?
>
> A. Yes, I did con – say…
>
> Q. Okay.
>
> A. …express concern about that. Yes, I did.
>
> Q. And you understood that because you were married and there was no custody order in place he can say, "I want [the child]." And – and you have to give [the child] to him, correct?
>
> A. I do understand that, yes. I did understand that.
>
> Q. Okay. And that if he didn't return [the child] after 48 hours then you could do something?
>
> A. Yes, I called the women's shelter.
>
> Q. Okay, and – and after that conversation with the women's shelter, that's what your understanding is?
>
> A. That's what they told me, yeah.
>
> Q. Okay. And did you understand, however, though that if Mr. [L] was charged with sexual assault that you would be able to leave and go to [P]…
>
> **MS. MACDONALD: Your Honour I'm going to object to this line of questioning. I don't understand what relevance it has to what we're dealing with?**
>
> **THE COURT: Yeah, what's the relevance Mr. Sheppard?**
>
> **MR. SHEPPARD: Well, what we're going to argue Your Honour, is that this story is – is told for the specific purpose of getting leverage in the Family Court.**
>
> **THE COURT: Credibility is in issue…**
>
> **MR. SHEPPARD: Yes…**
>
> **THE COURT: …is that what you're telling me?**
>
> **MR. SHEPPARD: …absolutely.**
>
> **THE COURT: All right, go ahead and ask the question.** [Emphasis added]

[51] Later during cross-examination, a similar line of questioning was pursued, again over the Crown's objection:

Q. Okay. All right, so, and then the next day, November 15 you were separated. You go to [P], and you within a couple weeks start an application in the Family Court in – in [A], is that correct?

A. I believe it was within a week or so, yes.

Q. Yeah?

A. It was…

Q. And…

A. I believe the papers were filed originally on the 23rd of November.

Q. Okay.

A. And then there was a mix-up. But I believe it was the 23rd of November, around there.

Q. And you were taking the position that Mr. [L] was to have no contact with [the child]?

A. When I originally went in, I didn't know what to say, and my original stance was I don't know what to do. I just want confirmation that [the child] will be returned. And that is – whether that is what's presented or not, that was my statement and that was my stance. I want a guarantee that [the child]'s not going to disappear somewhere.

Q. Okay, that's all you wanted was a guarantee that [the child] would come back to you?

A. Yes.

Q. Okay, so you – so you didn't insist on – on supervised access?

A. Oh, I did…

Q. Oh, you did?

A. …because no one could give me a guarantee that [the child] would be returned if [the child] went to him.

Q. So, that was your only reason for insisting upon supervised access, just to guarantee that [the child] would be back?

A. I don't agree with [M]'s parenting choices and that was something we had discussions about repeatedly through our marriage.

Q. Okay.

A. But my biggest concern was that [the child] would not be returned to me.

Q. All right. So, you told the Family Court you had significant concerns with [the child] having unsupervised parenting time with Mr. [L], correct?

A. I…

MS. MACDONALD: Your Honour again, I'm just wondering – we're going down a Family Court road at this point in time…

THE COURT: Yeah…

MS. MACDONALD: …I don't understand the relevance.

THE COURT: …what are you doing Mr. Sheppard? What's the relevance of this, creating a – a record for Family Court?

MR. SHEPPARD: Well, the witness is trying to present herself like, you know, she was all – she had these legitimate concerns about the child not being returned. But again, our evidence is going to be that this story is entirely made up to get leverage in the Family Court. So, I think that her position in that Family Court would have a bearing on her credibility in these.

THE COURT: Well, she just answered your question, she did insist on supervised access…

MR. SHEPPARD: Okay.

THE COURT: …move on.

MR. SHEPPARD: I do have a few follow-up questions on it.

THE COURT: Well, you ask it, I'll see if I'll let you…

MR. SHEPPARD: Okay.

THE COURT: …ask the question. What's the – what – what's the follow-up question?

BY MR. SHEPPARD:

Q. Mr. [L] proposed four different supervisors. You rejected them all.

A. Yes.

Q. Okay.

A. I rejected them because they were all people that I did not feel – my concern was [the child] would not be returned. He proposed someone from [ ] that [the child] didn't know and I didn't know. He proposed [T.I.], the mother of [ ].

Q. M-hm.

A. And I clearly spoke many times in my Family Court documents about how they classified it as co-parenting, but she would say do something and he would do it. So, I did not feel that she would be looking out for my child.

She – he proposed [T.I.]'s mother and I don't actually recall who the fourth one…

Q. His mother?

A. His mother. And I've watched him do things and be completely disrespectful, and his mother stands there and lets him do what he wants. So, my concern was that [the child] would be returned to me safely and I did not feel that those people would.

I did attempt to use other people that were not family, but that [the child] was also comfortable with. That was important, [the child] needed to know who these people were as well.

Q. Do you agree with me that [T.I.] is a good friend of yours?

A. No, not any more. I would not say that, no.

Q. Okay. Prior to your separation with Mr. [L] she was?

A. The more that I look on my relationship with [T], no. At the time when I left [M], yes, but the more that I spend time thinking and looking at what my life was, no. If you want my honest answer right now, no.

Q. Okay.

A. I would not, and I was afraid to tell her the things that I didn't agree with. I told [M] many times I didn't agree with things that [T] did. But I would never say it to [T], 'cause it wasn't my place, because [B] is not my child. But I did stick up for my child.

Q. You took the position that, sorry, we had an interim hearing scheduled for March 25th that got cancelled because of the COVID 19 pandemic?

A. Yes.

Q. And then after that you took the position that there was to be no further contact between Mr. [L] and – and his [child].

MS. MACDONALD: Again, Your Honour we're just – this is reliving the Family Court.

THE COURT: Yes.

MS. MACDONALD: I don't understand the purpose.

THE COURT: Move on Mr. Sheppard, it's not relevant.

BY MR. SHEPPARD:

Okay, I'll move on my – Your Honour. [Emphasis added]

[52] Pursuing the complainant's motive to lie as it related to Family Court proceedings was obviously permitted by the judge. The first two times the subject was raised and objections were made, the judge exercised her discretion to permit the cross-examination to continue. Following the Crown's third objection on the same basis, and at a point where questioning had essentially devolved into discussion about proposed access supervisors, the judge instructed counsel for the

second time to "move on" and he did so, without any clarification or explanation by him as had been provided the first time he was so instructed.

[53] I see no error in the judge exercising her discretion to limit cross-examination at the point when she did so. The judge asked counsel for the appellant to move on and her instructions were followed. There was no suggestion put to the judge that the matter be afforded further consideration, nor any explanation as to why further questioning about access supervisors would otherwise be relevant.

[54] I agree with the Crown the judge appropriately limited cross-examination once the relevance of the line of questioning "became opaque". Despite the judge curtailing the final round of questioning on the subject, the appellant was certainly able to advance his argument about the complainant's motive to lie, an issue then considered by the judge as demonstrated in her reasons.

[55] Deference is to be shown to a judge's discretion to curtail cross-examination when it is determined evidence is irrelevant or prejudicial. I am satisfied the judge provided ample opportunity for the appellant to pursue a line of questioning on a subject going ultimately to the credibility of the complainant. I am not persuaded that at the point where the judge was obviously satisfied relevancy had been exhausted, her request to "move along" had the effect of fettering the appellant's ability to conduct full answer and defence.

[56] For the foregoing reasons, I would dismiss the appeal.

Beaton J.A.

Concurred in:

Beveridge J.A.

Bourgeois J.A.