NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Kotio*, 2021 NSCA 76

Date: 20211110
Docket: CAC 497269
Registry: Halifax

Between:

Eastman Tamba Kotio

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on Publication: s. 486.4

Judge:	The Honourable Justice Van den Eynden
Appeal Heard:	April 1, 2021, in Halifax, Nova Scotia
Subject:	Criminal; Criminal – sexual assault; Expert evidence; Lay opinion evidence; Burden of proof; *R. v. W. (D.)*
Summary:	The appellant was convicted of sexual assault. He appeals from conviction. The appellant argues that the judge improperly admitted and relied on expert evidence. Further, the panel raised the issue of whether the judge improperly imposed a burden on the appellant to provide evidence and drew an adverse inference against him for failing to do so.
Issues:	(1) Did the judge err by improperly admitting and relying on expert evidence? (2) Did the judge improperly impose a burden on the appellant to provide evidence and then draw an adverse inference against him for failing to do so?

Result: Appeal allowed. Conviction overturned and new trial ordered.

(1) The judge erred by admitting and relying on evidence of the impacts of trauma on memory offered by Ms. Witherbee, an expert witness. This evidence is best characterized as lay opinion evidence.

(2) The judge also erred by shifting the burden of proof from the Crown to the appellant, and then drawing an adverse inference against the appellant for failing to provide evidence.

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 29 pages.

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

Judges: Wood C.J.N.S, Hamilton, Van den Eynden, JJ.A.

Appeal Heard: April 1, 2021, in Halifax, Nova Scotia

Held: Appeal allowed, per reasons for judgement of Van den Eynden J.A., Wood C.J.N.S. and Hamilton J.A. concurring

Counsel: Hanna Garson, for the appellant

Timothy O’Leary, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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:

Overview

[1] The appellant was charged and found guilty of a single count of sexual assault under s. 271 of the *Criminal Code*. He appeals against conviction claiming the judge made several errors in his admission and apprehension of the evidence, did not conduct a proper "*W.(D.)*" analysis and provided insufficient reasons for conviction.

[2] During the appeal hearing the panel raised a question that had not been specifically addressed by either party—whether the judge improperly imposed a burden on the appellant to provide evidence and then drew an adverse inference against him for failing to do so. Supplemental submissions were provided by the parties on this issue.

[3] I am satisfied the judge made several errors that warrant appellate intervention. For the following reasons, I would allow the appeal and order a new trial.

Background

[4] Justice C. Richard Coughlan presided over the judge alone trial in the Supreme Court of Nova Scotia. It spanned 3 days (January 10, 11 and March 26, 2019). The judge rendered his oral decision on May 10, 2019, followed by a written release on April 7, 2020 (2019 NSSC 402). He found the appellant guilty of sexual assault under s. 271 of the *Criminal Code*.

[5] The alleged assault took place on the evening of August 20, 2017, at the appellant's residence. The appellant and complainant knew each other. They had met in the spring of 2017 and had dated a few times. The appellant was attending university in Nova Scotia and left the province during the 2017 spring/summer school break. They stayed in touch via texting and Snapchat during the break.

[6] The appellant returned to Nova Scotia in August 2017 to resume his studies and the two made plans to meet up on the evening of August 20, 2017. The complainant wanted to stay overnight and raised that possibility with the appellant through text communications while she was in transit to his place. Apart from just wanting to be with him for the night, she also wanted to avoid having to take public transit home late at night—something she said she feared. The appellant

indicated in response (via text message) that spending the night might not be possible. These text messages were exchanged:

> Complainant: I'm so happy to get to spend the night with you
>
> Appellant: Wait u might not be able to spend the night tho/I'm just at the hotel and they don't let over night guest/It's stupid/It's not like a legit hotel/But I will ask the lady at the front desk
>
> Complainant: Oh crap I thought I was staying in scared shitless to take the bus at night
>
> Appellant: I will let you know

[7] Around 8:40 p.m. the complainant arrived at the place where the appellant was staying, which, in the record, was referred to as his "apartment" and the "hotel". For consistency, I refer to it as his "residence". Shortly after the complainant entered his residence, the appellant took a shower as he had been exercising before she arrived.

[8] While the appellant was showering, the complainant, without prompting, took off all her clothes. When the appellant came out of the shower, she performed consensual fellatio (oral sex) on the appellant. When asked by Crown counsel what happened next, the complainant said, "I told him to lay down and I got on top of him … he put a condom on his penis … and we were having vaginal sex."

[9] The complainant acknowledged that she was looking forward to having sex with the appellant and hoped to spend the night with him. She confirmed this during cross-examination:

> Q. … I'm going to suggest that, first of all, you very eagerly wanted to be with (the appellant) that evening. That's fair?
>
> A. Yes, I did.
>
> Q. Okay.And, in fact, and it's -- we've already discussed the text messages where you clearly were looking forward to staying the entire night with (the appellant)?
>
> A. I was looking forward to staying the night.
>
> Q. I'm further going to suggest that in the first part or as the encounter began, that you very eagerly wanted sexual relations with (the appellant). That's fair enough?
>
> A. It is. That's why I consented at the beginning.

Q. In fact, you took off your own clothing while he was in the shower to wait for him to come out? That's fair enough?

A. Yes, it was. We were already planning to have sex.

Q. And I'm going to suggest that this resolved into having sex with you on top of him.

A. Yes.

Q. Okay. And further, that he would have been lying on his back and you would have been straddling him at the time, correct?

A. What do you mean by straddling?

Q. Kind of being on top of him with your knees touching the bed.

A. Correct.

Q. I'm going to suggest that, in that position, you would have had -- you would have been in a position of control over how things were going. Isn't that fair to say? He's lying underneath you, you're doing most of the moving. Is that -- is that a fair comment?

A. Yes.

[10] At some point during the above described intercourse the appellant started to video-tape their encounter with his cell phone. The complainant said this happened without her consent and when she became aware, she objected and the appellant stopped. The video (not in evidence) was described as brief (about seven seconds) and she thought only to have captured genital areas.

[11] During the above consensual vaginal intercourse, described at times as rough or vigorous, the complaint says there was a change in position instigated by the appellant. The complainant said the appellant wanted to try “something new” and he asked her to change positions. She got on her hands and knees and the appellant went behind her. The complainant stated she thought the appellant was going to continue to penetrate her vaginally from behind in “doggie” style. Lubricating cream was applied to the appellant’s penis and he then tried to put “the tip of his penis inside my butt.” She claimed that she did not consent to anal sex; she repeatedly told the appellant to stop and that it hurt but he continued against her objections.

[12] The complainant described a harrowing experience. She said that anal penetration went on for fifteen minutes during which it felt like her insides were being ripped apart, she felt blood and was dripping blood and she was scared. She testified that during anal sex she tried to move away from the appellant, but he held her down. The complainant’s claim that she was “held down” arose during her trial

testimony. The appellant argued the complainant's failure to mention this in earlier communications with the police was a material inconsistency in her evidence—something the judge did not address in his decision.

[13] The complainant testified that after anal intercourse ended, she went to the bathroom to "clean up" and used one of the appellant's facecloths to clean her body. She said the appellant followed her into the bathroom and told her "I'm not done. I haven't come yet" and proceeded to take her by the hand back to his bed where they engaged in further vaginal intercourse. When asked by the Crown to describe this sexual encounter, the complainant explained:

> Q. Okay. And you say -- you say he took you by your --by -- he took you by his hand?
>
> A. Yes, and my hand.
>
> Q. Yeah. And where did you go?
>
> A. He led me to the bed and asked me to lean over the bed.
>
> …
>
> Q. And he told -- you said he told you to lean over the bed.
>
> A. Yes, he got me to lean over the bed.
>
> Q. And what did he do? What did he do at that point, if anything?
>
> A. He tried getting me to have vaginal sex.
>
> Q. He tried to -- sorry?
>
> A. Tried asking me to have vaginal sex.
>
> Q. Okay. Did he ask you?
>
> A. It was more like -- it wasn't he asked me. When he said -- he told me he didn't finish coming, he brought me over to the bed. I leaned over and he put it inside of me.
>
> Q. Inside of where?
>
> A. My vagina.
>
> Q. Okay. And did you want to have vaginal sex with him?
>
> A. No.
>
> Q. Okay. So why did you have vaginal sex at that point?
>
> A. I was just trying to finish so I was able to leave.
>
> Q. Okay. And when you say you were trying to finish, what do you mean by that?

A. Make him ejaculate.

Q. Okay. And so, can you describe how the vaginal sex occurred, where -- I guess what I'm asking you is where were you and where was he?

A. We were both on top of the bed.

Q. Okay. And how was he lying on the bed, or how was he on -- what was position on the bed? I'm sorry.

A. We ended up him -- having him lay down and I was on top of him. And in the end, I ended up giving him a hand job.

[14] The complainant said she did not consent to any of the sexual interactions after the anal intercourse. She claimed she engaged in further sexual acts because the appellant was angry at her for not wanting anal sex and participated so he could ejaculate and she could leave. The allegation that non-consensual vaginal intercourse occurred after anal intercourse arose at trial. I note that, like the claim by the complainant she was "held down" (para.12 herein) the appellant raised this as a material inconsistency at trial; however, the judge did not address this in his decision.

[15] After the last sexual encounter of vaginal intercourse, the complainant then took a shower and got dressed. Some discussion between them followed. The complainant hugged the appellant upon departure, claiming she did so to prevent detection of her concern with what had transpired earlier.

[16] As noted, the complainant had wanted and expected to stay the night with the appellant. He was not supportive and communicated this to her definitively while they were together at his residence. Around the time the complainant was preparing to leave the appellant's residence she sent a text to a female acquaintance, whom she had met on the public transit bus and exchanged contact information with a few hours earlier while on her way to meet the appellant. Her text said: "He's kicking me out fucked up shit happened". Further texts were exchanged between them and they agreed to meet not far from the appellant's residence.

[17] Not long after the complainant left the appellant's residence, she was found in a state of distress by a concerned passerby and told this person that she had been sexually assaulted. From there, a 911 call was made at 10:17 p.m. and police attended to her. The female acquaintance also arrived on scene. The passerby, the female acquaintance and attending police officers were called as Crown witnesses and corroborated that the complainant appeared to be in considerable distress.

[18] The police transported the complainant to the hospital, and she agreed to undergo a sexual assault examination. The Crown called sexual assault nurse examiner (SANE) Sandra Witherbee. She was the lead nurse who examined the complainant. The judge qualified her to provide expert opinion evidence in "the examination, observation and conclusions regarding sexual assault injuries".

[19] The Crown sought Ms. Witherbee's opinion on whether observed injuries might be consistent with penetration. She was not called upon nor qualified to opine on whether any injuries were consistent with consensual or non-consensual sexual acts. In addition to expressing her expert opinion evidence on penetration, she was also asked to provide fact evidence arising from her direct observations of the complainant during the examination.

[20] On this basis, the appellant's counsel did not contest her qualifications. During her direct testimony Ms. Witherbee did not go beyond the limits of her qualifications. However, when cross-examined on her report, she briefly strayed into providing evidence about how trauma affects memory. This evidence arose in the following exchange between defence counsel and Ms. Witherbee and was not in direct response to the posed question:

> Q. Okay. And section C contains what appears to be a narrative collected from the complainant. Is that fair to say?
>
> A. Yes, it is.
>
> Q. How full a narrative would this have been in relation to what this person would have told you?
>
> A. That's what she told us at that time. We -- if you can see in the first line she has (*sic*) initialled. So she has read this and...
>
> Q. I see.
>
> A. ...agrees with what we've written.
>
> Q. So that initial in the middle of the first line belongs to [the complainant]?
>
> A. Yes.
>
> Q. Okay. Thank you. Is -- in your view and according to your recollections, is this a kind of point form outline or is this a fairly full narrative compared to what you would have heard?
>
> A. Well, it is what she told us at that time. **I – I find in trauma people remember different things at different times.** But at that time, that's what she -- she told us.
>
> Defence counsel: Okay. Those are my questions. Thank you.

> Crown counsel: Nothing arising, My Lord. [emphasis added]

[21] Defence counsel made no objection when this evidence (the impact trauma has on memory) was proffered and the judge apparently did not turn his mind to whether such evidence was admissible. Neither Crown nor defence counsel mentioned this evidence in their oral or written closing submissions to the judge.

[22] However, the judge focused on this aspect of Ms. Witherbee's testimony. He explicitly cited and accepted this evidence in his decision and relied upon it when conducting his credibility assessment of the complainant. The judge found the complainant credible and accepted her version of events. In doing so, he was clearly influenced by Ms. Witherbee's evidence that trauma impacts memory. He said:

> [9] Ms. Witherbee prepared a SANE report which documented the findings of the examination. In commenting on the facts of the incident as given by [the complainant] during the examination, **Ms. Witherbee stated in trauma people remember different things at different times.** The statement in the report was what [the complainant] remembered at the time of the examination.
>
> …
>
> [57] The above inconsistences in [the complainant's] evidence at trial and in previous evidence and statements are of minor details, and do not go to the central facts of the assault. **I am also mindful of Sandra Witherbee's evidence, which I accept, that in trauma people remember different things at different times.**
>
> [emphasis added]

[23] Apart from this aspect of her evidence, Ms. Witherbee testified to the observations she made during her examination of the complainant. Her evidence was to this effect:

- In general terms, it is important to understand what transpired in the alleged sexual assault because during the physical examination the examiner would be more aware of the kind of injuries to look for.
- When examining the rectal/anal area the buttocks are spread and this area is looked over carefully. Any necessary swabs are taken and if the person is bleeding in any way, she would have a doctor come in and possibly use an anoscope to check for internal injuries.

- Her examination included looking head to toe for injuries and evidence, including spreading the buttocks. No blood or lacerations were found. Further, the panty liner worn by the complainant upon arrival was collected; no evidence of blood was reported to be found. Apart from the complainant's self reporting of tenderness in her rectal area there were no visible signs of trauma or visible injuries.
- She prepared a report detailing her examination.

I note that Ms. Witherbee's report was in evidence at trial. It indicated anal and rectal swabs were taken; no evidence of semen was reported to be found. Further, there was no evidence to suggest that any follow-up check for internal injuries occurred. In fact, the report noted "zero trauma noted", which Ms. Witherbee explained meant there were no lacerations or visible injuries detected to the complainant's rectal/anal area. Continuing on with Ms. Witherbee's evidence:

- Some bruising was observed on the complainant's thigh; however, she was not able to draw any conclusion as to when the bruising was caused. As to the complainant's report of soreness in the rectal area, all that could be said was it was possible this came from anal penetration.
- There was no internal vaginal examination of the complainant. That was because the complainant said the vaginal sex was consensual. The complainant made no mention of vaginal intercourse (consensual or non-consensual) that occurred after the alleged anal sexual assault nor did she mention being held down while the anal assault was occurring.

[24] Similarly, when the complainant reported the alleged assault to the police on the evening of August 20, 2017, she did not mention these events (non-consensual vaginal intercourse after the alleged anal assault and being held down during the anal assault). Her explanation was that she did not think she needed to get into these finer details at that time.

[25] The record reveals that police promptly obtained and executed a warrant to search the appellant's residence. The Information to Obtain (ITO) identified of specific interest a bed sheet and associated bedding, used condoms and the appellant's cell phone. A facecloth was also of interest. A number of photos taken by police during the execution of the warrant were tendered as exhibits, including

photos of the bedding and a facecloth. It is apparent from the record that the search of the appellant's residence did not lead to the discovery of any evidence to aid the Crown's prosecution—at least none that was put forward at trial. The appellant's cell phone was also seized and had yet to be returned to him at the time of trial.

[26] The ITO, prepared by the police, set forth the basis upon which the search warrant was requested and was tendered as an exhibit at trial. The ITO provided a detailed description of reportedly what the complainant disclosed to police about the alleged assault. The version of events attributed to the complainant in the ITO did not align with her direct evidence at trial. The ITO provided:

> F. Despite [the complainant's] refusal [to have anal intercourse] the [appellant] placed [the complainant] on her side, and proceeded to transition from vaginal sex to anal sex.
>
> G. [The appellant] forced this fashion of sexual intercourse on [the complainant] until orgasm.

[27] During cross-examination the complainant was given the opportunity to examine the contents of the ITO sworn by the requesting police officer. She was then asked whether the comments attributed to her were accurate. She confirmed they were. But when her attention was drawn to specific aspects that were inconsistent with her evidence at trial, she retracted and said the ITO was not entirely accurate. This exchange between defence counsel and the complainant demonstrates:

> Q. …I'm going to suggest to you that we had a police officer in here this morning testifying that this is what you said to the officers who arrived on scene and began questioning you. Do you recall that?
>
> A. Yes.
>
> Q. Having now refreshed your memory, how accurate is this version that you see in this document [the ITO]?
>
> A. I believe it's all correct.
>
> Q. All right. Take a look at paragraph (f). I should say subparagraph (f).You have him placing you on your side at the point where anal sex begins.
>
> A. I do not recall that part.
>
> Q. Well, is it correct or is it not correct?
>
> A. Incorrect.

Q. If you could look at paragraph (g), it appears to have him continuing to have anal intercourse with you until having orgasm, not anything about a -- you know, stimulation with the hand. Is that correct or incorrect?

A. Incorrect.

[28] The appellant testified in his own defence. His version of the sexual encounter differed. He denied having forced the complainant into any unwanted sexual acts. He viewed the overall progression of the evening as a consensual sexual encounter, and any anal penetration that occurred was unintentional and transitory in the midst of energetic, consensual vaginal intercourse. In his direct testimony the appellant explained the encounter this way:

Q. I'll take you back to the initiation of a sexual encounter. From oral sex, where did things go next?

A. So as -- as previously I've had -- I was really so tired that day. I already had multiple athletic event going on. I initially told her I was really tired. So I was -- after the oral encounter, I was -- I was laid -- I was laying-- laying on my back. And I -- I asked her, I asked [the complainant],"I do have lubrication in my bag, is it possible for you to get the lubrication from my bag?"And she said, oh, she was willing. She went, she grabbed the lubrication, opened it up, and put the condom on me. So as I was laying on my back, she -- she initiated as she was on top of me the whole majority of the time after the oral encounter.

…

A. So position-wise, I was on my back, facing the wall, and [the complainant] was on top of me, facing the mirror. And I was laying on my back, position-wise. So she -- she was on top of me, on her knees pretty much. Her knees were on -- on the bed while she was facing the mirror.

Q. And what kind of sex was occurring?

A. So, me, [the complainant] consenting to -- to she has, like, sex, meaning, well, previously she -- she had mentioned to me is that's something she was interested in, in doing. So she was on top of me. Not to go into more details but she was on top of me, riding me, but being -- going a lot crazy, is this something that she -- she -- she likes to do. So she was on top of me, going all out, and -- and that's -that was what was going on, that’s the type of sex that was going on, rough sex.

Q. What -- vaginal sex or anal sex?

A. Vaginal sex was going on at the -- at the time, to be...

Q. Can you please go on and discuss what happened next.

A. So as I was laying on my back and [the complainant] was -- was riding me and going up and down vigorously, with force, and I felt a pop, and I told her that we have to change the condom. And -- and I also asked her, is there -- is there a possibility that you can check into my bag and grab another condom. She -- she said, "Sure." She went to grab the condom and then put the condom on me and then continued. So while that was going on -- while that was going on, I began -- I began to get sore. So I asked [the complainant], "Is there a possibility that you can -- do you have lubrication?" And she-- she said she didn't have lubrication, and there was a – a hand sani -- hand cream that was on top of the -- the table. And she grabbed the -- grabbed the hand cream, brought the hand cream and put the hand cream on -- on the condom. And she -- and she kept going on. And then while that was going on -- while that was going on, [the complainant] was going -- was going up and down. And then as -- at a sudden moment, she made -- she made her sound and she went on the side of the bed. And I asked her, "Is anything -- is everything okay?" And she said, "Yes, everything is okay." And then she – she -- she just laughed it out and then carried on vag – vaginal sex.

Q. When you say a sound, what kind of a sound was it?

A. Like unpleasant sound, like maybe like a pop of a condom or just -- just a weird sound. And -- and then she said "Oh" and then she moved onto the side of the bed. And then I say, "Is everything okay?" She said, "Oh, yeah, everything is okay," and then she continued. And then she get-- got -- got back on top of me and continued with the vaginal, consensual sex.

…

Q. How did it end, to your recollection?

A. To my recollection, as she -- I was -- I was so tired by now. I said, "You know what? We -- we -- we should stop what's going on."And she -- she agreed, she agreed with that. And then we stopped, stopped the -- stopped having sex. And then she said, "What about I give you oral sex to help you finish off?" And I said, "Sure, if you -- sure, go -- go on." And she -- she kept giving me oral sex, and then after a while she -- as she -- as she gave me oral sex, and that's – and that just ended, the intercourse ended.

[29] The appellant then testified as to what happened after the sexual encounter ended:

Q. After sex ended, where did the two of you go?

A. So after the sex ended, she was on the -- she was on the bed, she said, "Oh, I'm sweaty, I need to go in the washroom and take a shower." So she went in the washroom, took a shower, came back for a bit. We were chatting about everything. She's asking me about life and stuff. And then she mentioned to me, "So what are we now?" And again, like I said previously, I told her, one, I'm in

> Halifax to pursue education, so I was not -- I was not in the right state to have a serious relationship. And that's -- that's what I told [the complainant].
>
> Q. Were there any other subjects discussed at that time?
>
> A. At that time I offered [the complainant] -- I have told her that she couldn't stay into the hotel. One, the bed was really small. Two, puror—puror (sic) to the conversation that we had on text messages I was stating that the hotel, it's one guest only. Guests are not allowed to stay over. And I -- I rementioned that to her, that she couldn't stay over based on those resorts (sic), that the bed is small, two, guests are not allowed to stay over. I offered [the complainant] a -- or get -- to get her a taxi, but she declined. And after a while she -- she mentioned -- and then I said," –why don't you take the transit?" She mentioned, she said she does not like taking the transit, which is something that she had mentioned to me, that it's dangerous to take the transit, and she has already mentioned to me previously why. When she was on the transit, the guys on the transit was making vigarage (sic) remarks to – towards her, so she wasn't really comfortable. And she went on and said that a friend of mine[the complainant's] would pick her up. And I said, "Are you okay? Are you sure? Are you -- are you okay with that?" She said, "Oh, yeah, I'm okay." And -- and she said, "Okay, I'm going to wait till my friend texts me," and then she said everything was all fine. I was really tired. I told her I had to go to bed, I had to be up early. And then I also mentioned that we would hang out again once I move into a new place. And she said, "Okay," opened the door, she left. And when I woke up the next morning, saw a officer. That's when the police officer came to arrest me.

[30] A main component of the defence's theory was that the complainant was angry at the appellant for: (i) not letting her stay the night, and (ii) not responding favourably to her query of their relationship status. The defence posed this, coupled with her fear of being out in the city at night, as an alternate explanation for the complainant's state of distress. Although the judge mentions some evidence of their competing versions in his decision, he does not otherwise directly engage with the defence theory articulated in closing submissions.

[31] In his decision, which is not lengthy, the judge focused on the issue of credibility. In assessing the appellant's credibility, the judge said he had "problems with the [appellant's] evidence". These six examples were listed:

> [48] I have problems with the evidence given by [the appellant]. Examples of problem areas include:
>
> > 1. Although [the complainant] asked [the appellant] to delete the video he took, he did not delete it saying his phone died. On cross-examination he said he took the video to defend against any allegation of sexual assault.

> However, [the appellant] told police the video was of their private parts, it does not show [the appellant's] face. One could not identify the participants from the video.
>
> 2. If the purpose of the video was to protect against any allegation of sexual assault, it is odd [the appellant] did not give the police the information to allow them to retrieve the video from his phone which the police seized.
>
> 3. In his direct examination [the appellant] denied anal sex stating nothing else happened other than vaginal sex. In his statement to police [the appellant] said if it happened [the complainant] consented. In cross-examination [the appellant] agreed he did not believe [the complainant] consented to anal penetration. He said if anal penetration took place he was not aware of it.
>
> 4. [The appellant] got the room, brought condoms but was shocked when he came out of the shower, wearing a towel, that [the complainant] was undressed.
>
> 5. In his statement to police [the appellant] said [the complainant] was on top half of the time but in his evidence he testified she was on top the "whole majority of the time". [The appellant], a university student whose first language is English, tried to explain discrepancies in his evidence by saying he has problems with the difference between words like half or whole.
>
> 6. In his direct examination [the appellant] testified he did not place the video on Snapchat. In cross-examination he testified he saved the video on Snapchat. [The appellant] told the police he did not save the video on Snapchat. [The appellant] testified the answer to the police was not incorrect. The video was saved on his Snapchat cloud not his Snapchat story. He stated he did not post the video for other people to see; it was saved on his cloud just for him to see.

[32] I note there is nothing in the record which supports anyone, other than the appellant, having viewed the video or that it was posted for public viewing.

[33] After he identified these "problems" the judge made no express rejection of the appellant's evidence. Nor did the judge make any particular findings of fact; rather, he accepted the complainant's version of events as he found her evidence to be credible.

[34] In his decision, the judge lists some of the inconsistencies in the complainant's evidence but does not address all the appellant argued were material. He used her post-event demeanour to corroborate her version. As noted, the judge also relied on evidence offered by Ms. Witherbee—as to how trauma

affects memory—to explain inconsistencies in the complainant's testimony. As will become evident in my analysis of the issues, the judge's reliance upon this aspect of Ms. Witherbee's evidence was problematic.

[35] The judge's *W.(D.)* analysis was brief. He reasoned:

> [68] Applying the test set out in *D.W. v. The Queen* and *R. v. N.M., supra,* I find the Crown has proved beyond a reasonable doubt that [the appellant] on August 20, 2017 at Halifax, Nova Scotia intentionally applied force to [the complainant]. [The complainant] did not consent to the force applied by [the appellant]; that [the appellant] knew [the complainant] did not consent to the force he applied and that the force was of a sexual nature (penetration of [the complainant's] anus and the vaginal intercourse after the penetration of [the complainant's] anus).
>
> [69] The Crown having proved all essential elements of the offence beyond a reasonable doubt, I find [the appellant] guilty of the charge of sexual assault contrary to s. 271 of the *Criminal Code*.

[36] I return to the first two examples the judge found problematic with the appellant's evidence. They relate to the short video the appellant took during what the complainant willingly confirmed was consensual vaginal intercourse. As I will discuss later, the appellant had no obligation to adduce any evidence. Further, the video would have little to no probative value as to whether any anal intercourse occurred and whether it was consensual, as the video only captured seconds of consensual vaginal intercourse—something which was not in dispute. Nevertheless, the judge found this problematic and drew an adverse inference against the appellant. It was this aspect of the judge's reasoning that underpinned the panel's question and our request for further submissions whether the judge improperly imposed a burden on the appellant to provide evidence and then drew an adverse inference against him for failing to do so.

[37] Any required additional background will be addressed in my analysis.

Issues

[38] The appellant raises the following grounds of appeal:

1. Did the judge err by improperly admitting and relying on expert evidence?
2. Did the judge fail to conduct a proper *W.(D.)* analysis?
3. Did the judge misapprehend evidence?
4. Were the judge's reasons sufficient?

[39] The appellant's complaints of error under the first issue seep into issues 2 to 4, which all somewhat overlap. I add this issue to the list:

> 5. Did the judge improperly impose a burden on the appellant to provide evidence and then draw an adverse inference against him for failing to do so?

[40] I will only address issues 1 and 5 as they are dispositive of this appeal. I will address the applicable standard of review in my analysis.

Analysis

Did the judge err by improperly admitting and relying on expert evidence?

[41] As noted, the Crown called Ms. Witherbee as an expert witness. She was qualified to provide expert opinion on "the examination, observation and conclusions regarding sexual assault injuries". The Crown sought her opinion only as to whether any injuries were consistent with penetration. In addition to expressing her expert opinion, she was also to provide fact evidence arising from her direct observations of the complainant during the sexual assault examination. Her opinion was not sought nor was she qualified as an expert to opine on the subject of human memory and trauma's impact on human memory.

[42] In summary, under this ground the appellant contends:

- During the qualification *voir dire* there was no mention of any education, experience and training that could have qualified Ms. Witherbee to provide expert evidence on the impact of trauma on memory. As she did not have the requisite expertise, the impugned opinion must be disregarded (citing *R. v. Marquard*, [1993] 4 S.C.R. 223, *R. v. Abbey*, 2009 ONCA 624, and *R. v. Mohan*, [1994] 2 S.C.R. 9).
- Notwithstanding the absence of any objection from counsel, because of its prejudicial impact on the judge's credibility assessment, a determination reserved for the trier of fact, as the gatekeeper of admissible evidence, the judge should have rejected this opinion evidence.
- The judge's decision reveals deference to Ms. Witherbee's opinion that inconsistencies in the evidence of the complainant

are merely a result of trauma. However, Ms. Witherbee's opinion regarding trauma's impact on an individual's ability to remember different things at different times is a broad opinion not offered in relation to the complainant. The opinion was offered in relation to a generalized group who had experienced trauma, meaning it cannot be inferred from the testimony that everyone who suffers trauma has their memory impacted in this way. There can be little reliability placed on this opinion evidence and its causal relationship to the complainant.

- This case was a 'he-said she-said'—credibility was the ultimate issue. Fundamental to our trial process, ultimate credibility determinations are for the trier of fact; they are not the proper subject of expert opinion. In this case, the impugned opinion evidence (how trauma impacts memory) is explicitly cited and relied on by the judge to explain and excuse inconsistencies in the complainant's testimony. The opinion evidence led the judge to assign a higher degree of credibility to the complainant's evidence. The judge's use of this inadmissible expert opinion to cloud or explain away inconsistencies or omissions amounted to improper oath helping and rendered the trial unfair. It also shifted the burden to the appellant because to say "in trauma people remember different things at different times" requires trauma (guilt) to be presumed which placed the burden of disproof on the appellant.

[43] In response, the Crown argues:

- Ms. Witherbee's impugned evidence should be viewed as factual and not subject to the opinion rule. Although the Crown was clear in that it was only seeking to have her offer expert evidence on whether any injuries were consistent with penetration, the challenged evidence should be viewed as factual evidence of her personal observations.
- In the alternative, if the evidence is a form of opinion evidence, failing to qualify Ms. Witherbee as an expert in trauma and memory should not be fatal. The evidence should be viewed as lay opinion evidence that reflects a common sense inference

drawn from a compendium of facts. The evidence was relevant and not prejudicial and the judge could weigh it as he saw fit.

- Further, if found to be inadmissible evidence, the curative proviso should apply, citing *R. v. Sekhon*, 2014 SCC 15:

> [53] As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error ... not been made" (citations omitted). Flowing from this principle, this Court affirmed in *Khan* that there are two situations where the use of s. 686(1)(b)(iii) is appropriate: 1) where the error is harmless or trivial; or 2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31).

[44] There is nothing in the record or the judge's decision that indicates the judge turned his mind to whether the impugned evidence of Ms. Witherbee was expert opinion, lay opinion or factual evidence and whether it was admissible. The judge was not invited to consider the impugned aspect of Ms. Witherbee's evidence. As noted, both counsel steered clear of this evidence in their closing submissions.

[45] However, it is clear the judge used this evidence when assessing the complainant's credibility. For convenience, I repeat what the judge said:

> [9] Ms. Witherbee prepared a SANE report which documented the findings of the examination. In commenting on the facts of the incident as given by [the complainant] during the examination, **Ms. Witherbee stated in trauma people remember different things at different times**. The statement in the report was what [the complainant] remembered at the time of the examination.
>
> …
>
> [57] The above inconsistences in [the complainant's] evidence at trial and in previous evidence and statements are of minor details, and do not go to the central facts of the assault. **I am also mindful of Sandra Witherbee's evidence, which I accept, that in trauma people remember different things at different times.**
>
> [emphasis added]

[46] I am mindful of the deference owed to a judge's credibility assessment. These principles were recently canvassed by this Court in *R. v. Gerrard*, 2021 NSCA 59 at paras. 44 to 48, and *R. v. Stanton*, 2021 NSCA 57 at paras. 65 to 69. However, this ground of appeal raises the question of whether the judge erred in admitting and relying upon opinion evidence from Ms. Witherbee which was outside the scope of her qualifications. That is a question of law which engages a

standard of correctness (see *R. v. Fedyck*, 2018 MBCA 74 (affirmed in 2019 SCC 3), *R. v. Dominic*, 2016 ABCA 114 and *Housen v. Nikolaisen*, 2002 SCC 33).

[47] In my view, the evidence Ms. Witherbee offered—that in trauma people remember different things at different times—is best characterized as lay opinion evidence. I do not accept the Crown's contention that the evidence was not prejudicial nor, even if inadmissible, the error was harmless. I am satisfied that the judge erred in admitting this aspect of Ms. Witherbee's testimony. Further, on this record, I am not satisfied the verdict would necessarily have been the same without the error and I would not apply the curative proviso. I will explain.

Was the evidence factual, lay opinion or expert opinion?

[48] First, an overview of some legal principles respecting factual and opinion evidence is helpful:

> 1. As a general rule, a witness may only testify to facts within their personal knowledge, observation or experience(see Sidney N. Lederman *et al*, Sopinka, *Lederman & Bryant on The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada Inc., 2018), at p. 815). However, lay opinion and expert opinion evidence are exceptions to this rule(see David M. Paciocco *et al*, *The Law of Evidence*, 8th ed. (Toronto, Irwin Law, 2020) at p. 234).
>
> 2. Opinion refers to any inferences from observed facts. However, for characterization purposes, it is recognized that the distinction between opinion and facts is often difficult to draw(see *Graat v. R.*, [1982] 2 S.C.R. 819 at p. 835).
>
> 3. A properly qualified expert may provide opinion evidence to assist the trier of fact where their technical expertise is required to assist in drawing inferences (see *R. v. Abbey*, [1982] 2 S.C.R. 24 at p. 42). It is also generally accepted that an expert may also offer lay opinion evidence in the course of their testimony: Paciocco *et al*, at p. 237.
>
> 4. Non-experts may give lay opinion evidence or draw inferences from facts where their evidence consists of a "compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly," so long as particular expertise or special qualifications are not required to draw the inference (*Graat* at p. 841). For example, also in *Graat*, the Supreme Court of Canada set this

> non-exhaustive list: the identification of handwriting, persons and things; apparent age; the bodily plight or condition of a person, including death and illness; the emotional state of a person—e.g. whether distressed, angry, aggressive, affectionate or depressed; the condition of things—e.g. worn, shabby, used or new; certain questions of value; and estimates of speed and distance (at p. 835).
>
> 5. It is important to recognize that when the evidence approaches the central issues a judge must decide, "one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops" (see *Sopinka, Lederman & Bryant on The Law of Evidence* p. 820).

[49] Applying these principles leads me to conclude that the impugned evidence is not factual. Ms. Witherbee went further than stating the sexual assault patients she treats often have memory difficulties. Instead, she made an inference about that observed fact—that the memory gaps are a result of trauma.

[50] Is the evidence lay opinion or expert opinion? This is a closer call. However, in my view, Ms. Witherbee provided lay opinion evidence when she testified that "I find in trauma people remember different things at different times". She drew an inference about factual observations she made incidentally in the course of her treatment of sexual assault patients, which did not involve the use of her specialized skills and experience.

[51] As Paciocco *et al* explain at p. 235, in distinguishing between lay and expert opinion evidence, it is not who is offering the opinion that is the main consideration; rather, it is the nature of the opinion being offered—more particularly, whether the offered opinion could be formed only by someone with special training or expertise". See also *R. v. Bingley*, 2017 SCC 12 at para. 34 to the same effect.

[52] Ms. Witherbee's specialized skills and experience were detailed during her qualification *voir dire*. On direct examination, she testified as to the expertise she could offer:

> Mr. Roberts: I see. Okay. And so as a sexual assault nurse, what opinion, on the basis of your observations, are you able to offer to courts?
>
> Ms. Witherbee: I could offer my opinion on collection of evidence…

> Mr. Roberts: Okay.
>
> Ms. Witherbee: …sexual assault evidence, yeah.
>
> Mr. Roberts: On the basis of evidence you collect, what – what opinions can you offer with respect to sexual assault?
>
> Ms. Witherbee: I can – I can collect the evidence and I can attest to whether the injuries – you know, what injuries were there.
>
> Mr. Roberts: Are you able to say whether injuries were consistent or not consistent with penetration?
>
> Ms. Witherbee: Yes.

[53] In cross-examination, Ms. Witherbee clarified that she could talk about "injuries from penetration," but not as to whether "an injury was caused by a consensual versus a non-consensual act". And as noted, the Crown was "only seeking to offer expert opinion evidence on whether injuries in this case are consistent or not consistent with penetration".

[54] There is no basis in her *voir dire* testimony or elsewhere in the record to determine if Ms. Witherbee had special training in psychology or another relevant discipline that would allow her to form an expert opinion regarding the effect of trauma on memory. For these reasons, I determine the impugned evidence is lay opinion.

Was it an error to admit this evidence?

[55] Lay opinion evidence that falls within one of the categories identified in *Graat* is admissible without further analysis. Otherwise, the admission of lay opinion evidence is a matter of judicial discretion. Ms. Witherbee's evidence does not fall within any of the non-exhaustive categories of lay opinion evidence outlined in *Graat*. The framework for the admission of opinion evidence by non-experts is set out in *Graat* at p. 835:

> To resolve the question before the court, I would like to return to broad principles. Admissibility is determined, first, by asking whether the evidence sought to be admitted is relevant. This is a matter of applying logic and experience to the circumstances of the particular case. The question which must then be asked is whether, though probative, the evidence must be excluded by a clear ground of law or policy.

[56] Policy considerations identified in *Graat* include the danger of confusing the issues or misleading the jury, unfair surprise, as well as a "tendency for judges and

juries to let the opinion of police witnesses overwhelm the opinion evidence of other witnesses" (at p. 841).

[57] Ms. Witherbee's evidence should have been excluded on policy grounds. Here, a danger similar to one discussed in *Graat*, is present. In my view, the judge should not have relied on Ms. Witherbee's opinion and used it to improperly dismiss inconsistencies in the complainant's testimony.

[58] While her opinion was based on her personal observations, Ms. Witherbee did not clearly state the observed facts on which she based her inference that trauma can affect memory. Rather, she made a bald statement in response to a question posed on cross-examination about the fullness of the complainant's narrative. There was no follow-up asking for Ms. Witherbee to clarify her comments. She also did not testify that the complainant herself was suffering from trauma when she examined her. As a result, the judge was not well-positioned to assess the reliability of her observations, as well as the weight to be afforded to the inferences Ms. Witherbee drew from them. As the Ontario Court of Appeal held in *R. v. Cuming (2001)*, 158 C.C.C. (3d) 433 (at para. 21) "with any opinion evidence, there must be some basis for the opinion before it can be given any weight".

[59] Furthermore, the danger of Ms. Witherbee's evidence distracting the judge is increased because her testimony approached a fundamental issue the trier of fact had to decide. This case turned on credibility. The judge used Ms. Witherbee's evidence to dismiss inconsistencies in the complainant's evidence, dealing a serious blow to the defence. The highly prejudicial nature of this evidence on a central question before the trier of fact, and the dangers of improperly affording it too much weight – especially as Ms. Witherbee was not thoroughly tested on her opinion by the parties – means the judge should have resisted admission of Ms. Witherbee's evidence. There was simply no basis on which the judge could have assessed the factual basis for Ms. Witherbee's lay opinion. I reiterate, nothing in this record indicates the judge turned his mind to these frailties.

[60] For these reasons, I am satisfied the judge erred in admitting and relying on Ms. Witherbee's impugned lay opinion evidence to dismiss inconsistencies in the complainant's evidence.

Would the verdict have been the same without the error?

[61] I reject the Crown's invitation to apply the curative proviso set out in s. 686(1)(b)(iii) of the *Criminal Code*. The burden is on the Crown to demonstrate

the curative proviso is applicable and that the conviction should stand notwithstanding error. I am mindful that defence counsel did not object to this evidence when Ms. Witherbee volunteered it in cross-examination. That is a relevant but not a determinative consideration in assessing whether the curative proviso applies.

[62] It is evident from my foregoing analysis that I have determined the error was neither harmless nor can it be said the verdict would have been the same absent the error. The judge took a (inadmissible) comment which the Crown did not suggest had any relevance and relied on it as a crucial linchpin in his credibility analysis.

[63] Although this error alone would be dispositive of this appeal, and warrants the ordering of a new trial, I will address the 5th and last issue.

Did the judge improperly impose a burden on the appellant to provide evidence and then draw an adverse inference against him for failing to do so?

[64] This issue, raised by the panel, is not a new issue *per se*. Rather, like issue number 2, it engages the question—did the judge conduct a proper *W.(D.)* analysis?

[65] As noted earlier, in assessing the appellant's credibility, the judge said he had problems with his evidence:

> [48] I have problems with the evidence given by [the appellant]. Examples of problem areas include:
>
> > 1. Although [the complainant] asked [the appellant] to delete the video he took, he did not delete it saying his phone died. On cross-examination he said he took the video to defend against any allegation of sexual assault. However, [the appellant] told police the video was of their private parts, it does not show [the appellant's] face. One could not identify the participants from the video.
> >
> > 2. If the purpose of the video was to protect against any allegation of sexual assault, it is odd [the appellant] did not give the police the information to allow them to retrieve the video from his phone which the police seized.

[66] In his factum, the appellant argues the judge misapprehended evidence, failed to conduct a proper *W.(D.)* analysis and gave deficient reasons. The appellant cited several examples in his factum, contending they demonstrate the judge's misapprehension of evidence and led to errors in his *W.(D.)* analysis. The

judge's use of the appellant's evidence about the video, and the negative inference drawn, was not one of those examples.

[67] However, this aspect of the judge's reasons raises questions the Crown and appellant have had an opportunity to fully address. The questions are: Did the judge improperly impose a burden on the appellant to provide evidence? If so, did the judge then improperly draw an adverse inference against the appellant for failing to do so, impacting his credibility assessment? I answer both questions in the affirmative. These are errors of legal principle; consequently, they negate the deference owed to the judge's credibility findings on this point and warrant appellate intervention.

[68] Before setting out my reasons for these conclusions, I will summarize the position of the appellant and Crown as advanced in their respective post-appeal hearing submissions and, address the applicable legal principles including the standard of review on appeal.

Position of the appellant

[69] The appellant submits he was under no obligation to provide his cell phone password to the police, regardless of either his motivation for creating the video or whether the alleged video would have been exculpatory or inculpatory. To draw an adverse credibility inference based on his failure to provide this password constitutes an error in law.

Position of the Crown

[70] The Crown argues it was open to the judge to question whether the appellant's purpose in obtaining the video was true, made sense or whether it was internally consistent, citing *R. v. Taylor*, 2013 SCC 10, in support. The Crown acknowledges it would have been preferable if the judge had explicitly stated that there was no onus on the appellant to provide the video to the police. However, the Crown emphasizes the judge did not say the appellant was obligated to give the video to the police and the judge is presumed to know the law—which would prohibit him from doing so.

Legal Principles

[71] Turning first to the standard of review, as canvassed by this Court in *R. v. K.J.C.*, 2021 NSCA 5, the standard of review for a *W. (D.)* analysis is:

> [33] In assessing credibility where there is evidence from the accused, the trial judge must have correctly identified and applied the relevant law (*R. v. W. (J.E.)*, 2013 NSCA 19 (N.S.C.A.), at para. 7). An allegation of error in the judge's application of *W. (D.)* is a question of law, reviewed on a standard of correctness (*R. v. H. (J.A.)*, 2012 NSCA 121 (N.S.C.A.), at para. 7). Unless she erred in principle, a trial judge's credibility assessments are entitled to appellate deference (*R. v. Dinardo*, 2008 SCC 24 (S.C.C.), at para. 26).

[72] Next, the legal principles as to the appellant's right to remain silent and refuse to cooperate with police—the right to remain silent is constitutionally protected and linked to the presumption of innocence. In *R. v. Noble*, [1997] 1 S.C.R. 874, Justice Sopinka for the majority recognized the link between the right to silence and the presumption of innocence under section 11(d). He concluded it would be an error of law for a trier of fact to use an accused's silence in the reasoning process to convict (at para. 53). As Justice Sopinka explained, doing so would impermissibly shift the burden of proof to the accused:

> [76] The presumption of innocence, enshrined at trial in s. 11(d) of the *Charter*, provides further support for the conclusion that silence of the accused at trial cannot be placed on the evidentiary scales against the accused. Lamer J. (as he then was) stated in *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, at p. 357, that:
>
> > Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.
>
> **If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused.** In a situation where the accused exercises his or her right to silence at trial, the Crown need only prove the case to some point short of beyond a reasonable doubt, and the failure to testify takes it over the threshold. The presumption of innocence, however, indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. **Thus, in order for the burden of proof to remain with the Crown, as required by the *Charter*, the silence of the accused should not be used against him or her in building the case for guilt.** Belief in guilt beyond a reasonable doubt must be grounded on the testimony and any other tangible or demonstrative evidence admitted during the trial. [Emphasis added.]

[73] As noted, the Crown relies on *Taylor* to argue the judge was permitted to consider the appellant's refusal to hand over the evidence to police as "odd", given his evidence that he took the video to prove the complainant consented. However, *Taylor* is distinguishable.

[74] In *Taylor*, the accused's son provided exculpatory evidence at trial that he did not previously provide to police. The judge considered the son's evidence a possible recent fabrication and negatively assessed his credibility as a result. A majority of the Supreme Court of Canada allowed the appeal for the reasons of the minority of the Newfoundland Court of Appeal and upheld the judge's original decision. As Justice Hoegg wrote in dissent:

> [31] **Stephen is a witness.** He has every right to remain silent about his involvement in his father's case. The trial judge did not suggest otherwise. However, **if a witness** gives unexpected evidence in circumstances where that evidence could reasonably be expected to have been disclosed earlier, he runs the risk of it being considered to be recently fabricated. This is what happened here. Stephen had the opportunity to address the Crown's insinuation of recent fabrication for the Crown attorney questioned Stephen as to why this evidence was just coming forth at trial, and Stephen explained his reasons. The reasons did not ring true to the trial judge. The trial judge found Stephen's evidence wanting and rejected it, as he is entitled to do. Just because there was no obligation on Mr. Taylor or Stephen to disclose Stephen's evidence does not mean that a negative inference cannot be drawn against its late disclosure. There is no logical connection between the two concepts. [Emphasis added.]

[75] In this appeal, Justice Coughlan's credibility assessment was of an accused, not a non-party witness as in *Taylor*. As noted, it is a well-established constitutional right of the accused to remain silent and not to cooperate with police, both during the pre-trial investigation and at trial.

[76] I find *R. v. Chambers*, [1990] 2 S.C.R. 1293, is a more applicable case. It deals with an accused's refusal to cooperate with police, rather than a non-party witness. In *Chambers*, evidence was led that the accused refused to speak to police following his arrest on charges of conspiring to import cocaine. On cross-examination, the Crown asked the accused, "[W]hy did you not tell the authorities as soon as you were arrested that it may look bad, but you have an explanation for why it looks so bad. Why didn't you?" (p. 1312). Both Crown and defence counsel agreed this line of questioning and the accused's answers were impermissible and asked the trial judge to so instruct the jury, but that did not happen. The Court was satisfied that a material error occurred as a result of the impermissible line of questioning and the judge's failure to provide a limiting instruction to the jury. The error could not be addressed by application of the curative proviso and the Court ordered a new trial.

[77] The constitutional right to silence is not absolute. In *R. v. Turcotte*, 2005 SCC 50, Justice Abella wrote for the Court:

> [47] Evidence of silence is, however, admissible in limited circumstances. As Cory J. held in *Chambers*, at p. 1318, if "the Crown can establish a real relevance and a proper basis", evidence of silence can be admitted with an appropriate warning to the jury.
>
> [48] There are circumstances where the right to silence must bend. In *R. v. Crawford*, 1995 CanLII 138 (SCC), [1995] 1 S.C.R. 858, for example, the Court was confronted with a conflict between the right to silence and the right to full answer and defence. …
>
> [49] Evidence of silence may also be admissible when the defence raises an issue that renders the accused's silence relevant. Examples include circumstances where the defence seeks to emphasize the accused's cooperation with the authorities (*R. v. Lavallee*, [1980] O.J. No. 540 (QL) (C.A.)); where the accused testified that he had denied the charges against him at the time he was arrested (*R. v. Ouellette* (1997), 1997 ABCA 268 (CanLII), 200 A.R. 363 (C.A.)); or where silence is relevant to the defence theory of mistaken identity and a flawed police investigation (*R. v. M.C.W.* (2002), 169 B.C.A.C. 128, 2002 BCCA 341).
>
> [50] Similarly, cases where the accused failed to disclose his or her alibi in a timely or adequate manner provide a well established exception to the prohibition on using pre-trial silence against an accused: *R. v. Cleghorn*, 1995 CanLII 63 (SCC), [1995] 3 S.C.R. 175. Silence might also be admissible if it is inextricably bound up with the narrative or other evidence and cannot easily be extricated.

Application of Principles

[78] The appellant testified in his own defence. The judge was required to observe the Supreme Court of Canada's direction in *W.(D.)* regarding the proper application of the burden of proof. As stated, the constitutional right to silence is not absolute. However, the use of this evidence by the judge does not fall into any of the recognized categories of exceptions outlined in *Turcotte*. As a matter of law, the appellant's failure to turn over the video to police could not on its own be used to justify an adverse inference against him supporting his guilt. Otherwise, the appellant's constitutional right to silence would be rendered illusory.

[79] The Crown argues the judge was merely commenting on the plausibility of the appellant's testimony; namely, its truthfulness and internal consistency. The flaw in the Crown's argument is that one cannot ascertain from the judge's reasons how he dealt with this evidence in his *W.(D.)* analysis. The assessment of the appellant's evidence is confined to the judge simply pointing out the "problems" he had with the appellant's testimony. I am mindful of the Supreme Court of Canada's warning in *R. v. G.F.*, 2021 SCC 20, that appellate courts should not

parse a trial judge's reasons, particularly as they relate to the assessment of credibility. However, a review of the record provides no additional context for the judge's reference to the appellant's failure to turn over the video evidence to police in his reasons, or what considerations guided his analysis of this evidence.

[80] If an appellate court is unable to ascertain from the judge's reasons whether the judge properly applied the burden of proof in the assessment of an accused's credibility, intervention is warranted. As this Court explained in *R. v. J.P.*, 2014 NSCA 29:

> [61] But correct articulation of the *W.D.* jury instruction is no guarantee the burden was properly applied (see: *R. v. D.D.S.*, 2006 NSCA 34 at para. 45; *R. v. A.P.*, 2013 ONCA 344 at para. 39). This legal reality was eloquently explained by Watt J.A. in *R. v. Wadforth*, 2009 ONCA 716:
>
> > [50] In cases like this, involving near-equivalent opportunity to commit the offence charged and conflicting assertions and denials of responsibility, it is crucially important that the trial judge's reasons reveal an understanding of the relationship between reasonable doubt and credibility. The failure expressly to articulate the word formula of *W. (D.)* is not fatal. **What must appear, however, from the reasons as a whole, is the trial judge's clear understanding of the relationship between reasonable doubt and the assessment of credibility and its application to the case at hand…**
> >
> > [51] The formula in *W. (D.)* is *not* a magic incantation, its chant essential to appellate approval and its absence a ticket to a new trial. Its underlying message is that the burden of proof resides with the prosecution, must rise to the level of proof beyond a reasonable doubt in connection with each essential element of the offence, and, absent statutory reversal, **does not travel to the person charged, even if his or her explanation is not believed**…[Emphasis added. References removed.]

[81] I am satisfied the judge impermissibly shifted the burden of proof from the Crown to the appellant as it relates to this issue. This was an error of law. I would allow this ground of appeal.

Conclusion

[82] For the above reasons, I would allow the appeal, overturn the conviction and order a new trial.

Van den Eynden, J.A.

Concurred in:

Wood, C.J.N.S.

Hamilton, J.A.