NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Murray*, 2023 NSCA 77

Date: 20231102
Docket: CAC 514727
Registry: Halifax

Between:

Dalton Douglas Murray

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication:
Section 486 of the *Criminal Code of Canada*

Judge: The Honourable Justice Carole A. Beaton

Appeal Heard: October 5, 2023, in Halifax, Nova Scotia

Subject: Criminal; Criminal – evidence; Criminal – sexual assault; *Criminal Code:* Evidence – credibility; Evidence – inferences; Evidence – reliability; Evidence – *W.(D.)* analysis; Reasons – sufficiency of reasons; Sexual assault.

Cases Considered: *R. v. Sheppard*, 2002 SCC 26; *R. v. G.F.*, 2021 SCC 20; *R. v. Braich*, 2002 SCC 27; *R. v. Vuradin*, 2013 SCC 38; *R. v. J.J.R.D.*, (2006), 215 CCC (3sd) 252; *R. v. Kishayinew*, 2019 SKCA 127 (aff'd 2020 SCC 34); *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *R. v. Coburn*, 2021 NSCA 1; *R. v. Horne*, 2023 NSCA 64; *R. v. Dinardo*, 2008 SCC 24; *R. v. McGraw*, 2023 NBCA 31; *R. v. Mah*, 2002 NSCA 99; *R. v. C.R.V.*, 2023 NSSC 169.

Summary: The appellant was acquitted on one count of sexual assault contrary to s. 271 of the *Criminal Code*, and was convicted on a second s. 271 count.

The trial judge was satisfied the complainant was a credible witness, but had concerns about her reliability given her evidence regarding the consumption of alcohol and its effect on her. The judge was satisfied the complainant's recall and the quality of her evidence was better for the events concerning the second count than the first count.

Issues:

(1) Were the judge's reasons insufficient?
(2) Did the judge engage in impermissible speculation about the complainant's level of intoxication and her ability to recall events?
(3) Did the judge conduct a flawed reliability assessment of the complainant's evidence?
(4) Did the judge fail to properly apply the *W.(D.)* framework?

Result:

(1) The judge's reasons are sufficient to permit appellate review, and allow the appellant to understand why he was convicted.
(2) The judge did not engage in impermissible speculation. He drew common-sense inferences from the evidence, to help inform his conclusions, without the need for expert evidence.
(3) The judge distinguished between the complainant's credibility and her reliability in his analysis, which led to differing outcomes on each of the two charges.
(4) While the *W.(D.)* framework was not specifically referenced, the judge's reasons demonstrate its principles were applied.

The judge did not commit any of the errors argued by the appellant. The appeal from conviction on the second s. 271 offence is dismissed.

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Appellant

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Respondent

Restriction on Publication:
s. 486 of the *Criminal Code of Canada*

Judges:	Bryson, Derrick and Beaton, JJ.A.
Appeal Heard:	October 5, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed , per reasons for judgment of Beaton, Bryson and Derrick, JJ.A. concurring
Counsel:	Matthew J. Ryder, 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).

Mandatory order on application

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

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

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

Reasons for judgment:

[1] Following a trial before the Honourable Judge William Digby ("the judge") in the Provincial Court of Nova Scotia, the appellant Mr. Murray was acquitted on one count of sexual assault contrary to s. 271 of the *Criminal Code*. He was convicted on a second s. 271 count, which forms the subject of this appeal. Mr. Murray asks the Court to quash his conviction, or in the alternative to order a new trial. For the reasons that follow, I would dismiss the appeal.

[2] On the evening of October 31, 2020, Mr. Murray was part of a group of people drinking at The Furnace, a nightclub located in Antigonish, Nova Scotia. Mr. Murray and his friends joined a table of patrons that included the victim D.S. Eventually Mr. Murray left the bar with his friend group; D.S. later departed with her friends. Mr. Murray and D.S. then encountered one another later that evening at a local restaurant where both groups had arrived. After eating, some members of each of the two groups, including Mr. Murray and D.S., drove in Mr. Murray's vehicle to a local hotel.

[3] Three witnesses testified at trial. In her evidence, D.S. described to the judge a non-consensual sexual encounter initiated by Mr. Murray in the bathroom of the hotel room. It caused her to leave the hotel on foot and walk toward the home of a friend. Mr. Murray eventually arrived in his vehicle and offered her a drive, which she accepted. They drove around for a period of time and then stopped the vehicle in a location where, as D.S. testified, Mr. Murray sexually assaulted her.

[4] The judge was satisfied that while D.S. was a credible witness, he had concerns about her reliability in relation to the first count, given her evidence about her consumption of alcohol and its effect on her powers of recall. The judge was satisfied D.S.'s recall was better for events occurring later during the evening. In his analysis of the Crown's burden of proof beyond a reasonable doubt, the judge concluded he had a doubt about the incident in the bathroom. He resolved it in Mr. Murray's favour, owing to what he determined was D.S.'s diminished ability to recall the events earlier in time at the hotel room, versus her ability to recall the later events in the vehicle.

[5] Regarding the incident in the vehicle, the judge was not prepared to accept Mr. Murray's evidence as to how he had acquired a bite mark on his arm, as captured in a photo tendered by the Crown. D.S. had testified that she inflicted the

bite mark in response to Mr. Murray's unwanted sexual advances. Mr. Murray testified the bite was D.S.'s reflexive response or reaction to his unintentional infliction of discomfort or pain, as both parties physically re-positioned themselves during a consensual sexual encounter.

[6] Mr. Murray says the judge erred in various ways in convicting him on the second count. These include:

(i) engaging in impermissible speculation;
(ii) conducting a flawed reliability analysis of D.S.'s evidence; and
(iii) failing to properly apply the *W.(D.)* framework.

In addition, he maintains the reasons furnished by the judge were insufficient. For the purposes of my analysis, I will first address that issue, before turning to consideration of the other three grounds raised.

Sufficiency of reasons

[7] Insufficient reasons are those that prevent adequate appellate review because the judge's reasoning process cannot be discerned (*R. v. Sheppard*, 2002 SCC 26 at para. 23). As stated by Mr. Murray, the judge's reasons must justify and explain to him why he was convicted. Mr. Murray asserts because the judge did not address the "live" issues put before him in a satisfactory fashion, Mr. Murray is left not knowing why he was convicted.

[8] The Crown argues Mr. Murray's complaints are unfounded because it can be seen in the judge's reasons that not only were the requisite credibility assessments of the witnesses made, but in addition Mr. Murray's evidence on a material point - regarding the bite mark - was rejected.

[9] Over the last two decades the Supreme Court of Canada has provided a wealth of direction about what constitutes sufficient reasons, and the need for appellate courts to apply a functional approach to the task of assessing a judge's reasons in the context of the evidence and issues at the trial. More recently, that Court's jurisprudence on sufficiency of reasons was summarized in *R. v. G.F.*, 2021 SCC 20:

> [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; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 19; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 101; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at paras. 10, 15 and 19; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 15; *R. v. Chung*, 2020 SCC 8, at paras. 13 and 33. 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.
>
> [70] This Court has also emphasized the importance of reviewing the record when assessing the sufficiency of a trial judge's reasons. This is because "bad reasons" are not an independent ground of appeal. If the trial reasons do not explain the "what" and the "why", but the answers to those questions are clear in the record, there will be no error: *R.E.M.*, at paras. 38-40; *Sheppard*, at paras. 46 and 55.
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> [71] The reasons must be both factually sufficient and legally sufficient. Factual sufficiency is concerned with what the trial judge decided and why: *Sheppard*, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record may explain the factual basis of the finding to the aggrieved party: para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge's findings: paras. 50 and 52.

[10] The question is whether the judge's decision permits a functional and contextual reading of his reasons by this Court, one that positions Mr. Murray to understand why he was convicted.

[11] Trial judges are presumed to know the law. Thus, the judge did not have to provide exhaustive reasons that touched on each and every aspect of the evidence,

as long as his reasons show he grappled with the critical issues (*R. v. Braich*, 2002 SCC 27 at para. 25).

[12] The judge did what was required in terms of furnishing an analysis of the case. In his reasons, he first recognized the legal principles in play in sexual assault cases, then canvassed the evidence and discussed the notions of reasonable doubt and burden of proof. Next, the judge distinguished between his conclusions on credibility and on reliability. He then considered the material issues in the context of the body of evidence put before him, and in particular the testimony of D.S. and of Mr. Murray.

[13] I agree with the Crown that on his way to concluding D.S. was believable, the judge specifically addressed the issues identified by counsel at the conclusion of the trial. In doing so, the judge met the standard discussed in *R. v. Vuradin*, 2013 SCC 38:

> [13] In *R.E.M.*, this Court also explained that a trial judge's failure to explain why he rejected an accused's plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence. No further explanation for rejecting the accused's evidence is required as the convictions themselves raise a reasonable inference that the accused's denial failed to raise a reasonable doubt (see para. 66).

[14] Mr. Murray suggests the judge's reasons do not sufficiently explain why his evidence was rejected. In response, the Crown relies on the decision in *R. v. J.J.R.D.*, (2006), 215 CCC (3d) 252 which recognizes the difficulty a trial judge might face in articulating with precision why evidence is not accepted, or is rejected. As in that case, here we can be satisfied that:

> [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.

[15] I am satisfied the judge's reasons permit appellate review. They demonstrate he properly considered all of the evidence and articulated why he was able to reach a conviction on one of the two counts.

[16] I would dismiss this ground of appeal.

Impermissible speculation

[17] Mr. Murray says the judge engaged in impermissible speculation, leading to an unreasonable verdict, concerning two aspects of the evidence: the victim's level of intoxication, and the victim's ability to recall.

[18] The standard of review on an assertion of impermissible speculation is correctness. The judge was required to apply the law correctly.

[19] As to D.S.'s intoxication, Mr. Murray accepts the judge was entitled to rely on general knowledge that intoxication can impair memory. However, he objects that there was no expert evidence tendered to support what the judge concluded about the effects of alcohol on D.S. Mr. Murray asserts the judge strayed into error in assessing the physiological effects of alcohol on D.S., by observing her level of intoxication had waned over the course of the evening, by noting her physical size and by commenting on when and what she had eaten during the evening. Mr. Murray says there was no expert evidence to support the judge's conclusion that D.S.'s level of intoxication was declining as the evening continued.

[20] Mr. Murray maintains that difficulty was then compounded when the judge, having engaged in speculation about the waning level of D.S.'s intoxication over time, used that observation to infer her memory, and thus her reliability, improved for events occurring later in the evening. Mr. Murray asserts that absent any proven facts from which the judge could infer D.S. was less intoxicated and more reliable by the time of the second incident, the judge's speculation led to an unreasonable verdict.

[21] The Crown properly submits the judge did not speculate, but rather made findings grounded in the evidence, based on common sense and judicial experience. The judge relied on D.S.'s evidence about her own understanding of her level of intoxication; for example, she testified that after eating she was "still drunk" but not as intoxicated as she had been earlier in the evening. As argued by

the Crown, D.S.'s recollection was unequivocal and detailed in relation to the second count, which assisted the judge in finding her reliable in relation to that charge. There was no need for expert evidence in this case.

[22] In his reasons the judge addressed directly how D.S.'s reliability concerning events earlier in the evening had been impacted by alcohol, and how the passage of time caused her level of intoxication to wane. A similar issue was considered in the dissent in *R. v. Kishayinew*, 2019 SKCA 127 (aff'd 2020 SCC 34):

> [78] The trial judge was acutely aware there were potential problems with L.S.'s reliability due to her memory issues resulting from the alcohol consumption and blackouts. He examined the evidence, addressed this issue, implicitly engaged in the required reliability analysis and determined L.S.'s evidence was reliable. A trial judge's assessment of reliability is accorded significant deference and cannot be interfered with on appeal unless it cannot be supported on any reasonable view of the evidence. The trial judge in this matter reached a conclusion on reliability that was reasonably available on the evidence before him. I cannot conclude the verdict reached by the trial judge is one that could not have been reasonably rendered by a properly instructed trier of fact. I would not interfere with the verdict on the basis of the assertion that L.S.'s evidence was not reliable.
>
> [Emphasis added]

[23] I am satisfied the judge was entitled to draw from the evidence the common-sense inferences he did, which then properly helped to inform his conclusions. I see no error in that regard. I would dismiss this ground of appeal.

The judge's reliability assessment

[24] This ground also attracts a correctness standard. The judge was required to be correct in his application of the legal principles in play.

[25] Mr. Murray complains the judge improperly siloed the evidence on the two counts before him, and then imparted greater reliability to D.S.'s evidence in relation to the second count. While Mr. Murray agrees the judge found D.S. to be credible, he says the judge erroneously enhanced D.S.'s reliability concerning the second count, because it cannot be logical that the same evidence leading to an acquittal on count one could support a conviction on count two.

[26] The Crown responds that it was the reliability of the victim in relation to each count that led to the differing verdicts. The Crown suggests the evidence was not the same for each count because D.S.'s level of intoxication was not a static condition, thus her reliability differed in relation to each count. I agree. I consider also that the evidence of the bite mark, corroborative of D.S.'s version of events in the vehicle, was evidence that went only to the second count, and the judge rejected Mr. Murray's evidence about the bite mark.

[27] The judge was satisfied the distinction in D.S.'s evidence leading to differing verdicts rested in the inferior quality of her reliability on count one versus on count two. He explained:

> Taking all of that into account, with respect to that first count , although I'm satisfied that [D.S.] was making her best effort to remember what happened that night, that her evidence can be impaired by her consumption of alcohol in terms of original perception that given the heavy burden on the Crown of proof beyond a reasonable doubt and reasonable doubt, as pointed out in the briefs , has been defined by the Supreme Court of Canada in *R. v. Lifchus*, on Mr. Murray's evidence which could possibly be true with respect to the events which happened in the bathroom, is sufficient to leave me in doubt as to what in fact happened. As pointed out in the case advanced by Mr. Singleton, the Court isn't engaged in deciding which version is ... is true, it 's whether the Crown has proved its case beyond a reasonable doubt and I find that with respect to count one, the Crown has not proven its case beyond a reasonable doubt and I do that because I 'm not satisfied that [D.S.'s] recollection is reliable. I acknowledge that she said that her degree of impairment was better after she had something to eat at the pizza parlor but the events at the Homeward Inn were not that long after they left the pizza parlor .

[28] And later, in relation to the second count, the judge concluded his analysis with these findings:

> I'm satisfied that she was less impaired at the time of the alleged second assault such that her evidence is more reliable. I also find that it is supported by the bite. I don't accept Mr. Murray's version of why he received the bite. I reject his evidence entirely on that point. I'm left in no reasonable doubt with respect to the second assault for the reasons that [D.S.] was less under the influence of alcohol at that time and her evidence is supported by the photographs of the bite marks on Mr. Murray's body which were photographed very shortly after the event by the RCMP.
>
> Mr. Murray is acquitted of count one and found guilty of count two.

[29] The dissent in *Kishayinew* is again instructive:

> [59] In analyzing this ground of appeal, it is important to understand the distinction between credibility and reliability because the assessment of credibility is a separate consideration from the assessment of reliability. It is the difference between the witness's willingness to testify truthfully (credibility) and the accuracy of the witness's testimony (reliability). Finding a witness to be credible does not equate to finding a witness's testimony to be reliable. While a non-credible witness's testimony will not be reliable, a credible witness's testimony is not necessarily reliable: see *Morrissey, H.C., Patrick, Schaff, Wolff,* and *R v Pelletier*, 2019 SKCA 113 at paras 138–139.
>
> [60] There are many reasons why witnesses – who are forthright, acting in good faith and honestly doing their best to tell the truth during testimony – may not be reliable. Some of those reasons include (but are not limited to) the following:
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> (a) inability to properly observe the events in the first instance;
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> (b) confusion with a different event;
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> (c) intoxication;
>
> (d) passage of time;
>
> (e) nervousness during testimony; or
>
> (f) other factors affecting a witness's ability to observe, remember and recount the events.
>
> [Emphasis added]

[30] His reasons illustrate the judge appreciated the difference between credibility and reliability, and he distinguished between them in his analysis. That analysis fuelled differing conclusions about D.S.'s reliability, leading to two different outcomes.

[31] I do not see any error in the judge's approach nor the results of his analysis. I would dismiss this ground of appeal.

The application of W.(D.)

[32] Mr. Murray asserts an error in the judge's application of the *W.(D.)*, analytical framework (*R. v. W.(D.)*, [1991] 1 S.C.R. 742). This ground must also be reviewed on a correctness standard (*R. v. Coburn*, 2021 NSCA 1 at para. 27).

[33] The Court's recent decision in *R. v. Horne*, 2023 NSCA 64 reproduces the *W.(D.)* analysis this way:

> [56] The *W.(D.)* principle, first enunciated by Justice Cory in *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, at p. 758, was developed to avoid judges reducing trials to credibility contests. Accordingly, the *W.(D.)* formula embeds any credibility analysis in the broader obligation of ascertaining reasonable doubt. As Justice Cory put it:
>
> > 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.
>
> [57] It is now widely acknowledged that *W.(D.)* is not a magic formula. At the end of the day, the question is whether the evidence gives rise to reasonable doubt (see for example: *R. v. J.H.S.*, 2008 SCC 30).

[34] Mr. Murray says there is no *W.(D.)* analysis apparent in the judgment, further evidenced by the judge having shifted the burden of proof to him and not assessing the whole of the evidence.

[35] The Crown reminds us the judge was satisfied regarding the victim's credibility and reliability, and stacked against Mr. Murray's evidence, he rejected Mr. Murray's evidence. The Crown says the judge was clearly alive to the concept of reasonable doubt as illustrated by the very fact he found a doubt in relation to count one, where he was satisfied the victim was credible but not reliable.

[36] While not specifically labelled as such, his reasons make it clear the judge effectively applied the *W.(D.)* framework. The judge was faced with a case that turned on credibility and reliability, factual determinations to which deference is owed (*R. v. Dinardo*, 2008 SCC 24 at para. 26; *R. v. McGraw*, 2023 NBCA 31 at para. 22). The judge examined D.S.'s evidence and found her credible, but not reliable on count one, and reliable on count two. As noted earlier, on that second count, the judge clearly rejected Mr. Murray's evidence about how he had acquired the bite mark.

[37] In its factum (albeit in discussing sufficiency of reasons) the Crown makes the following observation:

> [83] As in *Vuradin*, these reasons are sufficient because they demonstrate that the trial judge: (1) found [D.S.'s] evidence believable, (2) resolved the few "issues" with [D.S.'s] evidence raised by the Appellant at trial, and (3) rejected the Appellant's evidence where it conflicted with [D.S.'s]. The legal basis for the conviction is clear: despite the Appellant's denial, the trial judge was satisfied beyond a reasonable doubt of his guilt.

[38] The judge's reasons demonstrate he conducted the appropriate analysis, regardless of not having invoked the "magical incantation" (*R. v. Mah*, 2002 NSCA 99 at para. 41) of *W.(D.)*. Recently put another way, "the *W.(D.)* analysis is not some mathematical formula or decision-making tree that must be rigidly followed with step-by-step precision" (*R. v. C.R.V.*, 2023 NSSC 169 at para. 18).

[39] I am persuaded the judge's reasons capture the spirit and intent of a *W.(D.)* analysis, and how its principles were applied, without ambiguity. I would dismiss this ground.

[40] In conclusion, I am satisfied the judge's reasons permit appellate review and furthermore they reveal no errors. I would dismiss Mr. Murray's appeal from conviction on the second s. 271 offence.

Beaton, J.A.

Concurred in:

Bryson, J.A.

Derrick, J.A.