NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. K.J.M.J.*, 2023 NSCA 84

Date: 20231129
Docket: CAC 513996
Registry: Halifax

Between:

K.J.M.J.

Appellant

v.

His Majesty the King

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge: The Honourable Justice Peter M. S. Bryson

Appeal Heard: October 18, 2023, in Halifax, Nova Scotia

Subject: Criminal law – Judge's impartiality – Reasonable apprehension of bias

Cases Cited:

The King v. Sussex Justices, ex parte McCarthy, [1924] 1 K.B. 256, at p. 259; *Wewaykum Indian Band v. Canada*, 2003 SCC 45; *R. v. Gough*, [1993] A.C. 646 (H.L.); *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155; *R. v. Pan; R. v. Sawyer*, 2001 SCC 42; *R. v. C.W.G.* (1993), 36 BCAC 234; *R. v. Sadoroszney* (1999), 132 C.C.C. (3d) 320 (BCSC); *R. v. Williams* (1995), 58 BCAC 53; *R. v. MacMillan*, 2002 BCCA 306; *R. v. Hossainnia*, 2011 BCCA 117; *R. v. Lund*, 2006 BCCA 296; *Ermina v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1785 (FCTD), 160 F.T.R. 317; *Kosko v. Bijimine*, 2006 QCCA 671; *R. v. Baldovi*, 2016 MBQB 90; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *Sandboe v. Coseka Resources Ltd.*, 1989 ABCA 22; *Sherman Estate v. Donovan*, 2021 SCC 25; *La Presse inc. v. Quebec*, 2023 SCC 22; *Endean v. British Columbia*, 2016 SCC 42; *R. v. Walker*, 2010 SKCA 84; *R. v. Schofield*, 2012 ONCA 120; *R. v. Roy* (1976), 32 C.C.C. (2d) 97 (Ont. C.A.); *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.); *R. v. Ontario Corp. 844781*, [1996] O.J. No. 4496 (Ct J (Gen Div)); *R. v.*

Curragh Inc., [1997] 1 S.C.R. 537; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *R. v. Schneider*, 2004 NSCA 99; *R. v. Lilly*, 2023 NSCA 80; *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24; *R. v. Aucoin*, [1979] 1 S.C.R. 554; *R. v. MacLean* (1991), 106 N.S.R. (2d) 213; *R. v. Coreas* (1996), 115 C.C.C. (3d) 353 (Ont. C.A.); *R. v. Potter*; *R. v. Colpitts*, 2020 NSCA 9; *R. v. Baccari*, 2011 ABCA 205; *R. v. Lee*, 2011 BCSC 1518; *R. v. Hossu* (2002), 162 O.A.C. 143; *R. v. Lyttle* (2005), 203 O.A.C. 41; *Lloyd v. Bush*, 2012 ONCA 349; *Gedge v. Hearing Aid Practitioners Board*, 2011 NLCA 50; *R. v. Mills*, 2019 ONCA 940; *R. v. Ruthowsky*, 2018 ONCA 552; *Palkowski v. Ivancic*, 2009 ONCA 705; *R. v. Huang*, 2013 ONCA 240; *C.B. v. T.M.*, 2013 NSCA 53; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76; *R. v. Farinacci*, 67 O.A.C. 197; *R. v. Sheppard*, 2002 SCC 26.

Statutes Cited:

Criminal Code, ss. 151, 152, 271, 650(1), 682(1); *Canadian Charter of Rights and Freedoms*, s. 11(d).

Authors Cited:

Lord Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010).

Summary:

K.J.M.J. was charged with sexual offences involving his stepdaughter. Prior to final argument, the trial judge made highly critical comments of K.J.M.J.'s character and credibility. He expressed his belief in K.J.M.J.'s guilt regarding one charge. The trial judge said the comments were "off-the-record" and "privileged". He wrote an email to the Court of Appeal objecting to inclusion of his impugned remarks in the trial record. K.J.M.J. appealed, alleging a reasonable apprehension of bias against the judge.

Issues:

(1) Was the judge's email to the Court of Appeal part of the "record"?
(2) Were the judge's remarks "privileged"?
(3) Did the judge's remarks give rise to a reasonable apprehension of bias?

Result:

Appeal allowed. New trial ordered.

(1) The judge's letter to the Court of Appeal was part of the record in accordance with s. 682(1) of the *Criminal Code* or by agreement.

(2) No privilege attached to the judge's remarks.

(3) The judge's comments made prior to any argument gave rise to a reasonable apprehension of bias because they showed the judge:

   (a) had predetermined guilt on one charge;

   (b) had made findings which informed his critical comments about K.J.M.J.'s character and credibility.

(4) The judge's attempts to expunge his impugned remarks from the record both at trial and afterwards, in all the circumstances, also gave rise to a reasonable apprehension of bias.

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 99 paragraphs.

NOVA SCOTIA COURT OF APPEAL

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Date: 20231129
Docket: CAC 513996
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Between:

K.J.M.J.

Appellant

v.

His Majesty the King

Respondent

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

Judges:	Bryson, Bourgeois and Derrick JJ.A.
Appeal Heard:	October 18, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson J.A.; Bourgeois and Derrick JJ.A. concurring
Counsel:	Lee Seshagiri, for the appellant Jennifer MacLellan, K.C., 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:

Introduction

[1] The astonishing behaviour of the trial judge in this case requires a salutary reminder of the duty of all judges privileged to hear and decide cases in court:

> […] it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.[1]

[2] This legal imperative flows from the "overriding public interest that there should be confidence in the integrity of the administration of justice".[2]

[3] K.J.M.J. appeals to this Court from his convictions for sexual misconduct with his stepdaughter. Judge Alain Bégin found him guilty of sexual assault, touching a child for a sexual purpose, and invitation to sexual touching (respectively ss. 271, 151, and 152 of the *Criminal Code*). K.J.M.J. says his convictions should be set aside and a new trial ordered owing to a reasonable apprehension of bias arising from comments and conduct of the trial judge.

[4] K.J.M.J. alleges the trial judge made three serious errors creating a reasonable apprehension of bias by:

(a) Offering premature conclusions on the outcome of certain charges, prior to the conclusion of trial;

(b) Repeatedly making disparaging and conclusory remarks about K.J.M.J.'s character, triggering the forbidden risk of propensity reasoning; and

(c) Attempting to "cover up" his errors by directing that a part of the trial transcript be deleted from the record, in violation of the open court principle and the right of meaningful appellate review.

[5] The passages to which K.J.M.J. takes particular exception include:

---

[1] *Per* Lord Hewart C.J., *The King v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256 at p. 259, quoted by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at ¶66.

[2] *Per* Lord Goff in *R. v. Gough*, [1993] A.C. 646 (H.L.) at p. 659, quoted by the Supreme Court of Canada in *Wewaykum* at ¶66.

> **THE COURT:** Is he swimming with angels? Look at me, sir. Is he swimming at angels and totally innocent? Absolutely not. Does he have issues and invited some young child to do stuff to him? Absolutely. Zero doubt in my mind. He's got issues. Yeah, I'm looking at you. You've got issues, sir. You've got sexual deviance issues. There's no doubt in my mind. Is it proven here? Probably not. Do you have issues? Yeah, you do. You should get them fixed. Do you understand?
>
> […]
>
> **THE COURT:** He'd be guilty of count three, inviting a child to do stuff. That's where I'm at. Sexual assault, I'm not so sure. You know, the fact she says there wasn't penetration, it was just a quarter or a half, that's -- that's her mindset and that doesn't convince me there was no penetration.

[6] Shortly after, the Crown asked the judge, "I think I'd still like an opportunity to try and at least make some argument".

[7] No doubt K.J.M.J.'s counsel shared a similar sentiment.

[8] The Crown's request to make submissions prompted the judge to characterize his comments as "initial impressions", which should not be in the record:

> **THE COURT:** […] while it was recorded, it's an off-the-record comment and won't form part of the transcript because we just -- I was invited to give some initial impressions and I gave my initial impressions. […] I honestly don't know where I'm leaning on this for the most part.

[9] A few moments later, he said:

> **THE COURT:** So when they prepare the transcript, make sure they don't have my comments from when we sat back and talked.

[10] We know of the impugned exchange and the judge's attempt to expunge it from the record because the transcriptionist asked the Crown whether it should be included and was instructed to do so. More will be said about this later.

[11] Remarkably, the judge wrote to the Court of Appeal in reply to a court-requested inquiry of court staff regarding a restriction placed on the audio recording of the trial. The judge claimed a purported "privilege" which he did not "waive" and questioned the Crown's authority to authorize inclusion of his "initial impressions" in the record. Again, more will be said about this email later.

[12] K.J.M.J. says that prior to hearing any argument, and so before conclusion of the trial, the judge expressed strong negative conclusions about his character, his credibility, and indicated a predetermination about one of the charges.

[13] The Crown does not defend the propriety of the judge's comments but argues that no reasonable apprehension of bias arises in the full context of the case. While the judge's comments were "unfortunate", they were heard after all of the evidence was in and reflected merely a "preliminary appreciation of the case". The Crown says no "nefarious purpose" should be imputed to the judge for attempting to delete part of the record.

[14] The impropriety of the judge's conduct does not warrant the Crown's generous characterization. For reasons elaborated on below, the judge's startling language and behaviour gives rise to a reasonable apprehension of bias and offends judicial impartiality, the presumption of innocence, the open court principle, the right to make full answer and defence, and could have frustrated appellate review.

[15] The convictions should be set aside and a new trial ordered.

[16] Following a brief factual overview, it will be convenient to address:

(a) The impugned record of which K.J.M.J. complains;

(b) Whether the trial judge's written objection to the impugned record should also be considered part of the record;

(c) Whether the impugned record is "privileged" as the judge claims;

(d) The law of reasonable apprehension of bias;

(e) Whether a reasonable apprehension of bias arises in this case owing to:

(i) The judge's "predetermination" of the charges;

(ii) The judge's comments on K.J.M.J.'s character and credibility;

(iii) The judge's attempted "cover up" of the impugned record.

Factual Overview

[17] In 2012, K.J.M.J. began a relationship with the complainant's mother, who had two children: the complainant and a son three years younger than his sister. In 2016, K.J.M.J. and the complainant's mother were married. In November 2019, when she was 14, the complainant told her mother that K.J.M.J. had been "molesting" her since grade three.

[18] K.J.M.J. was asked to leave the house and did so. A complaint was made to the police in March of 2020.

[19] In June of 2020, K.J.M.J. was charged with sexual assault, touching a young person for a sexual purpose, and inviting a young person to touch him for a sexual purpose. K.J.M.J. pleaded not guilty. The evidence was heard on June 29 and 30, 2021. The complainant and her mother testified. K.J.M.J. testified in his own defence and denied all the charges.

[20] At the conclusion of the evidence, before any argument had been heard, Crown counsel asked the judge on behalf of both counsel if "there's certain parts or certain issues we should focus on" and whether he had "any preliminary thoughts". After an evidentiary preamble, the judge then described K.J.M.J. as a "sexual deviant" who was guilty of inviting the complainant of touching for a sexual purpose, about which he had "[z]ero doubt". Further problematic remarks followed, concluding with the judge's comments that he was speaking "off-the-record" and directing exclusion of his comments from the record.

[21] The trial was then adjourned for submissions. These were made on November 16, 2021. The judge reserved his decision. He delivered it on January 24, 2022. He found the complainant's evidence "compelling and credible". He rejected the evidence of K.J.M.J. He did not believe K.J.M.J.'s denials. He convicted K.J.M.J. of all three charges. The case was adjourned for sentencing.

[22] On March 1, 2022, K.J.M.J. was sentenced to eight years in prison. Shortly thereafter, he filed his own handwritten Notice of Appeal in which he alleged "judicial bias and misconduct" amongst other things. This became the sole ground of appeal in this Court, elaborated on once counsel was retained as "conduct [giving] rise to a reasonable apprehension of bias".

The Impugned Record

[23] The record on which K.J.M.J. relies for his appeal begins at the conclusion of the evidence at trial but before arguments had been scheduled or heard. K.J.M.J. takes especial exception to the emphasized passages:

> **COURT RESUMED** (TIME: 2:29 p.m.)
>
> **MR. HOEHNE**: Your Honour.
>
> **MS. BARRETT**: Myself and Mr. Hoehne just spoke, and we just felt perhaps there might be -- or if Your Honour is prepared to do so -- as Crown I'm in no way conceding this case at this point in time but, you know, sometimes we informally have discussions. If -- if, for example, there's certain parts or certain issues we should focus on versus not, if Your Honour has any preliminary thoughts -- I mean, sometimes judges don't need so much time to make decisions, but if you have any preliminary thoughts, or if you don't want to go there -- if you want to give us guidance on what issues to focus on if we...
>
> **THE COURT**: This is *Twinley*, right? This is *Twinley* all day long. It's absolute denial. So, yeah, I can see why you went where you did with your cross-examination, because there's -- he said no. He's not going to say yes when he said no. Very straightforward and clean. So where I'm at is you sort of take the little tidbits that come out that don't make sense, or I thought don't make sense, but now all of a sudden I'm wrong. I'll be totally blunt. I was absolutely disbelieving when he said yesterday that they all sat down as a family after the breakup and had a chat. I thought there's no way possible. She told him to get the heck out of the house. He was irate, she was emotional, and I'm thinking, boy, that's a big chink in the armour of *Twinley*. It just doesn't make such. You know, it doesn't make sense stacked up with everything else. And then she says, "Yeah, it happened." So I'm at -- I'm at a loss. I truly am at a loss now. I was thinking -- those type of things is where I was at. That's where I was heading at. And then a couple of other little snippets come. I'm not sure how much further you want me to go but I can come close to giving you a decision right now.
>
> **MS. BARRETT:** I'm...
>
> **THE COURT**: ***Is he swimming with angels? Look at me, sir. Is he swimming at angels and totally innocent? Absolutely not. Does he have issues and invited some young child to do stuff to him? Absolutely. Zero doubt in my mind. He's got issues. Yeah, I'm looking at you. You've got issues, sir. You've got sexual deviance issues. There's no doubt in my mind. Is it proven here? Probably not. Do you have issues? Yeah, you do. You should get them fixed. Do you understand?***
>
> **[K.J.M.J.]**: ***I understand what you're saying, Judge.***
>
> **THE COURT**: ***Yeah. Don't argue with me because I know I'm right. This is what I do for a living.***

<u>MS. BARRETT</u>: Based upon that, Your Honour, one of the frustrations I've had doing sexual assaults with judge and jury is victim, family members ...

<u>THE COURT</u>: ***He'd be guilty of count three, inviting a child to do stuff. That's where I'm at.*** Sexual assault, I'm not so sure. You know, the fact she says there wasn't penetration, it was just a quarter or a half, that's -- that's her mindset and that doesn't convince me there was no penetration.

<u>MS. BARRETT</u>: Okay.

<u>THE COURT</u>: But there's just lots of little things there. ***Did he have issues? Does he have sexual deviance issues? No doubt in my mind he does. No doubt in my mind he does.*** It's just such a high threshold. ***Did something happen? Absolutely.*** Do I know exactly what happened? No.

<u>MS. BARRETT</u>: Perhaps...

<u>THE COURT</u>: ***Does he have issues, sexual deviance issues? Absolutely.***

<u>MS. BARRETT</u>: Perhaps I can speak again with Mr. Hoehne.

<u>THE COURT</u>: Yeah.

<u>MS. BARRETT</u>: And we might be able to sort things out.

<u>THE COURT</u>: Yeah, absolutely.

<u>MS. BARRETT</u>: Perhaps.

<u>THE COURT</u>: Don't go anywhere, sir.

COURT RECESSED (TIME: 2:33 p.m.)

COURT RESUMED (TIME: 2:51 p.m.)

[…]

<u>MS. BARRETT</u>: Sorry I was a little bit longer, Your Honour.

<u>THE COURT</u>: That's fine.

<u>MS. BARRETT</u>: I did want an opportunity to speak with the victim, her support person and her mom. I think I'd still like an opportunity to try and at least make some argument.

<u>THE COURT</u>: Yeah.

<u>MS. BARRETT</u>: Does Your Honour feel that we are beyond that ...

<u>THE COURT</u>: No.

<u>MS. BARRETT</u>: ... at this point in time?

<u>THE COURT</u>: No. I mean, that's pretty much -- ***while it was recorded, it's an off-the-record comment and won't form part of the transcript***

because we just -- I was invited to give some initial impressions and I gave my initial impressions. I -- you know, I honestly don't know where I'm leaning on this for the most part. Things happened, there's no doubt about that. How far, how much can I accept, you know, it's the accepting some of the witness's evidence and not the other, but I have to go back and think it through myself.

MS. BARRETT: And ...

THE COURT: I certainly made notes in the margins of some of these. ***And he could be in deep trouble still***. We'll figure it out.

MS. BARRETT: I looked -- I looked for guidance, Your Honour, because, you know, while I'm not conceding that we don't have a case, you sometimes see that there's some issues. But that being said, it's -- when you're in a case such as this, you may think you heard the evidence one way ...

THE COURT: Yeah.

MS. BARRETT: ... and maybe it's -- maybe it's -- you know, in reading the transcripts ...

THE COURT: Yeah.

MS. BARRETT: ... you see something a little bit different.

THE COURT: It's not clear cut.

MS. BARRETT: No.

THE COURT: It's -- it's not clear cut.

MS. BARRETT: You know I've conceded cases where it's clear ...

THE COURT: Oh, yeah, Absolutely.

MS. BARRETT: ... in the middle of trial, but this one ...

THE COURT: No.

MS. BARRETT: This one is -- yeah, I think there's ...

THE COURT: Things happened. Exactly what do I think happened? I'll figure that out as we go on. But we'll go from there. ***So when they prepare the transcript, make sure they don't have my comments from when we sat back and talked.***

[Emphasis added.]

[24] The foregoing was included in the Appeal Book on the strength of an agreement between counsel embodied in the following letter submitted to the Court:

September 19, 2023

VIA COURIER

Caroline McInnes, Registrar
Nova Scotia Court of Appeal
The Law Courts – 1815 Upper Water Street
Halifax, NS B3J 1S7

Dear Ms. McInnes:

RE: *[K.J.M.J.] v. His Majesty the King*, C.A.C. No. 513996

The Appellant, with consent of the Respondent, seeks to put forward three agreed facts to the Court for the purposes of the above-noted appeal:

1. The external transcriptionist preparing the transcript of the Appellant's trial for the present appeal contacted the Nova Scotia Public Prosecution Service's Appeals and Special Prosecutions Office to inquire whether the portion of the trial transcript referenced by the Trial Judge as being "off-the-record" should be included in the transcript.
2. The query was brought to the attention of Mr. Mark Scott, K.C., who confirmed that it should be included.
3. The parties understand that the transcriptionist's request pertained to the portion of the trial transcript found at Tab 13 of the Appeal Book at page 210, line 10 to page 216, line 11.

Yours truly,
NOVA SCOTIA LEGAL AID

Lee V. Seshagiri

CC: Jennifer MacLellan, KC

[25] The parties prepared the appeal on the basis of the inclusion of the impugned exchange and on the understanding described in this letter. But more was to follow.

[26] Trial proceedings are recorded. Typically, the Court of Appeal has access to these audio recordings. In this case, the Court could not listen to the recording of the foregoing transcript because access had been restricted. Accordingly, the Court instructed a Deputy Registrar of the Court to write to counsel as follows:

> The Panel thanks you both for Mr. Seshagiri's letter of the 19th, copied to Ms. MacLellan.
>
> The Panel has a follow up question. A restriction has been placed on the Voxlog recording of the proceedings transcribed from pp. 210 to 216, referred to in Mr. Seshagiri's letter, so the Panel is currently unable to listen to that part of the record.

The Panel requests that counsel make inquiries: 1) to determine who authorized the restrictions placed on the Voxlog recording; 2) when those restrictions were placed; and 3) what reason or explanation was given for the restriction.

In view of the imminence of the appeal, the Panel looks forward to your prompt reply.

[27] As a result of this request, counsel wrote to the Directors of Court Services:

September 25, 2023

VIA COURIER

Allan Coley and Peter James
Directors of Court Services – Nova Scotia Department of Justice
1690 Hollis Street, 4th floor (B3J 3J9)
P.O. Box 7
Halifax, Nova Scotia – B3J 2L6

Dear Mr. Coley and Mr. James:

RE: *[K.J.M.J.] v. His Majesty the King*, C.A.C. No. 513996

As per the attached letter from Sarah McClare on behalf of the Nova Scotia Court of Appeal, dated September 22, 2023, counsel for the Appellant and Respondent are seeking additional information that may be relevant to the above-noted appeal.

The parties would be appreciative if Ms. McClare's letter could be reviewed at your earliest convenience and the three questions posed by the Court of Appeal responded-to forthwith. Please address your response to both appellate counsel.

You will note that Ms. McClare's letter references prior correspondence from Lee Seshagiri to Caroline McInnes, dated September 19, 2023. A copy of Mr. Seshagiri's letter, as well as relevant portions of the *R. v.* [*K.J.M.J.*] trial transcript referred to therein, are attached to provide context to the inquiries.

<u>The appeal hearing in this case is scheduled for October 18, 2023</u>. Thank you very much for your prompt attention to this request.

Yours truly,
NOVA SCOTIA LEGAL AID

Lee Seshagiri

CC: Jennifer MacLellan, KC
CC: The Honourable Judge Alain Bégin
CC: The Honourable Chief Judge Perry Borden

CC: Tiffanie Bates (Truro Provincial Court)
enclosures

[28] In reply, on September 26, 2023, the Registrar of the Court received this email from the trial judge which was copied to counsel:

> I am including all persons whose name appears in the package of documents that I received today. The documents are:
>
> - the letter by Mr. Seshagiri dated September 19, 2023, with attached transcript marked Tab 13
>
> - the letter by Ms. McClare dated September 22, 2023
>
> - the letter by Mr. Seshagiri dated September 25, 2023
>
> It is very obvious from the transcript at Tab 13 that the discussion between myself and counsel were to be without prejudice and off the record:
>
> > **- pg. 214: "...it's an off-the-record comment and won't form part of the transcript..."**
> >
> > **- pg. 216: "So when they prepare the transcript, make sure they don't have my comments from when we sat back and talked."** [Emphasis in original.]
>
> It is very clear that ***I, as the trial judge, was invited by counsel***, after counsel had met outside of the courtroom to discuss this for 18 minutes, ***to provide comments. The only reason that I agreed to do so was that I was invited by counsel, and that it was on the condition that it would not form part of the record/transcript***.
>
> ***I question where Mr. Scott finds the authority to go behind the clear agreement between counsel and the trial judge to unilaterally decide that the "off-the-record" comments would now somehow be part of the record and transcript. This is certainly a breach of basic legal principles.***
>
> For this to occur is a violation of the agreement between myself and counsel, and it undermines the agreement on which I agreed to speak with counsel. This will set a very dangerous precedent for any candid discussions presumed, and agreed, to be "off record" between counsel and any judge going forward.
>
> I do <u>not</u> consent, nor agree, to the contents at Tab 13 being part of the appeal transcript. The obvious privilege that attached to this conversation is not being waived. [Emphasis in original.]
>
> Alain Bégin
> Provincial Court Judge
>
> [Bold italicized emphasis added.]

[29] More will be said later about the novel legal propositions in this email. For now, it suffices to observe that the record does not support the judge's assertions of any agreement that his comments were conditional on them being "off the record". The judge's attempt to impose confidentiality on his remarks followed rather than preceded his indiscretions. Regardless, it is improper for the judge to suggest he can insulate himself from appellate scrutiny by pausing the trial as he seems to suppose.

[30] At the appeal hearing, the Court asked counsel to provide additional written submissions on whether the judge's email should be considered as part of the record for the purposes of appeal. Written submissions by counsel followed.

Should the judge's September 26, 2023 email form part of the record?

[31] The judge's email was a reply to counsel's letter to Court Services of September 25, 2023 inquiring about when, why and who authorized restriction of access to the audio recording of the impugned passages. K.J.M.J. submits that the judge's email of September 26 should form part of the record and is admissible under s. 682(1) of the *Criminal Code*, which provides:

> **Report by judge**
>
> 682 (1) Where, under this Part, an appeal is taken or an application for leave to appeal is made, the judge or provincial court judge who presided at the trial shall, at the request of the court of appeal or a judge thereof, in accordance with rules of court, furnish it or him with a report on the case or on any matter relating to the case that is specified in the request.

[32] K.J.M.J. cites *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, in which the majority accepted that reports under s. 682(1) may be used in "rare circumstances where something has occurred which is not reflected on the record upon which opposing counsel cannot agree" (at p. 192).

[33] K.J.M.J. also refers us to *R. v. Pan; R. v. Sawyer*, 2001 SCC 42 at ¶45 which describes the role of s. 682(1) and what it may not be used for:

> [45] A judge's decision may be challenged on appeal, but judges cannot be compelled to testify as to how and why they arrived at a particular judicial decision: *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56. In fact, as a general rule, reviewing courts do not seek information from the courts whose judgments they are reviewing in order to assess the likely impact of apparent

> errors. The limited exception to this is s. 682(1) of the *Criminal Code*, which requires the trial judge to "report" to the court of appeal at the request of the court of appeal. As noted by Cory J. for the majority of this Court in *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, at p. 192, the court of appeal should only request such a report "in those rare circumstances where something has occurred which is not reflected on the record upon which opposing counsel cannot agree". In any event, it is neither designed nor used to probe into the deliberative process of the decision maker, be it judge alone or jury.

[34] Other cases illustrative of an appropriate use of s. 682(1) relate to clarifying the trial record: *R. v. C.W.G.* (1993), 36 BCAC 234; *R. v. Sadoroszney* (1999), 132 C.C.C. (3d) 320 (BCSC); *R. v. Williams* (1995), 58 BCAC 53; *R. v. MacMillan*, 2002 BCCA 306; *R. v. Hossainnia*, 2011 BCCA 117; *R. v. Lund*, 2006 BCCA 296.

[35] K.J.M.J. argues the judge's email should be considered as part of the record because this Court's request for additional information did not relate to the merits of the judge's decision. Nor did the judge's reply do so or trespass on the deliberative process. The inquiry in this case concerned the scope of the record. Moreover, the judge's email was not an unsolicited interference in the appeal. It responds to counsel's letter to Court Services, copied to the judge. Counsel's letter implemented this Court's request.

[36] K.J.M.J. adds that his appearance of bias argument does not depend upon admission of the September 26 email from the trial judge but is augmented by that letter.

[37] For its part, the Crown concedes that the trial judge's email can be considered part of the record either under s. 682(1) or simply by agreement. The Crown agrees the email should be part of the record on appeal.

[38] For the reasons advanced by K.J.M.J. and, additionally, in light of the Crown's concession, the September 26 email should form part of the record on appeal.

Was the impugned record "privileged" as the judge claims?

[39] The judge's comments that the impugned passages were off the record first arose after Crown counsel's request for an opportunity to make argument:

> **MS. BARRETT:** I did want an opportunity to speak with the victim, her support person and her mom. I think I'd still like an opportunity to try and at least make some argument.

THE COURT: Yeah.

MS. BARRETT: Does Your Honour feel that we are beyond that ...

THE COURT: No.

MS. BARRETT: ... at this point in time?

THE COURT: No. I mean, that's pretty much -- while it was recorded, it's an off-the-record comment and won't form part of the transcript because we just -- I was invited to give some initial impressions and I gave my initial impressions. I -- you know, I honestly don't know where I'm leaning on this for the most part.

[40] From the foregoing, it would appear the judge considered his comments to be "off-the-record" because he was invited to give some "initial impressions" and he gave them. In his letter, the judge asserted an agreement with counsel; questioned the Crown's authority to include the impugned passages within the record; and claimed that he had not "waived" any "privilege".

[41] The Crown does not share the judge's view that his comments were "off the record". Rather, the Crown observes that the judge seemed to regard his remarks as an "informal resolution conference of sorts", which are often "off the record" and "not recorded". The Crown suggests it is possible that this is what the judge "mistakenly intended" by asking the court clerk not to transcribe his impugned remarks.

[42] The judge's September 26 email makes several alarming assertions. The factual error of an "agreement" with counsel that his comments were "off the record" has already been noted. But the judge goes further. He claims the Crown's decision to include the impugned remarks on the record offends "basic legal principles". He asserts a right to "consent" to those remarks forming part of the record, which he purports not to have "waived". No authority is cited for these astounding propositions because there is no such authority.

[43] Judicial independence recognizes two judicial privileges. One immunizes judges from civil suit for actions taken in the course of their judicial duties. A second exempts them from testifying with respect to those judicial duties.[3]

[44] Judicial privilege exists to protect the institution of the court, not individual judges. The privilege cannot be waived by an individual judge (see: *Ermina v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1785

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[3] *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796 at ¶89.

(FCTD), 160 F.T.R. 317 at ¶10; *Kosko v. Bijimine*, 2006 QCCA 671 at ¶43; *R. v. Baldovi*, 2016 MBQB 90 at ¶22).

[45] It is immediately obvious that the claimed "privilege" in this case does not exist. The exchange occurred in open court with counsel and parties present. Other than exceptions that have no application here, there is no privilege over conversations with the judge during trial.

[46] The judge's asserted "privilege" offends the open court principle.[4] The judge cannot evade breach of his judicial obligations by claiming that such remarks were "off the record", whether solicited by counsel or not. The errors of counsel do not define the duties of the judge.

[47] The judge's disturbing comments betray a fundamental misconception of the role of judge and counsel in a criminal trial. In both criminal and civil proceedings, it is possible to have "off the record" discussions between counsel and sometimes with a judge present in an effort to reach an informal resolution of the merits. A criminal trial is not one of those occasions. Such efforts at resolution do not occur mid-trial in open court. Judges involved in pre-trial "off the record" attempts at resolution do not hear the case on the merits. That is for another day and another judge. The trial judge here appears to have confused tentative directions with impermissible conclusions.

[48] Off the record discussions are not immune from appellate review for reasonable apprehension of bias, even in civil cases when less is at stake for the complaining party. In *Sandboe v. Coseka Resources Ltd.*, 1989 ABCA 22, the offending judicial language occurred in the judge's chambers with only counsel present. That did not preclude appellate review for a reasonable apprehension of bias. But in a criminal trial, the accused is entitled—indeed obliged—to be present at trial.[5] That means being present for anything affecting an accused's vital interests.[6] Absent the accused, meetings between counsel and the judge in which defences and possible pleas were discussed, and in which the judge offered an opinion, constituted a breach of s. 650(1) of the *Criminal Code*.[7]

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[4] The principle that court proceedings are presumed to be open to the public: *Sherman Estate v. Donovan*, 2021 SCC 25; *La Presse inc. v. Quebec*, 2023 SCC 22 at ¶5; *Endean v. British Columbia*, 2016 SCC 42 at ¶83-85.
[5] *Criminal Code*, R.S.C. 1985, c. C-46, s. 650(1).
[6] *R. v. Walker*, 2010 SKCA 84 at ¶21-27; *R. v. Schofield*, 2012 ONCA 120 at ¶17-19.
[7] *R. v. Roy* (1976), 32 C.C.C. (2d) 97 (Ont. C.A.).

[49] It is not improper for a judge to probe counsel during argument, as the Ontario Court of Appeal said in *Stewart*:[8]

> I do not quarrel with the trial judge's right to identify his concerns for counsel or to set out his tentative conclusions ***in the course of argument***. Nor would I suggest that an indication by a trial judge of his views as to the credibility of various witnesses ***in the course of argument*** necessarily destroys the appearance of the fairness of the trial. ***In this case, however, where credibility was the sole live issue at the end of the trial, the trial judge's repeated, emphatic description of the appellant as a liar and the defence as concocted or orchestrated suggests the trial judge had reached a firm, unalterable conclusion as to the appellant's credibility at the outset of the argument***. When these comments are considered in conjunction with the comments made to the appellant during his evidence, the reasonable observer could conclude that the trial judge had made his assessment of the appellant's credibility early in the appellant's cross-examination and that his statements made during argument were affirmations of that assessment.
>
> [Emphasis added.]

[50] It sometimes happens that counsel will ask a judge whether there are issues of fact or points of law on which the judge would especially like to hear argument. In many cases, that is unobjectionable. In this case, credibility was fundamental and such comments were neither necessary nor desirable. Counsel was wrong to ask, and the judge was certainly wrong to oblige.

[51] What *Sandboe* and cases like it make plain is that conduct giving rise to a reasonable apprehension of bias need not be "on the record" to be objectionable.[9] Unrecorded comments in a judge's chambers may give rise to a reasonable apprehension of bias and trigger a request for recusal.

The Law Respecting Reasonable Apprehension of Bias

[52] The *Charter* links the presumption of innocence to a fair trial before an independent and impartial tribunal:

> 11. Any person charged with an offence has the right: […]
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

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[8] *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.) at p. 319.

[9] *Schofield*, *supra*; *R. v. Ontario Corp. 844781*, [1996] O.J. No. 4496 (Ct J (Gen Div)).

[53] The paramountcy of impartiality has been prominently noticed by the Supreme Court (*R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484). In *R. v. Schneider*, 2004 NSCA 99, this Court said:

> [68] Nothing is more important in the legal system than the impartiality of judges. […]

[54] The vital necessity of judicial impartiality is a very old principle of our common law. Sir Matthew Hale was Chief Justice of the King's Bench of England in the 1670s. He put it this way in some of his resolutions which he wrote out to guide his conduct at the time:

> That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.
>
> That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.[10]

The principles embodied in these sentiments endure today.

[55] If a reasonable apprehension of bias is established owing to a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law. The recent decision of *R. v. Lilly*, 2023 NSCA 80 at ¶44, quotes from relevant jurisprudence of this Court applying Supreme Court of Canada authority:

> [44] This issue arises for the first time on appeal. The test for determining a reasonable apprehension of bias was set out in *C.B. v. T.M.*, 2013 NSCA 53:
>
> > [31] If a reasonable apprehension of bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at ¶ 99. In *C.H.D.* at ¶ 25, Hamilton J.A., for this court set out the test for reasonable apprehension of bias:
> >
> > > **25** The test for a reasonable apprehension of bias is set out in **R. v. R.D.S.**, [1997] 3 S.C.R. 484:
> > >
> > > > [31] The test for reasonable apprehension of bias is that set out by de Grandpré J. in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this

[10] Lord Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) at p. 20.

> > Court in the intervening two decades: [citations omitted]. De Grandpré J. stated, at pp. 394-95:
> >
> > > ... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
> >
> > The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added]
>
> [32] In *S. (R.D.)* at ¶ 35, the Supreme Court of Canada observed that according to its Commentaries on Judicial Conduct (1991), the Canadian Judicial Council stated at p. 12:
>
> > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.
>
> [33] According to *S. (R.D.)*, to successfully assert that a judge might be partial, one must demonstrate that the beliefs, opinions, or biases held by the judge prevent him or her from setting aside any preconceptions and reaching a decision based only on the evidence:
>
> > 113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly. [Emphasis added]
>
> [Emphasis in original.]

[56] Establishing a reasonable apprehension of bias is very difficult to do, in part because there is a strong presumption of judicial impartiality. The appellant must lead evidence establishing "serious grounds" sufficient to justify that a decision

maker should be disqualified owing to an apprehension of bias. Whether such an apprehension exists is highly fact specific and depends on the context.[11]

[57] The test for a reasonable apprehension of bias is objective and is related to the requirement that justice must be seen to be done.[12]

[58] Once a reasonable apprehension of bias is found the only remedy is a new trial because the judge has lost jurisdiction.[13]

Does a reasonable apprehension of bias arise in this case?

[59] K.J.M.J. says a reasonable apprehension of bias is apparent from:

a) The judge's predetermination of at least one charge;
b) His critical comments of K.J.M.J.'s character;
c) His attempt to "cover up" his in-court comments.

Predetermination of the charges?

[60] K.J.M.J. begins his criticism of the judge's comments and conduct by claiming the judge predetermined the invitation to sexual touching charge, while being more equivocal regarding sexual assault and touching for a sexual purpose.

[61] The judge's problematic comments were prefaced with, "I can come close to giving you a decision right now". These words are dangerous territory. The trial is not concluded until the parties have made submissions or had the opportunity to do so. A verdict announced before submissions deprives an accused of the right to make full answer and defence. As K.J.M.J. argues, this has been uncontroversial since the Supreme Court's decision in *R. v. Aucoin*, [1979] 1 S.C.R. 554, relied upon by this Court in *R. v. MacLean* (1991), 106 N.S.R. (2d) 213:

> [5] In our opinion, it is incumbent upon a trial judge to give a party appearing before him an opportunity to present argument before making a decision on any issue. In particular, a party must be allowed to make submissions at the close of the evidence. See **R. v. Aucoin**, [1979] 1 S.C.R. 554. In the context of a criminal case, these rights are among those guaranteed to an accused as a component of

[11] *Nova Scotia (Attorney General) v. MacLean*, 2017 NSCA 24 at ¶39, relying upon *Wewaykum*, *supra*.
[12] *Wewaykum*, *supra* at ¶67.
[13] *Curragh Inc.*, *supra* at ¶5, followed in *S. (R.D.)*, *supra* at ¶99.

> fundamental justice under s. 7 of the **Charter**, and more particularly by s. 11(d) thereof, and by s. 802(1) of the **Criminal Code**.

[62] K.J.M.J. highlights the judge's comments on the invitation to sexual touching:

> Does he have issues and invited some young child to do stuff to him? Absolutely. Zero doubt in my mind. […] He'd be guilty of count three, inviting a child to do stuff. [K.J.M.J.'s emphasis.]

[63] K.J.M.J. acknowledges judicial uncertainty regarding sexual assault:

> Sexual assault, I'm not so sure. [K.J.M.J.'s emphasis.]

[64] The judge went on:

> You've got sexual deviance issues. […] Is it proven here? Probably not. […] there's just lots of little things there. […] Does he have sexual deviance issues? No doubt in my mind he does. […] It's just such a high threshold. Did something happen? Absolutely. Do I know exactly what happened? No. [K.J.M.J.'s emphasis.]

[65] K.J.M.J. relies upon the Ontario Court of Appeal in *Roy*,[14] in which the judge, in his chambers, suggested the accused consider accepting a plea on a lesser charge. The Ontario Court of Appeal found this compromised judicial impartiality, the presumption of innocence, and trial fairness:

> [5] After most anxious consideration of what was said and the evidence that had been heard, we have reached the conclusion that we must give effect to this ground of appeal. A judge conducting a trial without the intervention of a jury is of course the trier of fact and determines the question of guilt or innocence. In my opinion ***he cannot initiate such a discussion after entering upon the trial and hearing evidence and still preserve the appearance of impartiality and being of an open mind, which qualities are so essential to a fair trial and the meaning of the presumption of innocence. The fact that he initiates such a discussion and sends counsel to the accused with talk of pleas of guilty and terms of sentence could reasonably result in apprehension by the accused that the judge presiding at his trial had reached some conclusions about the case***. It does not hurt to repeat again that justice must appear to be done. This is not limited simply to what is seen from the floor of the courtroom or by the public but includes what transpired here. It is also vital that justice must appear to be done, to the accused

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[14] *Roy*, *supra* at ¶48.

> man in particular. In those circumstances we think the trial lacked this quality and therefore it cannot stand.
>
> [Emphasis added.]

[66] K.J.M.J. also relies upon *R. v. Coreas* (1996), 115 C.C.C. (3d) 353 (Ont. C.A.) in which the trial judge opined the Crown had not proved its case beyond a reasonable doubt prior to the defence electing not to call evidence. Because the judge expressed a conclusion with respect to the Crown's case before the trial was completed, the court of appeal found this to be a miscarriage of justice and ordered a new trial.

[67] Arguing that judges may comment on the evidence mid-trial, the Crown concedes the judge's language in this case was "unfortunate" but maintains that it does not give rise to a reasonable apprehension of bias, citing *R. v. Potter*; *R. v. Colpitts*, 2020 NSCA 9 at ¶743 which quoted from the Alberta Court of Appeal in *R. v. Baccari*, 2011 ABCA 205 at ¶24:

> [24] During argument, trial judges are not precluded from commenting on evidence or attempting to focus the argument on issues of particular concern to the trial judge. Give and take between a trial judge and counsel may be robust but observations made by a trial judge during argument are not pronouncements: ***R. v. Hodson***, 2001 ABCA 111, 281 A.R. 76 at paras. 33 and 35. A trial judge is not precluded from voicing concerns about the evidence. Nor is a trial judge precluded from directing counsel's attention to the real issues in the case. Trial judges are not expected to be mute manikins: ***R. v. W.F. M.*** (1995), 169 A.R. 222 (C.A.) at para. 10.

[68] Notably, *Baccari* distinguishes between "observations" and "pronouncements". In *Baccari*, the judge asked counsel to focus on evidence placing Baccari at the scene of the crime. Identity was crucial. The judge was focussing on the evidence, not giving a decision.

[69] By contrast, in this case, the judge unequivocally said K.J.M.J. invited "some young child to do stuff to him"; and, to repeat, "Absolutely. Zero doubt in my mind. […] He'd be guilty of count three, inviting a child to do stuff". These are not comments on the evidence, but conclusions.

[70] Next the Crown refers us to *R. v. Lee*, 2011 BCSC 1518, in which the judge said while the accused was testifying, "Oh, Mr. Lee, you're really stretching things here. You're a terrible liar". The Summary Conviction Appeal Court did not find apprehension of bias:

> [20] Prejudice or bias implies judgment before all of the evidence is heard. An indication that a court has made up its mind *before* a party has had an opportunity to give his or her side of the case will likely be fatal to any subsequent judicial determination. In any case a court hears, however, it continuously evaluates the strength of the evidence. It is obviously very important, even where the case for the Crown appears to be strong, that the court keep an open mind until all the evidence has been heard.
>
> [21] In a brief proceeding in which an accused person testifies as the only witness for the defence, a trier of fact may well have a provisional view of the case at the end of his direct evidence. The court's intervention in this case was at a point much later, well into the cross-examination, that is, after the appellant had been given a full opportunity to say what he had to say. Nothing in the cross-examination that follows the court's intervention or in the brief re-examination suggests that the appellant's evidence was preempted, or that there was evidence helpful to his case that the court disregarded. The judge spoke at a point where, in evidentiary terms, the full case was before the court.
>
> [Emphasis in original.]

[71] Respectfully, these comments are wrong in law if they imply that a judge can display bias and a predisposition respecting credibility, prior to final argument.[15]

[72] The Crown rightly insists that the judge's challenged language must be placed in context. As K.J.M.J. concedes, not all of the judge's language betrayed a predisposition, or at least predisposition unfavourable to K.J.M.J.

[73] The judge was "not so sure" K.J.M.J. was guilty of sexual assault, "Did something happen? Absolutely. Do I know exactly what happened? No".

[74] After the Crown asked for an opportunity to make argument, the judge did say, "I honestly don't know where I'm leaning on this for the most part". Later he said, "It's not clear cut". Many months passed before a decision was rendered. The Crown says this shows the judge was taking time to reflect.

[75] But as the Crown argues, context is important. Most of the judge's equivocal language followed his insistence that his comments were "off-the-record" and "won't form part of the transcript". An objective observer could reasonably consider the judge's apparent equivocation as damage control. The judge's earlier conclusions about K.J.M.J.'s credibility and guilt cannot be retrieved by a belated

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[15] *R. v. Hossu* (2002), 162 O.A.C. 143 at ¶19; *R. v. Lyttle* (2005), 203 O.A.C. 41 at ¶22.

resumption of a proper judicial demeanour.[16] Nor can one infer indecision and reflection simply because the judge rendered his decision months later. Time alone does not mitigate the apparent bias displayed in the comments made.

[76] The Crown adds that K.J.M.J. had an obligation to raise the issue of reasonable apprehension of bias as soon as possible. The Crown submits "[t]he basis for this rule is waiver: a party cannot ask for remedy from a tribunal and afterwards claim reasonable apprehension of bias".[17]

[77] Typically, three concerns arise with apprehension of bias claims raised for the first time on appeal: the potential for an undeveloped record; the lost opportunity of the trial judge to modify his behaviour or give a corrective instruction; possible gamesmanship by a party waiting for an adverse verdict before complaining.[18] Notwithstanding these concerns, the cases suggest the court will entertain a reasonable apprehension of bias claim on appeal if the record allows the court to make that assessment.

[78] The Crown concedes that failure to raise a reasonable apprehension of bias expeditiously is not always fatal, but insists an appellant alleging bias must move quickly. The Crown refers to this Court's decision in *Potter*, quoting from the Ontario Court of Appeal in *Palkowski v. Ivancic*, 2009 ONCA 705 at ¶73 and 74, cited in *Potter* at ¶784:

> [73] An allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. Judges start with a presumption of impartiality. Where the ground is raised for the first time on appeal in circumstances where there is no record below, this court must exercise great caution: see, e.g., *R. v. Fell*, [2009] O.J. No. 2828, 2009 ONCA 551, at para. 9.
>
> [74] Where counsel in the court below is of the view that the trial judge, or, in this case, the motion judge, is exhibiting bias, they have the obligation to raise it with the judge below at the time. At that point, a record will become available and the judge will make a ruling -- both of which will then be available for this court to review. That was not done here and the motion judge was not alerted to this issue, now raised for the first time on appeal.

[79] Neither *Gedge* nor *Palkowski* were criminal cases with the very serious criminal consequences present for the appellant here. Moreover, in both *Gedge* and

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[16] *Lloyd v. Bush*, 2012 ONCA 349 at ¶57; *Roy*, *supra*.
[17] Citing *Gedge v. Hearing Aid Practitioners Board*, 2011 NLCA 50 at ¶23 and 24.
[18] *R. v. Mills*, 2019 ONCA 940 at ¶227; *R. v. Ruthowsky*, 2018 ONCA 552 at ¶28; *Potter*, *supra* at ¶784 and 810.

Palkowski, both courts of appeal considered the argument of reasonable apprehension of bias on its merits, notwithstanding it had been raised late in the day.

[80] While lamenting the attenuated record, this Court in *Potter* also considered the apprehension of bias claim on the available record.

[81] It would obviously have been preferable if K.J.M.J. had raised the matter of reasonable apprehension of bias before the trial judge. But the fair trial rights of an accused should not turn on the alacrity with which counsel acts—or fails to act—on such a grave allegation. Counsel's silence is not waiver.[19] Raising an issue of reasonable apprehension of bias is a serious matter. In this case, counsel would have been doing so with a judge whom he would see in a busy local provincial court on a regular basis.

[82] No possible curative behaviour by the trial judge is proposed by the Crown. No gamesmanship is apparent. There is no evidentiary vacuum because apprehension of bias was not raised at trial. The judge's provocative comments and his efforts to prevent this Court from considering them are before this Court. We also have the dubious benefit of the judge's objections to our possession of this record.

[83] The specific question for resolution here is whether the judge's remarks meet the test for reasonable apprehension of bias. Adapting the language from *Wewaykum*: what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude? Would this person think it is more likely than not that the judge, whether consciously or unconsciously, did not decide fairly?

[84] The judge's comments, offered prior to closing arguments, disclose his conclusion that K.J.M.J. was guilty of invitation to sexual touching. His language was emphatic and unequivocal. He used words such as "[a]bsolutely" and "[z]ero doubt" in connection with "[h]e'd be guilty of count three". The surrounding circumstances reveal less certainty about the other charges, but they do not diminish the uncompromising language regarding the invitation to sexual touching. The prejudgment here in all the circumstances gives rise to a reasonable apprehension of bias.

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[19] *R. v. Huang*, 2013 ONCA 240 at ¶21.

Impermissible character assessment?

[85] K.J.M.J. refers again to the court's comments that he had "[z]ero doubt" that K.J.M.J. invited a child to "do stuff to him". The judge went on to say that K.J.M.J. had sexual deviance issues and not to argue with him because "I know I'm right". The judge went on to say he had "no doubt" that K.J.M.J. had sexual deviance issues "[a]bsolutely".

[86] K.J.M.J. says this is prejudicial propensity-based reasoning. A sexual deviant is more likely to have committed the offences charged. The judge even invited confrontation with K.J.M.J. saying:

> Look at me, sir. […] Yeah, I'm looking at you. You've got issues, sir. You've got sexual deviance issues. […] Yeah, you do. You should get them fixed. Do you understand? […] Don't argue with me because I know I'm right. […]

[87] As earlier noted, it is a serious error to comment on the credibility of a witness prior to the conclusion of a trial.[20] The judge's aggressive manner here does not project the appearance of an unbiased trial judge who retains an "open mind".[21]

[88] The Crown argues that these comments on character do not constitute propensity of reasoning because they do not involve faulting K.J.M.J. in this case for prior bad behaviour, but are available conclusions on the evidence in this trial. Precisely so. But they are not conclusions the judge was entitled to reach prior to the end of the trial. They are credibility findings. The judge could not have made these comments unless he had already accepted the complainant's evidence and rejected that of K.J.M.J. He did so without the benefit of any argument. He was wrong to do so.

[89] The trial turned on credibility. How could an objective observer have confidence in the enduring impartiality of a trial judge who expressed opinions and findings of fact fundamental to guilt prior to final argument? How could an objective observer have confidence the judge retained an open mind?

[90] Applying the *Wewaykum* test, an informed person keeping in mind the judge's credibility findings that precede any argument and his commentary on

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[20] *Hossu*, *supra* at ¶19; *Lyttle*, *supra*.
[21] *Lilly*, *supra*, at ¶44 citing *C.B. v. T.M.*, 2013 NSCA 53 at ¶32.

K.J.M.J.'s character would reasonably conclude it more likely than not that the judge would not decide fairly.

The judge's "cover up"?

[91] K.J.M.J. says the judge's attempted purging of the record should remove any "lingering doubt" of the impropriety of his remarks.

[92] By retroactively saying that his comments were off the record and directing that they not be included in the transcript, the judge was undermining the open court principle which has constitutional foundation in the right to freedom of expression and the strong presumption that justice should proceed in public view.[22] K.J.M.J. also insists the judge was frustrating the principle of appellate reviewability, critical to fairness in the criminal justice system, citing *R. v. Farinacci* (1993), 67 O.A.C. 197 at ¶24 and *R. v. Sheppard*, 2002 SCC 26 at ¶25, 28, and 46.

[93] K.J.M.J. argues by analogy that out of court communications on material issues by trial judges is wrong and offends the principle that justice not only be done but be seen to be done. Such private communications compromise judicial impartiality.[23]

[94] The Crown's reply, alluded to in the introduction, is that the judge appeared to regard the comments as an informal resolution conference of sorts. In any event, the Crown says a transcript was produced and "is before this Court so no prejudice arises from the Judge's request". The Crown goes on to say there was no violation of the "open court" principle. No attempt to cover up should be inferred.

[95] Respectfully, for reasons already discussed, there is no reasonable basis for concluding that the judge's comments were "off the record". That a transcript was produced and the open court principle was not offended can be attributed to the diligence of the transcriptionist and the probity of Chief Crown counsel. As the judge makes plain in his remarks—and in his subsequent email to this Court—if it were up to him, we would know nothing of his improper comments or his efforts to suppress them.

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[22] *Sherman Estate*, *supra* at ¶30; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76 at ¶29.

[23] *Coreas*, *supra*; *Schofield*, *supra* at ¶21; *Roy*, *supra*.

[96] Again, applying the *Wewaykum* test, the following are highly disturbing errors by the judge:

- factually misstating that there was any agreement with counsel that his impugned remarks would be "off the record";
- the legally groundless assertion of "privilege" over those comments;
- improperly attempting to exclude those comments from the record;
- the legally groundless assertion of non-waiver of "privilege";
- the attempt to restrict access to the audio recordings; and
- the criticism and challenge of the Chief Crown Attorney's decision that the transcript be produced,

which give rise to a reasonable apprehension of bias on the part of the trial judge.

Conclusion

[97] The judge's statements prior to conclusion of trial concerning K.J.M.J.'s credibility and his guilt respecting at least one charge transcend injudicious musing. They displace the high bar of the presumption of judicial impartiality. They give rise to a reasonable apprehension of bias. That apprehension is amplified, not dispelled, by the judge's attempt to conceal the remarks provoking that apprehension.

[98] The judge's premature conclusions and intemperate conduct denied K.J.M.J. the presumption of innocence, the right to make full answer and defence, and could have impaired the open court principle and appellate review.

[99] It is most unfortunate that the judge's behaviour has resulted in much wasted time, expense and distress for all concerned. But for the foregoing reasons, the convictions should be set aside and a new trial ordered.

Bryson J.A.

Concurred in:

Bourgeois J.A.

Derrick J.A.