NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. AMB*, 2024 NSCA 49

Date: 20240425
Docket: CAC 518299
Registry: Halifax

Between:

AMB

Appellant

v.

His Majesty the King

Respondent

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

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	December 6, 2023, in Halifax, Nova Scotia
Subject:	*Criminal Code*; s. 271; sexual assault; s. 151; sexual interference; admissibility of statement; s. 715.1; corroboration; uneven scrutiny
Summary:	The appellant was convicted of sexual assault and sexual interference offences. He appealed against conviction. The issues on appeal involve the admissibility of and weight to be assigned to a video statement the victim gave to the police; admitted at trial under s. 715.1 of the *Criminal Code*. The appellant contended the victim did not sufficiently adopt her statement; thus, the trial judge should have found it to be inadmissible. He also claimed the victim had no independent recollection of the events described in her statement thus the trial judge should have sought corroboration of her statement. The appellant also complained that the trial judge scrutinized his evidence on a stricter standard.

Issues:	1. Did the trial judge err in law by admitting SM's statement under s. 715.1 of the *Criminal Code*? 2. Did the trial judge err in law by failing to appropriately instruct and caution himself on the permissible weight and use of the SM's statement? 3. Did the trial judge err in law by applying uneven scrutiny to the evidence of SM's and AMB?
Result:	Appeal dismissed. The trial judge did not err in admitting the statement. He was correct in concluding the victim adopted her statement. Further, the trial judge was not required to find corroboration in order to rely upon her s. 715.1 statement. The trial judge was balanced in his treatment of the evidence; there was no uneven scrutiny.

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 81 paragraphs.

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Judges:	Bryson, Scanlan, Van den Eynden, JJ.A.
Appeal Heard:	December 6, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Van den Eynden, J.A.; Bryson and Scanlan, JJ.A., concurring
Counsel:	Jonathan T. Hughes, for the appellant Glenn A. Hubbard, for the respondent

Order restricting publication — sexual offences

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

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 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.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Reasons for judgment:

Overview

[1] The appellant (AMB) seeks to overturn four convictions under the *Criminal Code*; two sexual assaults (s. 271) and two instances of sexual interference (s. 151). The complainant (SM) was under the age of 16 years when the offences took place.

[2] The issues raised on appeal involve the admissibility of a video statement (statement) SM gave to the police, admitted at trial under s. 715.1 of the *Criminal Code*.

[3] AMB contends SM did not sufficiently "adopt" her statement; thus, the trial judge should have found it to be inadmissible. He also claims SM had no independent recollection of the events described in her statement and thus the trial judge should have sought corroboration of the statement. AMB also asserts the trial judge scrutinized his evidence on a stricter standard than that of SM.

[4] AMB says these errors, either individually or collectively, warrant overturning the convictions and ordering a new trial.

[5] I am not persuaded by AMB's assertions of error. The trial judge was correct in concluding SM adopted her statement. The trial judge did not have to seek corroboration in order to rely upon SM's s. 715.1 statement. And, in any event, the evidence supports the trial judge's finding that SM had an independent recollection of the "acts complained of". Nor did the trial judge scrutinize AMB's evidence on a stricter standard.

[6] Accordingly, I would dismiss the appeal. My reasons follow.

Background

[7] Justice Peter P. Rosinski of the Supreme Court of Nova Scotia presided over the trial. The pre-trial matters and the trial took place over 18 days in 2022, concluding on October 5, 2022. Justice Rosinski rendered three decisions:

- *voir dire* - *R. v. AMB*, 2022 NSSC 148
- conviction - *R. v. AMB*, 2022 NSSC 169

- sentence - *R. v. AMB*, 2022 NSSC 262[1]

[8] Among other matters, the *voir dire* decision dealt with a dispute between the parties as to whether the Crown should be permitted to tender SM's statement to police. The trial judge granted permission to do so, explaining:

> [38] I anticipate that SM will "adopt the contents" of her videotaped statement. In *CCF*[2], the court considered the proper meaning of "adopt". At its core it requires the witness to state that they recall giving the statement and at the time of its making they intended to be truthful to the best of their then constituted recollection.

[9] The trial judge then went on to specifically address the concerns raised by AMB and concluded:

> [41] I am satisfied that any prejudicial effect upon the fair trial rights of AMB of the admission of the videotaped statement, would not operate unfairly to AMB, and does not outweigh its probative value. Furthermore, I am *not* satisfied that its admission would interfere with the proper administration of justice, including the truth-finding process.

[10] In order to contextualize AMB's allegations that his convictions are tainted by legal errors, it is necessary to review the background and the judge's reasoning path to conviction in some detail.

[11] At the time of trial, AMB was 33 years of age and SM was 14 years of age. They were known to each other as AMB had been in a relationship with SM's mother, JM.

[12] AMB met JM in late 2009. JM was a single parent at that time. AMB moved in with JM shortly after their relationship began. They subsequently had two children together – DB and WB, who where respectively 8 and 11 years old at the time they testified at trial.

[13] AMB and JM separated the end of October 2018. AMB went to live with his cousin RB in the Hammonds Plains area. JM and the children (SM, DB and WB) moved to a two-bedroom apartment in Lower Sackville, after a short stint with her parents. Prior to AMB and JM separating, they all had been living together in Hammonds Plains in a four-bedroom split-entry house.

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[1] AMB was sentenced to 7 years in custody, less time served. He did not appeal against sentence.
[2] *R. v. F*. (C.C.), [1997] 3 SCR 1183 – which the trial judge refers to as *CCF*.

[14] As will become evident, the dates and locations are relevant to SM's testimony of where and when the offences took place.

[15] On January 12, 2020, SM disclosed to her mother, JM, that AMB had sexually assaulted her. A complaint was made to the police that same day. SM gave a videotaped statement to police on January 13, 2020.

[16] On January 14, 2020, AMB was interviewed by police and gave a voluntary videotaped statement. He was charged with the subject offences shortly thereafter.

[17] SM said that between July 2018 and December 31, 2019, AMB made her fellate his penis; had vaginal and anal intercourse with her; and manipulated her breasts. The trial judge reviewed relevant specifics about the living arrangements:

> [17] RB's house was a split entry and had two bedrooms downstairs and at least three bedrooms upstairs.
>
> [18] JM and the children stayed with her parents until January 2019 when they moved into a two-bedroom apartment in Lower Sackville. There, all three children slept on two twin beds in one bedroom and JM in the other bedroom. The two boys slept on one bed and SM on the other.
>
> [19] AMB and JM informally agreed and generally stuck to a schedule at all material times, that saw all three children visit and stay with AMB every Thursday and Friday (after school) and every second weekend.
>
> [20] At first, from January 2019 onward, AMB spent a lot of time at JM's apartment as he worked close by, and I infer he wanted to maintain contact with the children. Although separated, AMB and JM got along reasonably well. They slept together at times.
>
> [21] At some point not long after, the kids began to stay at RB's on visits with AMB. A separate bedroom became available for AMB. He would have the three children sleep in the same bed as he did.
>
> [22] By August/September 2019 another spare bedroom had become available, and thereafter the two boys slept there (upstairs) while SM slept in AMB's bed (downstairs), which I conclude was the only private space available for SM to sleep.
>
> [23] AMB maintained that at RB's, "SM liked to sleep in my bedroom with me".
>
> [24] Both JM and AMB agreed that SM had long had trouble getting to sleep, and that while living together, occasionally JM would lay down with her until she fell asleep, but usually it was AMB that did so upon request by SM.

> [25] JM and AMB agreed that it would be nice for the family to spend the two weeks around Christmas 2019 together at her Lower Sackville apartment, and they did so.
>
> [26] AMB testified that he stayed over at her Lower Sackville apartment with the kids as recently as January 3-5, 2020, and that he had the kids at RB's house on January 9 and 10 (Thursday and Friday) - he returned them to JM's home on Saturday January 11, 2020.
>
> [27] AMB testified that he remained welcome at JM's home, as late as Sunday, January 12, 2020, for an agreed-to "family night". He picked up JM to take her for a one-hour rehearsal. SM babysat the boys. The plan was to make supper together after they returned. Upon their return, he testified a disagreement broke out between he and JM, and he stormed out telling her that he was "done with the situation".

[18] Not long after AMB left JM's apartment, SM disclosed to JM that he sexually abused her. The trial judge summarized how this unfolded:

> [29] JM testified that she heard SM crying at approximately 10 PM Sunday January 12, 2020, and that the two of them had an emotional discussion at which time SM disclosed to her the gist of her allegations before this court.
>
> [30] JM was unsure of what to do next, so she sought the opinion of a close friend who suggested that she call her pastor HM.
>
> [31] According to the evidence of HM, she received a text message from JM at approximately 11 PM that night. They spoke for about five minutes by telephone. JM told her that SM had disclosed the sexual abuse by AMB, and JM was looking for guidance about what to do next. HM consulted with another member of the church, and together they decided HM should go to JM's house to speak with her in person.
>
> [32] When she arrived SM and JM were in the living room. They sat down and did a recap of what JM had said. HM also asked SM some questions. This encounter lasted 15 minutes.
>
> [33] HM described SM as quiet, and uncomfortable with giving answers to the questions asked.
>
> [34] HM noted a "degree of relief it seemed" by SM after she disclosed to HM.
>
> [35] She characterized JM as flustered and skittish and unsure of what to do. She appeared to have been crying.
>
> [36] HM decided that she had an obligation to report this abuse of a child and called 911. Two officers came to speak to them.

[19] Next, the trial judge set out the details of the sexual abuse SM disclosed in her police statement, taken the following day:

[38] As I understand the allegations made by SM, they may be summarized as follows [these arise from her videotaped statement which she adopted, and her testimony in direct and cross-examination]:

1. the first incident of sexual abuse she could remember started a couple of weeks after her mother and AMB "broke up" [what she meant by "broke up" was not clearly articulated, however the evidence which I accept suggests the parents decided in July 2018 to break up but they actually moved to separate residences in November 2018];

2. her video statement initially references the first instance she remembers was when AMB made her put her mouth on his penis was when he was living with RB [after November 2018] – but she later stated as to "where it happened, I think it was in my mom and dad's room, stepdad's room"; she later stated therein that it happened about three times at the Hammonds Plains house [I bear in mind that even AMB stated that once JM got her Lower Sackville apartment in January 2019, he was there a lot, although "living at" RB's – thus SM's reference to "my mom and step-dad's room" may be a reference to JM's bedroom in her Lower Sackville apartment, and it first happening in January 2019 or more likely it is to the Hammonds Plains home (i.e. before October 31, 2018). In her direct testimony she stated that AMB first sexually abused her at the Hammonds Plains home [on the couch in the living room when he made her put her mouth on his penis and no one was home]. She also stated that AMB told her "not to say anything or else" which made her scared, so she just kept quiet;

3. her further references to the "first four times", I take to mean that AMB made her put her mouth on his penis, and that these were either at RB's house, JM's new apartment or the Hammonds Plains house;

4. her statement that on the fifth time he had anal sex with her at RB's where he had his own room fits with the rough chronology of when he may have been able to move into RB's cleared out downstairs office space – she also references the "pills" he gave her to relax [which she says he gave her about 3 to 5 times – "he just said it was something that would help me relax" during anal intercourse] so it wouldn't be painful, but she pointed out it didn't help …;

5. she stated he "touched me in unwanted places a lot" – this reference includes him touching her breasts and manipulating them even at her mother's Lower Sackville apartment;

6. not as frequently, but sometimes he put his penis in her vagina – "I make sure it does not go in as far as it goes in my butt – so like it will just go in a little bit – he won't make me – his sperm won't go in either in any of my places. Sometimes he does it in my butt and that will also give me

diarrhea a lot and sometimes it will make me feel nauseous" – generally vaginal sex takes place at RB's house;

7. most of the time the instances of sexual abuse at RB's would happen on the weekends, even when RB is at home, and her brothers are present in the home;

8. she was too scared to do anything so she "just let him take my clothes off for me";

9. although she couldn't say with precision how many instances of sexual abuse there were, she settled on 35 times "as a reasonable guess" [she had also indicated that just the "hand and mouth" incidents happened about 30 times];

10. she says he used lubricant when having anal intercourse with her but he never used condoms;

11. he also abused her at JM's apartment while JM was preoccupied with video gaming, her brothers would be asleep, or JM was not there;

12. she stated that the last incident at her mom's house was about two weeks before January 13, 2020 [which is consistent with both JM's and AMB's testimony that they had a two-week Christmas break together at JM's residence and AMB's evidence that he had also been at that residence with the kids between January 3-5, 2020, inclusive] and while she didn't remember exactly what they did, she believed it was "hand and mouth" - which would involve him masturbating until she would take his penis in her mouth once he was ready to ejaculate;

13. she referred back to the last incident at RB's which she described as: it was late and AMB was downstairs and called up to her "come here" – and when she declined he emphatically said: "no, come down now", [her brothers were upstairs in a guestroom]. She elaborated his penis was in her mouth and "he let me go and I went to the bathroom and I was feeling ill again because I remember the taste of it, it's still in my mouth a little bit and it tastes a lot like gone bad fish... I think that's why I feel ill a lot because of that taste in my mouth... like that taste has always been there. It's always been there. And I don't know why, and I don't know how" [AMB's evidence is that he had the kids at RB's on the evenings of January 9, 10 and for part of the daytime on January 11 2020];

14. she testified that the "hand and mouth" instances *alone* happened at least 30 times.

15. she never yelled out at any time, although AMB used physical force to have her comply and treated her roughly at times.

[20] AMB testified at trial. The trial judge summarized AMB's defence position, which included the following:

[53] [AMB] says: SM is a dishonest and unreliable witness. As an example, he references her videotaped statement, which he says contains only vague accusations of various sexual acts happening at uncertain locations over an uncertain period of time; and her testimony provided more examples which bring into question the reliability of her evidence.

[54] Counsel asked SM to identify the most recent allegation that happened before AMB was arrested (January 14, 2020) that SM suggested in her videotaped statement and testimony, and she remembered well. AMB says that SM vacillated about whether it had happened at RB's house or at JM's apartment, in the approximately two weeks before her disclosure on January 12, 2020 (for example, in her videotaped statement, SM suggested the last incident was about two weeks ago based on "my school stuff... around Christmas time... Wait. No.... When we were setting up the Christmas tree it was a couple of weeks before... Two weeks before... I'm all messed up... It was during then. Question: And it sounds as if there may have been one while setting up the tree as well. So he was there before Christmas and after Christmas? Answer: yeah" …

[55] AMB established through cross-examination of JM and his own testimony that he has a larger dark mole at the base of his penis where it meets his scrotum, in an area of light-coloured pubic hair. His counsel asked SM whether during the 30 "hand and mouth" incidents she described when she would have had a chance to see AMB's penis, she noticed "anything distinguishing about it"? She answered: "not really". Then he asked whether "he doesn't have anything like scars, freckles or moles, or anything like that? She answered: "not that I can recall"; although she did recall that he had unshaved pubic hair - which I note JM also confirmed; as well as JM's testimony that the location of the mole was covered by pubic hair and was not "on" his penis. I also note here that SM confirmed that before and during the material periods of time she had never seen any other adult male penis.

[56] Moreover, AMB's counsel says in argument that SM testified:

1. she wasn't sure what "a lie was" in her videotaped statement, and in cross-examination said: "I'm still not sure what a lie is";

2. she admitted that if she didn't have the videotaped evidence, she would not have any independent recollection of the offences;

3. she was *unable* to give much more detail to her allegations than she did in her videotaped statement.

[57] AMB testified that he spoke to SM about sexual matters, as JM was reluctant to do so, and they discussed penises, vaginas, and ejaculation, but he agreed in cross-examination that he did *not* discuss oral and anal sex. AMB's evidence suggested that SM's knowledge of sexual matters originally arose from what was being taught to her in school while she was 10 - 12 years old, and this is why he discussed such matters with her.

> [58] AMB also argues that SM was motivated by her mother to falsely accuse him of the sexual offences.
>
> [59] He suggests that on January 12, 202[0], he had finally decided without question to terminate any continuing "family" relationship between he and JM, that he "felt used" by JM, and it was time for him to move on. AMB testified that about four months before the allegation (therefore approximately mid September 2019) JM made him aware that she had been sleeping with someone else. AMB responded to her then that he would therefore no longer sleep with JM. On or about January 12, 2020, JM must have believed it was in her best interests to have the allegations made against AMB, and therefore she convinced SM to falsely accuse AMB of these offences.

[21] The trial judge's analysis of whether the Crown had proved, beyond a reasonable doubt, the essential elements of each offence is set out in paras. 60 - 121 of his conviction decision.

[22] The trial judge assessed both the evidence of AMB and SM. It is obvious from his reasons the trial judge clearly understood the central issues to be resolved and responded to the specific arguments raised by defence counsel, including the "mole" argument, SM's understanding of the truth *vis a vis* her s. 715.1 statement, and the allegation SM was swayed by her mother JM to fabricate a false narrative.

[23] Ultimately, the trial judge rejected the evidence of AMB and accepted the evidence of SM. He provided clear reasons for doing so, which include:

> [98] I have concluded that SM did not embellish her evidence when she had the opportunity to do so – this lack of embellishment is a factor I can consider in deciding whether she had a motive to lie (*R. v. Gerrard*, 2022 SCC 13 at para. 5).
>
> [99] When one conceptually places AMB's arguments that SM had a motive to lie upon his claimed evidentiary basis, the inferences he suggests, collapse into dust.
>
> [100] I conclude that there is an absence of evidence of motive to lie about these allegations by JM and SM.
>
> [101] I accept SM's evidence as credible regarding her core allegations herein.
>
> [102] Furthermore, in light of all the other evidence that I accept, and having considered the exculpatory evidence presented, and the absence of evidence, I accept her evidence as the basis upon which to conclude beyond a reasonable that AMB committed these offences against her.
>
> [103] Although SM's (videotaped statement and testimony) evidence was imprecise at times in relation to the various details of the offences (including

times and locations) alleged, there are factors which explain why this could be the case, such as:

> 1. her young age when the offences began and that she was only just 12 years old at their conclusion;
>
> 2. the differing locations where the family unit had lived over the time-period in question (their own house in Hammonds Plains; the apartment in Lower Sackville, and RB's house);
>
> 3. I infer there were likely emotional loss/effects on SM from the split of her "parents", in late October 2018;
>
> 4. that numerous commissions of the offences would have been similar in nature and locations, consequently somewhat indistinguishable over time;
>
> 5. that if such events had happened to her, they would be traumatic, and she did testify that she tried to block them out, which if she tried to do so, might reasonably account for her vague memories thereof;
>
> 6. that her first recorded expression of what had happened to her was not until January 13, 2020, arguably at least a year after she says these alleged offences started
>
> 7. [SM] also testified credibly that she had not spoken to her mother about the details of the allegations themselves since she gave her statement;
>
> 8. this matter proceeded by way of direct indictment ensuring there was no preliminary inquiry here before the trial;
>
> 9. [SM] testified in redirect that in some respects her testimony of what happened to her "are kinda blacked out, really foggy"; however she does remember the incidents happening, but can no longer give details – she has been trying not to think about them and move on, and it has already been over two years since she made her complaint;
>
> 10. [SM] only was contacted again by Constable Murray on April 14, 2022, to check on whether she was prepared to testify without assistance (regarding the ss. 486.1, 486.2, and 715.1 *CC* applications by the Crown).

[104] I infer from her statements and demeanour in the videotape, and while testifying, that to testify in public before strangers and family alike, against her "dad", about him having had vaginal and anal sexual intercourse with her, having routinely ejaculated, and having had her perform fellatio on him repeatedly and ejaculating into her mouth, must be one of the most unpleasant and traumatic public experiences that she would likely ever experience in her life.

…

> [106] SM was not "shaken" on cross-examination. I carefully watched her while testifying, as I did AMB, and I found she:
>
> 1. was attempting to be responsive to the best of her ability; candid, and prepared to testify to and admit things that may have placed her in an unfavourable light;
>
> 2. gave the impression of a witness who understood well the seriousness of this matter, and was just telling the court what she remembered.
>
> [107] I accept her evidence that she was afraid of AMB, that he told her repeatedly not to tell anyone about what was happening, and that he had ongoing anger issues.
>
> [108] In her videotaped statement, she spontaneously alluded to this when she commented that once he became aware of SM's allegations, she believed that consequently her family will probably have to relocate and live in a different place.
>
> [109] I find SM credible – that is, she was truthful and reliable in relation to the core allegations she has made against AMB.

[24] The trial judge was satisfied, beyond a reasonable doubt, that AMB committed each of the four offences of which he stood charged.

[25] AMB appealed against conviction only. I turn to his grounds of appeal.

Issues

[26] AMB advances these grounds of appeal:

> 1. Did the trial judge err in law by admitting SM's statement under s. 715.1 of the *Criminal Code?*
>
> 2. Did the trial judge err in law by failing to appropriately instruct and caution himself on the permissible weight and use of SM's statement?
>
> 3. Did the trial judge err in law by applying uneven scrutiny to the evidence of SM and AMB?

[27] I will set out the standard of review each ground attracts in my analysis of whether the trial judge erred.

Analysis

Did the judge err in law by admitting SM's statement under s. 715.1 of the Criminal Code?

Standard of review

[28] The admissibility of SM's statement is an issue of mixed law and fact. This ground of appeal involves the legal term "adopts" set out in s. 715.1(1). This term must be understood by the trial judge on a standard of correctness. However, any relevant factual findings the trial judge made based on SM's evidence are assessed on a palpable and overriding error standard. This was explained by the Manitoba Court of Appeal in *R. v. J.M.*, 2022 MBCA 25:

> [23] Before admitting a video statement under section 715.1 of the Code, a trial judge must determine whether it complies with the legal requirements. When the admissibility of evidence requires the evaluation of certain criteria, the deferential standard of review applies. As explained by Chartier CJM in *R v Desjarlais (DG*), 2016 MBCA 69 (at para 13):
>
> > . . . Typically, questions surrounding the admissibility of evidence are questions of law reviewable on the correctness standard. However, where the admission of evidence requires an evaluation of certain criteria, such as in the case of a section 715.1 application, the trial judge's assessment is a discretionary decision and, unless there was misdirection or the decision was so clearly wrong as to amount to an injustice, it is owed significant deference (see *R v Regan*, 2002 SCC 12 at para 117, [2002] 1 SCR 297).

Governing legal principles

[29] SM's statement is presumptively inadmissible hearsay. Section 715.1(1) of the *Criminal Code* provides an exception. The section provides:

> Evidence of victim or witness under 18
>
> 715.1 (1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

[30] The Crown must establish, on a balance of probabilities, that the statutory requirements for admissibility are met.[3] If the statutory conditions are met the out-of-court statement can be admitted for the truth of its contents.

[31] The objectives of s. 715.1(1) were reviewed by the Supreme Court of Canada in *R. v. L (D.O.)*, [1993] 4 S.C.R. 419 and *R. v. F*. (C.C.) at paras. 18 - 22. The objectives were also summarized in David Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) at p. 587:

> Section 715.1 is designed to achieve two main purposes. First, it aids in the preservation of evidence and the discovery of truth. The videotape preserves an early account of the child's evidence, given in a more natural setting, which may well provide the best account of what took place and is also an account free from subsequent influence or suggestion. "The video record may indeed be the only means of presenting a child's evidence. For example, a child assaulted at the age of three or four years may have very little real recollection of the events a year or two later when the child is attempting to testify at trial." Second, using the videotape at the trial makes it less stressful and traumatic for the child. It reduces the number of interviews that the child must undergo prior to trial in which the child faces repeated questioning, most often by strangers, usually concerning a very painful incident. At trial, the child is freed from the initial need to recount the incident in direct examination, although, to be sure, the child will still be subject to cross-examination.
>
> [footnote omitted]

The s. 715.1(1) criterion in issue on appeal

[32] On appeal, the only statutory criterion raised by AMB is whether SM adopted her statement. In summary AMB submits in his factum:

> 2. On the issue of admissibility of the statement, this appeal will address the issue of whether the Complainant can be said to have properly adopted the statement at trial, given the lack of attention paid to the statement while it was being played, and whether she could properly have been said to have been honest when she gave the statement in light of her answers about what the truth and a lie are, coupled with her continued lack of understanding of what a lie is, despite her age. It is the Appellant's position that where a witness does not actually watch the statement, but rather is distracted and simply answers in a *pro forma* manner that she vaguely recalls giving the statement and was trying to be honest, that the

[3] *R. v. P.S.*, 2019 ONCA 637 at para. 12.

> requirements under section 715.1 of the *Criminal Code* cannot be said to have been met.

[33] In response, the Crown says in its reply factum that this claim is without merit:

> 2. The Appellant's claim, on this point, is without merit. The Trial Judge addressed each prerequisite for the statement's admissibility in his *voir dire* decision. At trial, the Complainant testified that she recalled making the video recorded statement, and that she was telling the truth when she gave it. The Trial Judge was correct in concluding that the statement had been "adopted", as that term has been defined by the Supreme Court of Canada.

Application of standard of review

[34] In applying the governing standard of review, I am satisfied the trial judge did not commit any error when he determined SM adopted the contents of her statement while testifying. I will explain, beginning with the trial judge's firm grasp of the legal principles he had to apply when deciding whether to admit SM's statement.

[35] The trial judge was well aware of the prerequisites for admissibility of a child's out-of-court, video recorded statement. This was evident in his *voir dire* decision (paras. 30 - 39). He noted the definition of "adopts" as per the Supreme Court of Canada's decision in *R. v. F. (C.C.)*. The trial judge said:

> [38] … In *CCF,* the court considered the proper meaning of "adopt". At its core it requires the witness to state that they recall giving the statement and at the time of its making they intended to be truthful to the best of their then constituted recollection.

[36] The trial judge was cognizant of the legal principles that relate to complainants who no longer possess an independent memory of the "acts complained of". In his *voir dire* decision, the trial judge, again citing and relying upon *R. v. F. (C.C.)*, observed:

> [37] SM describes the "acts complained of" in the video recording. Although some references are more detailed than others, there is sufficient description of the acts complained of to meet the legislative criterion. Where a complainant has no independent memory at trial of the "acts complained of ", the court should caution *(sic)* itself per the reasons in *CCF* at paras. 35-44:
>
> 39…

> *A videotape made shortly after the event is more likely to be accurate than the child's viva voce testimony, given months later, at trial*. It is quite possible that a young child will have a recollection of going to the police station and making the statement and of her attempt to be truthful at the time yet have no memory of the unpleasant events. This is particularly true where the elapsed time between the initial complaint and the date of trial is lengthy. *If effect is to be given to the aims of s. 715.1 of enhancing the truth seeking role of the courts by preserving an early account of the incident and of preventing further injury to vulnerable children as a result of their involvement in the criminal process, then the videotape should generally be admitted.*
>
> …
>
> 44 I recognize that the *Meddoui*[4] approach to "adoption" gives rise to another problem. Specifically, a witness who cannot remember the events cannot be effectively cross-examined on the contents of his or her statement, and therefore the reliability of his or her testimony cannot be tested in that way. However, it was recognized in *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.) ; *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.) , and *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.) , that cross-examination is not the only guarantee of reliability. There are several factors present in s. 715.1 which provide the requisite reliability of the videotaped statement. They include: (a) the requirement that the statement be made within a reasonable time; (b) the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanor, and assess the personality and intelligence of the child; (c) the requirement that the child attest that she was attempting to be truthful at the time that the statement was made. As well, the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was made. These *indicia* provide enough guarantees of reliability to compensate for the inability to cross-examine as to the forgotten events. *Moreover, where the complainant has no independent memory of the events there is an obvious necessity for the videotaped evidence. In Meddoui, it was recommended that in such circumstances, the trier of fact should be given a special warning (similar to the one given in R. v. Vetrovec, [1982] 1 S.C.R. 811 (S.C.C.)) of the dangers of convicting based on the videotape alone. In my view, this was sage advice that should be followed.*
>
> [emphasis by trial judge]

[37] The trial judge went on to explain that even if the answers to (a) - (c) in the above excerpt from *R. v. F. (C.C.)* were answered in the affirmative, the inquiry does not end there. The trial judge, (para. 39 and referencing paras. 51 and 52 of *R.*

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[4] *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345, 111 A.R. 295 (Alta. C.A.).

v. F. (C.C.)), was aware he also had to consider the residual discretion to edit or exclude evidence, in part or in whole, should his analysis conclude the prejudicial effect would operate unfairly to the accused because the statement does not conform to the rules of evidence or the prejudice from its admission would outweigh its probative value.

[38] As noted, the trial judge concluded in his *voir dire* decision:

> [41] I am satisfied that any prejudicial effect upon the fair trial rights of AMB of the admission of the videotaped statement, would not operate unfairly to AMB, and does not outweigh its probative value. Furthermore, I am *not* satisfied that its admission would interfere with the proper administration of justice, including the truth-finding process.

[39] AMB did not identify any error in the trial judge's articulation of the legal principles; rather, AMB asserts he erred in concluding SM satisfied the test for admissibility.

[40] On appeal, AMB argues, as he did in the court below, that:

> 29. …the statement was not properly adopted either by virtue of the Complainant failing to actually watch the video, by her inability to recall giving the statement, or by the fact that her statements about being truthful must be observed in light of her inability to articulate what a truth and a lie are. Where the verdict rests on an "amalgam" of inadmissible evidence, the error is fatal.

[41] The trial judge did not find that contention convincing, nor do I. That is because any fair and balanced review of the record confirms there was sufficient evidence before the trial judge to support his determination SM adopted her statement.

[42] For example, after watching her video recorded statement at trial, SM was asked and answered the following questions by Crown counsel:

> Q. So, [SM], I'm just going to pause the video there. And the time on the video is 19:40. Do you recognize yourself in this video?
>
> A. I do. …
>
> …
>
> Q. Okay. And you spoke with the officer and the social worker on this day?
>
> A. Mm hmm.
>
> Q. Okay. When you spoke with them, were you attempting to be truthful?

A. Yes.

Q. And did you tell the truth about what was happening?

A. Yeah.

…

Q. So, after listening to that entire videotape statement, was what you told to the social worker and what you told to the officer in that statement the truth?

A. Yes. …

…

Q. … for example, what you told the . . . the officer and the social worker about [AMB] putting his penis in your mouth, was that the truth?

A. Yes.

Q. Okay. And what about what you told the officer and the social worker about [AMB] putting his penis in your vagina, was that the truth?

A. Mm hmm.

Q. Okay.

A. Yeah.

Q. And what you told the social worker and the officer about him putting his penis in your bum, as you had described it, was that the truth?

A. Yes.

Q. Okay. And about him touching you in places that he didn't want to be touched, was that . . .

A. Yes.

[43] Although SM answered the above questions clearly, AMB draws attention to another exchange during the cross-examination of SM:

Q. Yesterday, when we were playing the video, would it be fair to say that you had a hard time focusing on it?

A. Yes, but I was still listening to it.

…

Q. Okay. I'm going to suggest to you that the reason you had such a hard time focusing on it is because you know that what you were saying in the video wasn't true.

A. No.

Q. Because when you gave your statement to the police, you said that a lie is something that you say to keep someone away from you, right?

> A. I guess, but I don't also . . .**I still don't really know what a lie is**. I think . . . I had to do something on stop. I felt like I couldn't really . . . sorry, this is . . .I'm having a really hard time focusing because the camera's on the judge and not on you.
>
> [emphasis added]

[44] AMB argues the bolded answer of above reflects SM's inability to understand the difference between the truth and a lie which, in turn, undermines her earlier testimony that she was truthful when giving her statement.

[45] The Crown says AMB's submissions are misguided. SM was testifying from a remote location, and as the above reveals, SM was distracted and could not concentrate on the question posed because of the focus of the camera. It appears she did not finish what she was trying to express and defence counsel did not ask her any follow up questions to confirm what she was trying to convey.

[46] The trial judge dealt with AMB's concern in para. 56 of his conviction decision, and expanded his address in a footnote:

> [56] Moreover, AMB's counsel says in argument that SM testified:
>
> 1. she wasn't sure what "a lie was" in her videotaped statement, and in cross-examination said: "I'm still not sure what a lie is";

The footnote to para. 56 provided:

> [10] I take into account that during her videotaped interview [SM] was asked: "Question: can you tell me the difference between a truth and a lie what that means to you?... Answer: The truth is something that happened and when it happened.... It's hard to explain, because there are so many different ways to say it and so many different reasons why it's true...but the truth is if you have proof, I would believe... Question: And what would you say a lie is? Answer: a lie is just something that, I guess –a lie is just something that keeps someone [i.e. AMB] away from them [i.e. SM], because they are scared [I am satisfied that it is reasonable to interpret what SM is saying as: that she believes she is presumptively not to be believed until there is proof of what she is alleging, and therefore it is a "lie" until proved to be true]... And I know that I am scared, but I'm going to tell the truth and the whole truth. Because I am scared, but I'm only scared of what's going to happen... What's going to happen to me if my dad finds out, when he's going to find out. That's just why I'm scared. But I'm only going to tell the truth." p. 5 transcript. SM confirmed in her testimony, that she intended to and was telling the truth when she gave her videotaped statement, and that she would do so in relation to her testimony as well. I am amply satisfied she

> understands what is a "lie", and what is a "truth". She also testified that she was being truthful when she specifically said that AMB put his penis in her mouth, his penis in her vagina and his penis in her bum and touched her in places she did not want to be touched.
>
> [emphasis by trial judge]

[47] In *R. v. W.D.A.Z.* (Y.C.J.A.), 2018 BCCA 180, concerns were also raised about a witnesses' ability to differentiate a truth from a lie. In that case, the victim (G.M.) had virtually no memory of her video statement or of the appellant. The appellant was a fourteen-year-old male international student who had been living with G.M. and her mother at the time of the offence. Because of G.M.'s very young age (around 4 years old) there were arguments made concerning her ability to distinguish truth and lies and her ability to pay attention to the video statement. The British Columbia Court of Appeal reviewed the legal framework regarding s. 715.1 and the SCC's decision in *R. v. F. (C.C.).*

[48] As in the current dispute, the issue in *R. v. W.D.A.Z.* was whether G.M. had adopted her s. 715.1 statement when she testified. G.M. testified she remembered speaking to the lady (the police interviewer) but could not recall why. She also contradicted her s. 715.1 statement during the *voir dire* by identifying different persons as the ones who touched her. When asked if she understood what it means to tell the truth, G.M. referred to her mother's directions and the possibility of spankings. The trial judge was satisfied from the video and G.M.'s *viva voce* testimony that she had sufficient understanding for her age of the difference between the truth and a lie and the need to be truthful. On the issue of attention to the statement during adoption, "[t]he [trial] judge determined there was nothing to suggest she was not listening to the video even though she was not always watching it" (para. 35). On appeal, the court held that:

> 61 The first issue on the *voir dire* was whether G.M. had the ability to adopt her video statement. The judge determined she did while recognizing her age and limitations: *VDR* at para. 4. **He had the advantage of seeing and hearing her testimony and absent palpable and overriding error, which has not been alleged, his finding will not be disturbed on appeal.**
>
> [emphasis added]

After addressing other issues, the court dismissed the appeal.

[49] AMB also refers to comments SM made to her support person while the court was in recess. SM was asked about this in cross-examination:

> Q. Yesterday, when we were playing the video, would it be fair to say that you had a hard time focusing on it?
>
> A. Yes, but I was still listening to it.
>
> Q. Oh, okay. You recall saying to Ms. Oldham that you were paying more attention to the ferry than you were to the video, right?
>
> A. Yeah.
>
> Q. And that the view was better than watching all the boring stuff that you've already watched?
>
> A. Yes.
>
> Q. Okay. I'm going to suggest to you that the reason you had such a hard time focusing on it is because you know that what you were saying in the video wasn't true.
>
> A. No.

[50] During closing submissions AMB's counsel referred to her testimony when attempting to persuade the trial judge that SM did not adopt her statement:

> When she did testify at trial, she admitted that she wasn't paying attention to the statement. She admitted that she was paying more attention to the ferry. She admitted…She was watching the ferry out the window of what room she was in.

[51] On appeal, AMB complains that although he raised this issue the trial judge did not expressly address it in his decision. While true, that is of no consequence. The primary focus of AMB's submissions was on whether SM understood what a lie was. Further, SM made clear in her cross-examination she was listening to the playback of her statement. Lastly, the trial judge's reasons confirm he carefully reviewed and considered all of SM's evidence. He did not have to mention all of her evidence and, in any event, nothing turns on the ferry watching evidence.

[52] I refer back to the standard of review; questions surrounding the admissibility of evidence are questions of law, reviewable on the correctness standard. However, where the admission of evidence requires an evaluation of criteria, such as in the case of a section 715.1 application, the trial judge's assessment is a discretionary decision. Unless there was misdirection or the decision was so clearly wrong as to amount to an injustice, the trial judge's determinations are owed significant deference.

[53] Justice Rosinski identified and applied the correct law when assessing whether to admit SM's statement. His evaluation of the s. 715.1(1) statutory

criteria reveal no misdirection, nor on this record could it be said that his conclusion SM adopted her statement amounts to an injustice.

[54] I accept the Crown's submission that:

> 34. The Trial Judge pinpointed ample evidence to support his finding that the Complainant adopted the video recorded statement. The Complainant clearly recalled giving the statement, given her testimony under direct examination. In addition, the Complainant testified that she was making every effort to tell the truth. As a result, the Respondent submits that the Complainant's s. 715.1 statement was properly admitted.

[55] I would dismiss this ground of appeal.

Did the trial judge err in law by failing to appropriately instruct and caution himself on the permissible weight and use of the SM's statement?

Standard of review

[56] Once admitted into evidence, the weight to be applied to SM's statement is a question for the trier of fact. In *R. v. F. (C.C.)*, the Supreme Court said that if a complainant has no recollection of the events described in a video recorded statement, then considering a *Vetrovec*-[5]like caution is "sage advice that should be followed" (para. 44). However, corroboration is ultimately not a prerequisite for relying upon a s. 715.1 statement (see *R. v. R.G.B.*, 2012 MBCA 5, at para. 44 - 45).

[57] Subsequently, the weight to be attributed to SM's evidence, including whether SM testified to having an independent recollection of the events described, is assessed on a palpable and overriding error standard (see *R.G.B.*, at paras. 47-49).

Application of standard of review

[5] *Vetrovec v. The Queen*, [1982] 1 SCR 811. A *Vetrovec* warning is a caution to the trier of fact on the risks associated with convicting an accused on the evidence of an unsavoury witness without independent corroboration. The *Vetrovec*-like warning is recommended in these situations not because the witness is unsavoury, but because of the potentially reduced reliability of the evidence due to the inability to cross-examine the witness on the contents of the statement as described by the SCC in *R. v. F. (C.C.)* at para. 44.

[58] AMB argues SM had no independent recollection of "the acts complained of" and in such circumstances the trial judge should have, but did not, identify any corroborative evidence to support SM's allegations.

[59] The Crown says AMB's assertion lacks merit:

> 4. This claim is without merit as well, for three reasons:
>
> > a. a trier of fact is not required to find corroboration in order to rely upon a s. 715.1 statement;
> >
> > b. the Trial Judge did find support for the Complainant's version of events in the evidence presented at trial;
> >
> > c. upon review of the Complainant's testimony, it's clear that she did hold an independent recollection of the allegations, as she was able to answer questions under cross-examination that revealed additional detail.

[60] In my view, the Crown is correct on all fronts; however, AMB's unsustainable assertion that SM had no independent recollection is fatal to this ground of appeal.

[61] The trial judge was alive to AMB's concerns. In his *voir dire* decision the trial judge said:

> [37] SM describes "the acts complained of" in the video recording. Although some references are more detailed than others, there is sufficient description of the acts complained of to meet the legislative criterion. Where a complainant has no independent memory at trial of "the acts complained of", the court should caution *(sic)* itself per the reasons in *CCF* at paras. 35-44:

[62] Further, in his conviction decision, (footnotes 5, 11 and 12) the trial judge wrote:

> [5] I keep in mind the comments of the Supreme Court of Canada in *R. v. DOL*, [1993] 4 SCR 419, *R. v. CCF*, [1997] 3 SCR 1183, in particular para. 44, regarding corroboration. In my written decision permitting the introduction of the videotape, I referenced paragraph 44 in *CCF*, which stated that in certain circumstances it is prudent to look for corroboration of what a complainant has said in a videotaped statement. From my perspective of watching her testify, I conclude that SM did independently recall, not only the making of the videotaped statement but also, the core allegations she recounted therein. Thus, while I must scrutinize carefully the videotaped statement and direct and cross-examination of SM to determine the appropriate weight to be given thereto, I am satisfied I need not look for corroboration *per se*.

…

[11] After listening to her testimony again, this statement by AMB's counsel is an overstatement. SM was responsive to questions in direct and cross-examination, but it is clear her memory had faded. At approximately 10 AM on May 20, 2022, he asked her whether certain details about the offences that she discussed in the videotaped statement are difficult to remember, and she agreed that it has been two years since then. She agreed she probably wouldn't remember "much" of individual incidents, and in relation to the first time anything happened she could not remember that incident. However, she testified that she does recall some of the aspects of AMB's earliest sexual offences against her, and references the living room and AMB sitting on a couch when he unbuckles his pants and tells her to put her mouth on his penis.

[12] Her videotaped statement was lengthy and recounted many details over the years in issue. Moreover, this statement must be seen in context. As a witness, SM responds to the questions presented to her. Her direct examination was quite limited. During her cross-examination she did give greater details than in her videotaped statement, but her doing so is restricted to the questions she is asked. She did give greater detail of the layouts of the various homes where she says the offences occurred and reiterated and expanded upon some of the questions that had previously been put to her in her videotaped statement. It remains nevertheless true that her testimony is not rich in detail.

[63] The Crown also noted the following evidence extracted from SM during cross-examination:

43. … [SM]

a. … recalled the first conversation she had with her mother about the allegations;

b. … opened up to one of her friends about what happened between her and the Appellant;

c. … recalled going to the IWK for a physical exam and discussing the allegations with a doctor;

d. … recalled the police being called in the early morning hours before she gave her initial statement;

e. … recalled a specific incident of sexual assault that took place on the couch in the living room of her Hammonds Plains home. She recalled it took place when they were starting to pack up their belongings, and that no one else was home at the time.

f. … recalled being worried about stretch marks that she believed may have been caused by the sexual assault;

g. … recalled the pill she was given by the Appellant to relax her, and where he kept them;

> h. … recalled the "lube" that was used by the Appellant and that he kept it under his bed. [SM] recalled that the Appellant would take the lube, pop it open, put it on his hands and then rub it on her "butt";
>
> i. … recalled that when the Appellant put his "private part" into her bum that it would cause her to experience diarrhea;
>
> j. … recalled that she would struggle to get away from the Appellant at times due to the weight that he was putting on her;
>
> k. … recalled getting bumped into the wall by the Appellant during the assaults, and that she never yelled out when it was happening;
>
> l. … recalled that she got jammed up against the wall causing her neck to hurt, due to her neck being bent at an odd angle;
>
> m. … recalled that she was shoved up against the wall only when the Appellant would put his penis into her "butt";
>
> n. … recalled at least 30 occasions of "hand and mouth" but in total, there were a lot more than 30 times that she was sexually assaulted by the Appellant;
>
> o. … recalled that the Appellant had long pubic hair;
>
> p. … recalled the taste of the pills as being "bad" but that they didn't really have an effect on her[6].

[64] It cannot be said the trial judge's finding that SM had an independent recollection of "the acts complained of" was a palpable and overriding error. There is sufficient evidentiary support in the record that underpins the trial judge's determination. Accordingly, I would dismiss this ground of appeal.

Did the trial judge err in law by applying uneven scrutiny to the evidence of SM's and AMB?

Standard of Review

[65] It is an error of law to apply different standards of scrutiny to the evidence of the defence and Crown. Errors of law attract a correctness standard of review (see *R. v. Willis*, 2019 NSCA 64 at para. 11). Doing so offends the burden of proof.

Governing legal principles

[6] Appeal book references omitted for items a – p.

[66] An allegation of different standards of scrutiny is a challenging argument to make.[7] Credibility assessments fall within the domain of trial judges. This Court owes deference to such findings. The following principles set out in *R. v. Radcliffe* 2017 ONCA 176, illustrate:

> [23] First, as the appellant recognizes, this is a difficult argument to make successfully. The reasons are twofold. Credibility findings are the province of the trial judge. They attract significant appellate deference. And appellate courts invariably view this argument with skepticism, seeing it as little more and nothing less than a thinly-veneered invitation to re-assess the trial judge's credibility determinations and to re-try the case on an arid, printed record: *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.), at para. 59; *R. v. George*, 349 O.A.C. 347, at para. 35.
>
> [24] Second, to succeed on an uneven scrutiny argument, an appellant must do more than show that a different trial judge assigned the same task on the same evidence could have assessed credibility differently. Nor is it enough to show that the trial judge failed to say something she or he could have said in assessing credibility or gauging the reliability of evidence: *Howe*, at para. 59.
>
> [25] Third, to succeed on the argument advanced here, the appellant must point to something, whether in the reasons of the trial judge or elsewhere in the trial record, that makes it clear that the trial judge *actually* applied different standards of scrutiny in assessing the evidence of the appellant and complainant: *Howe*, at para. 59; *George*, at para. 36.
>
> [26] Fourth, in the absence of palpable and overriding error, there being no claim of unreasonable verdict, we are disentitled to reassess and reweigh evidence: *George*, at para. 35; *R. v. Gagnon*, [2006] 1 S.C.R. 621, at para. 20.
>
> [. . .]
>
> [28] I begin with the obvious. The mere fact that the trial judge accepted the evidence of the complainant and rejected that of the appellant in concluding that guilt had been established beyond a reasonable doubt does not move the yardsticks on an argument based on uneven scrutiny.

Application of standard of review

[67] AMB contends the trial judge applied an uneven level of scrutiny to his evidence, versus the level of scrutiny applied to SM's evidence. The focus of AMB's dissatisfaction is with the trial judge's credibility findings which obviously

[7] This Court recently addressed an allegation of uneven scrutiny in *R. v. W.B.G.*, 2024 NSCA 24. Therein it was noted (para. 81) that the Supreme Court of Canada questioned in *R. v. G.F.*, 2021 SCC 20, whether a claim of uneven scrutiny should be considered as an independent ground of appeal.

had a crucial impact on the outcome at trial—as the trial judge ultimately rejected the evidence of AMB and accepted the evidence of SM.

[68] AMB puts forward several specific assertions of uneven scrutiny. None are persuasive. Nevertheless, I will summarize his complaints of uneven scrutiny and explain why they have no substance.

[69] AMB complains the trial judge treated his stumble over a question differently than SM's stumble over a question. He points to this conclusion the trial judge drew:

> [71] In his testimony [AMB] confirmed that at RB's, SM slept alone with him throughout the night in his bed - however, when the Crown put to him that he did *not* tell JM this, he stated that was "incorrect", but then he stuttered badly during his ensuing testimony in relation thereto, ultimately stating: "sorry, I am getting confused... there was no need for me to spend all night in bed with SM [in order to get her to sleep – because once asleep she'd stay asleep?]".
>
> [72] There was no reason for confusion – it was a simple question.

[70] AMB asserts this stands in contrast to the trial judge's failure to dig down into SM's testimony to ascertain whether she understood the difference between the truth and a lie. AMB points to SM's testimony when she was distracted during cross-examination (by the focus of the camera, see above paras. 41 - 46) and did not offer a clear answer to a question. However, as noted, defence counsel could have, but did not, ask any further questions of the child witness to clarify her response after she was momentarily distracted. Furthermore, the trial judge sufficiently assessed both issues in his decision—the sleeping arrangements, and whether SM was attempting to be truthful at the time her statement was made. That was expected of him. AMB takes issue with the trial judge's view of the evidence but that does not make it wrong. This example does not assist AMB.

[71] AMB suggests that in finding SM did not embellish her testimony the trial judge glossed over her exaggeration that he was an angry, mean and controlling man—things SM said in her statement to police. AMB's point being that SM's bad character comments were themselves embellishments.

[72] However, as the Crown points out, the trial judge dealt with this issue during the s. 715.1 admissibility *voir dire*. The trial judge concluded SM's comments were akin to mundane descriptions of marital discord that did not rise to the level of "bad character" evidence. Further, the trial judge cautioned himself on its

relevance/use in any event. In this context, this cannot be said to be uneven scrutiny.

[73] I agree with the Crown's submission. I see nothing amiss with how the trial judge handled this evidence. This example does not assist AMB.

[74] The final example proffered as demonstrating uneven scrutiny relates to a mole on AMB's penis. AMB suggests the trial judge failed to adequately address SM's testimony on the subject. That complaint is not borne out when examining the trial judge's reasons. For convenience, I will set out para. 55 of the conviction decision again:

> [55] AMB established through cross-examination of JM and his own testimony that he has a larger dark mole at the base of his penis where it meets his scrotum, in an area of light-coloured pubic hair. His counsel asked SM whether during the 30 "hand and mouth" incidents she described when she would have had a chance to see AMB's penis, she noticed "anything distinguishing about it"? She answered: "not really". Then he asked whether "he doesn't have anything like scars, freckles or moles, or anything like that? She answered: "not that I can recall"; although she did recall that he had unshaved pubic hair - which I note JM also confirmed; as well as JM's testimony that the location of the mole was covered by pubic hair and was not "on" his penis. I also note here that SM confirmed that before and during the material periods of time she had never seen any other adult male penis.

[75] As the Crown aptly points out:

> 62. It would appear, from this excerpt, that the Trial Judge saw the Appellant's argument as having missed its target. The mole referenced by the Appellant, was not, in fact, on his penis, which distinguished the answer given by the Complainant on this topic; and the impugned mole was, in fact, covered by pubic hair – pubic hair that the Complainant correctly described.

[76] The trial judge's assessment of the mole evidence does not demonstrate uneven scrutiny.

[77] A review of the trial judge's thorough decisions on the *voir dire* and conviction dispels the allegation of uneven scrutiny. It is clear the trial judge carefully scrutinized both the allegations made by SM and the denial put forward by AMB. Approximately 60 paragraphs of his decision focused on this task. AMB must point to something, whether in the reasons of the trial judge or elsewhere in

the trial record, that makes it clear the trial judge actually applied different standards of scrutiny in assessing the evidence of AMB and SM. He did not.

[78] The following excerpt from *R. v. Radcliffe* best describes this ground of appeal: “little more and nothing less than a thinly-veneered invitation to re-assess the trial judge's credibility determinations and to re-try the case on an arid, printed record”.

[79] For completeness, I note AMB suggests there was an aggravating factor to his uneven scrutiny contention, that being a misstatement of one aspect of the evidence:

> 47. Each of the above reasons demonstrates the errors of law present by the Trial Judge’s clearly differential treatment of the evidence from the Complainant and the Appellant. … This is further aggravated by the fact … at paragraph 38 of the trial decision, the Trial Judge lists the allegations SM made against the Appellant. At point 12, he states that “she stated the last incident at her mom’s house was about two weeks before January 13, 2020...” This is clearly incorrect, as the Complainant very clearly states in the recorded statement: “It was at [RB’s]…

[80] In addition to rejecting AMB’s claims of “differential treatment” as explained above, I also reject the contention this misstatement of fact is relevant to this ground of appeal. It is of no consequence. It does not demonstrate uneven scrutiny of evidence nor does it otherwise undermine the trial judge’s finding of guilt.

Disposition

[81] AMB has not established the trial judge made any error in his reasons for convicting him of the stated four offences. I would dismiss the appeal.

Van den Eynden, J.A.

Concurred in:

Bryson, J.A.

Scanlan, J.A.