IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. J.P.M., 2003 NSSC 193

Date: 20031006
Docket: S.PH. No. 189952
Registry: Port Hood

Between:

J. P. M.

Appellant

v.

The Queen

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Frank Edwards

Heard: June 26, 2003, in Arichat, Nova Scotia

Written Decision: October 6, 2003

Counsel: Stanley W. MacDonald, Esq, for the Appellant
Robin W. Archibald, Esq., for the Respondent

By the Court:

1. The Appellant appeals his conviction on a charge of sexual assault.

2. ***History of the Proceedings:*** The Appellant, J. P. M., was charged in an Information sworn in November, 2001, that he, on or about the 19th day of October, 2001, at or near [...], in the County of Inverness, Province of Nova Scotia, did commit a sexual assault on C. L. M., contrary to Section 271(1)(b) of the ***Criminal Code***. The Crown proceeded summarily.

3. The trial proceeded before the Honourable Judge John. D. Embree in the Nova Scotia Provincial Court at Port Hood on September 3, 2002. The Crown called the complainant, L. M. and her mother, C. M.. The Defendant, J. P. M., testified in his own defence and also called S. T. and M. M. as witnesses on his behalf. At the conclusion of the evidence and submissions, Judge Embree found the Appellant guilty as charged.

4. On November 12, 2002, the Appellant was sentenced to a fine of $1,200.00, to be followed by a period of probation of 18 months, with conditions. In addition, the Court imposed a DNA Order pursuant to Section 487.051 of the ***Criminal Code***. By order of this Court, the sentence has been stayed pending the outcome of the appeal.

5. By Notice of the Appeal dated November 20, 2002, the Appellant gave notice of his intention to appeal the convictions entered against him on September 3, 2002, and the sentence imposed on November 12, 2002. The Appellant has abandoned his sentence appeal.

6. ***Circumstances of the Offence:*** In October, 2001, the 16 year old complainant lived with her parents in a mobile home in [...], Inverness County. On the night of October 19, 2001, the Appellant arrived at the complainant's residence with the complainant's mother. The complainant's mother and the Appellant sat at the kitchen table and talked until the early morning hours. The complainant and her friend, S. T., were asleep on the floor of the livingroom of the mobile home. The Appellant went to sleep on the couch in the livingroom.

7. The complainant testified that her friend, S. T., became ill so she woke up her father and they both drove S. T. home to [...]. When they returned, the complainant went back to sleep on the floor in the livingroom, near the couch where the Appellant was also sleeping. The complainant testified that, before sunrise, the Appellant sexually assaulted her by grabbing her breast. She testified that she did not consent to the alleged assault.

8. The Appellant testified on his own behalf. In his testimony, he indicated that, before sunrise, the telephone in the kitchen of the mobile home rang. He called out to the complainant to answer it. When the complainant did not answer it, he said that he got up to answer it. The Appellant testified that, in the course of getting up, he had to feel his way around the room in the dark. While doing so, he touched the complainant. He acknowledged that it was possible that he may have touched her breast, but that if this occurred, it would have been unintentional.

9. ***Grounds of Appeal:*** The grounds of appeal appear in the Amended Notice of Appeal dated March 19, 2003 as follows:

> 1. That the trial Judge erred by using evidence of the complainant's prior out of Court statements to friends and the police for the purpose of showing consistency and truthfulness, and thereby bolstering her credibility;
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> 2. That the trial Judge erred by speculating with respect to the evidence of S. T. concerning the complainant's prior inconsistent statement to her, and misapplied and misapprehended the evidence, resulting in a miscarriage of justice pursuant to Section 686(1)(a)(iii) of the Criminal Code.
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> 3. That the trial Judge erred by subjecting the testimony of the 16 year old complainant to a lower level of scrutiny for reliability than that of an adult and, in doing so, lowered the burden of proof;

> 4. That the trial Judge erred in his application of the burden of proof as set out in R. v. W.(D), [1991] 1 S.C.R. 742 (S.C.C.).

10. ***Ground No. 1 - That the trial Judge erred by using evidence of the complainant's prior out of Court statements to friends and the police for the purpose of showing consistency and truthfulness, and thereby bolstering her credibility;***

11. The law is clear that, subject to certain exceptions, evidence of prior consistent statements made by a witness are not admissible as evidence of the consistency of such witness. In ***R. v. F.(J.E.)*** (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), Justice Finlayson set out this rule and stated at page 464:

> "It is generally accepted that the rationale for this rule relates to concerns about hearsay and the probative value of such evidence."

12. At times, evidence of prior consistent statements is admitted for the purpose of assisting the trier of fact in its understanding of what occurred and why. In those circumstances, the Judge must be careful not to use the evidence for an improper purpose. The importance of the limited use of such evidence is highlighted by Justice Finlayson in R. v. F.(J.E.), supra, at page 475 where he states:

> "With a proper limiting instruction to the jury, I think that this evidence was properly admissible as part of the unfolding of events from the alleged offences to the inception of this prosecution.
>
> However, there was no such limiting instruction in this case. The jury was never told that the complaints were not admissible for the truth of their contents, and that they were to consider only the fact that the complaints were made to assist them in their understanding of what occurred and why.
>
> . . . .
>
> Despite the lack of objection of defence counsel, this remains a most serious matter of non-direction because the content of the statements could be perceived by the jury as corroboration of the complainant's story."

13. The admissibility of prior consistent statements was reviewed by the Nova Scotia Court of Appeal in R. v. O.B., [1995] N.S.J. No. 499 (Tab 2 - Appellant's Book of Authorities). Justice Roscoe, for the unanimous Court, adopted the law as set out in R. v. F.(J.E.). In that case, the trial Judge permitted the Crown to lead general evidence that the complainant had disclosed the alleged sexual assaults to her daughters and her mother. The trial Judge failed to caution the jury as to the limited use that could be made of that evidence. In the course of setting aside the jury's guilty verdicts, Justice Roscoe stated at page 10:

> "I cannot agree that this non-direction is a harmless error or so insignificant that it can be said that the verdict would have been the same without the error."

14. Justice Roscoe continued at page 10 by referring to the decision of the British Columbia Court of Appeal in R. v. Ay as follows:

> "In R. v. Ay, supra, Wood J.A., on this point, said at page 472:
>
> 'Even in cases where the evidence is strictly confined to the fact that a prior complaint was made, without any reference as to its content, it is essential that the trial judge instruct the jury that such evidence is admitted only to assist their understanding of what happened and that it cannot be used by them as proof of the truth of its implicit content despite fact that contents were not explicitly admitted, or as a prior consistent statement corroborative of the complainant's testimony at trial: R. v. George; R. v. Jones.'"

15. With the consent of Defence counsel, the Crown in the case at bar introduced evidence of the complainant's prior consistent statements through the complainant. At pages 23 to 25 of the trial transcript, the complainant testified that she had told four friends and the police about the incident involving the Appellant.

16. It was agreed between counsel that this evidence was introduced as part of the narrative, an exception to the rule precluding the admission of prior consistent statements (transcript pages 22 - 23).

17. The trial Judge ruled that the statements were admissible as part of the narrative and were not to be admitted for the purpose of "oath helping."

18. After completing her direct examination, the complainant was cross-examined by Defence counsel. In particular, the complainant was cross-examined about whether she told S. T. that the Appellant had touched her between the legs during the incident that she described in the mobile home. The complainant categorically denied having said this to S. T. (transcript page 55).

19. The Defence then called S. T. as a witness. Ms. T. testified (page 71 transcript) that she had a conversation with the complainant in the basement of her home the day after the alleged incident between the complainant and the Appellant. Ms. T. testified that, during that conversation, the complainant told her that the Appellant had put his hand between her legs during the alleged incident (transcript page 79).

20. The Defence highlighted this inconsistency during submissions (pages 140 and 141 transcript). The submission made then, and now, was that the testimony of Ms. T. evidenced a major inconsistency in the complainant's version of events and thereby affected the complainant's credibility and reliability.

21. In the course of his decision, the trial Judge addressed this issue by stating:

> "Looking at all of the evidence, I am looking at those two witness' testimony as part of the evidence, I certainly cannot conclude that that aspect of S. T.'s testimony is or can be considered by me as a verbatim account of the conversation; however, even if that was said or something like that was said by L. M. to S. T., I also keep in mind everything else that she told me that was said on that occasion.
>
> I do not consider that, nor do I have any reasonable doubt about the fact that, even if that comment may have been made by L. M. to S. T. ***among the four friends that she says she told in addition to the police***, that that comment to this one person on this occasion causes me to doubt her honesty or credibility about every other aspect of the matter that she has told me about." (Emphasis added) (Transcript pp. 156 and 157)

22. The Appellant argues that the foregoing excerpt clearly shows that the trial judge used the fact that the Complainant had told her four friends and the police about the allegation of sexual assault to bolster her credibility. I have carefully reviewed what the trial judge said about the apparent inconsistency between the evidence of the Complainant and the witness T.. The relevant portion of his decision is set out at pages 154 to 157 of the transcript where he said as follows:

> "I have considered the testimony of S. T. and what she says she was told by L. M. approximately a day after the events involving Mr. M. occurred in L. M.'s home. A portion of what was put to the complainant in cross-examination and it was

suggested to her that she said to S. T. that in telling her the events that allegedly took place involving the defendant on this occasion that she had said to Ms. T. that the defendant had put his hand between her legs and as part of the explanation, it was suggested to her that she said that he touched her breast and put his hand between her legs. She denied that and said she did not tell that to Ms. T..

Ms. T.'s evidence as to what was said was that she recalled Ms. M. telling her that Mr. M. was drunk, that he was sleeping on the couch in the living room, that S. had got sick and had to go home. I believe she said, in the course of passing, that she was not home on that occasion, meaning S., and that Ms. M. had told S. that the defendant had touched her breast, that he had put his hand between her legs and that the phone rang and that the defendant had said, stay here, I'll be right back.

Firstly, the circumstances under which that conversation occurred are not before me ***in any great detail***. The witness, in the course of giving her testimony, was distraught and upset and had to be asked questions about the conversation on several occasions before she answered.

Human experience certainly tells us that when someone recounts an event, what one person hears is not always what another person says and sometimes the more a story gets repeated and retold, its circumstances can change and that is not necessarily an indication of an intention to be inaccurate but sometimes it is a consequence of human nature.

The preciseness of the recollection of this witness about what was said by Ms. M. to her, the Court does not have much of an opportunity to assess. Whether she actually said the words that Ms. T. testified to, whether she said that, I think that's what he did, or, that's what he tried to do, or, I believe he did, or whatever, the precision of that, obviously in these circumstances is considerably less accurate than one would

have with a handwritten statement or with an audiotape of someone speaking.

Ms. M., in her testimony, denied that she said that. I do not conclude or do I have any reasonable doubt about the fact that the denial was dishonest. Whether or not it is accurate, I do not think I can say definitively. S. T. did not strike me as someone who is here with the intention of being dishonest either. I thought she was a credible witness and was trying to recount as best she could and answer the questions put to her as best she could.

Looking at all of the evidence, I am looking at those two witness' testimony as part of the evidence, I certainly cannot conclude that that aspect of S. T.'s testimony is or can be considered by me as a verbatim account of the conversation; however, even if that was said or something like that was said by L. M. to S. T., I also keep in mind everything else that she told me that was said on that occasion.

I do not consider that, nor do I have any reasonable doubt about the fact that, even if that comment may have been made by L. M. to S. T. among the four friends that she says she told in addition to the police, that that comment to this one person on this occasion causes me to doubt her honesty or credibility about ever other aspect of the matter that she has told me about.

It raises a question as to why she might say it and I have certainly considered it and given it thought but it does not ultimately cause me to question Ms. M.'s credibility or raise any reasonable doubt about that. And Ms. M. is not here saying today or is there any indication she said to anybody else that that occurred with regard to Mr. M. putting his hands between her legs or attempting to."

23. The foregoing passage clearly demonstrates that the trial judge carefully analysed the evidence pertaining to the apparent inconsistency between the two witnesses. It also demonstrates that he did not make use of the prior consistent statements the Complainant had made to her four friends and the police. I do not accept that this passing reference to the fact that she had told others what had happened negates the trial judge's careful analysis of the evidence of Ms. T. and the Complainant. What the Complainant had told the others was not before the trial judge. There is nothing in the transcript to suggest that the trial judge was unaware of the law that such statements were not admissible for the truth of their contents. I am sure that he was aware of that limitation and he must be taken to have been so. His ruling that the statements were introduced as part of the narrative and not for the purpose of "oath helping" is indicative of his understanding.

24. Further, I am satisfied that the trial judge did not speculate about the contents of the other statements in order to bolster the Complainant's credibility. He looked at the specific inconsistency which was before him. I am dismissing this ground of appeal.

25. ***Ground No. 2 - That the trial Judge erred by speculating with respect to the evidence of S. T. concerning the complainant's prior inconsistent statement to her, and misapplied and misapprehended the evidence, resulting in a miscarriage of justice pursuant to Section 686(1)(a)(iii) of the Criminal Code.***

26. This ground of appeal, to some extent, overlaps the first ground. The Trial Judge appropriately weighed the fact of the apparent inconsistency between the Complainant's evidence and that of Ms. T.. As a result of that analysis, he concluded that the apparent inconsistency did not impair the Complainant's testimony. On the evidence before him, the Trial Judge was clearly entitled to make such a finding.

27. The Appellant attempted to develop an argument that the trial judge had misapprehended the evidence of S. T.. The Appellant argued that this misapprehension of the evidence was critical in the trial judge's reasoning process and led him to convict the Appellant. The Appellant cited ***R. v. Miller*** [1999] NSJ No. 17 (N.S.C.A.) in support of this argument.

28. In ***Miller*** , the appellant's conviction was overturned as a result of the misapprehension of the evidence in the courts below. The error was explained by Hallett, J. at pages 5 - 6:

"In my opinion, there was a manifest and critical error made by the trial judge in his assessment of the evidence. The error went to the heart of his reasoning to convict the appellant. This error was not picked up by the appellate court judge.

In The Criminal Lawyers' Guide to Appellate Court Practice, Gil D. McKinnon, Q.C. makes an observation that is applicable to the situation we have before us on this appeal. He states commencing at p. 108:

MISAPPREHENSION OF SIGNIFICANT EVIDENCE

'... In R. v. Morrissey, (1995), 97 C.C.C. (3d) 193, 38 C.R. (4th) 4 (Ont. C.A.) Doherty J.A. suggests that a submission alleging a misapprehension of evidence should first be assessed under s. 686(1)(a)(i), and if unsuccessful, then under s. 686(1)(a)(iii). In allowing the appeal under s. 686(1)(a)(iii) in Morrissey, Doherty J.A. gave a useful statement on when a misapprehension of evidence might result in a miscarriage of justice:

"The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a 'true' verdict. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence then, in my view, it must follow that the appellant has not received a fair trial, and was the victim of a miscarriage of justice. This is so even if the

evidence, as actually adduced at trial, was capable of supporting a conviction.

The appellant has demonstrated significant errors in the trial judge's understanding of the substance of the evidence. He has further demonstrated that those errors figured prominently in the reasoning process which led to crucial findings of credibility and reliability, and then to crucial findings of fact. In these circumstances, the appellant has met the onus of showing that the convictions on the counts relating to F.P. and B.G. constitute a miscarriage of justice. Those convictions must be quashed and a new trial ordered.'"

Mr. McKinnon also makes reference to R. v. G.(G) (1995), 97 C.C.C. (3d) 362 at p. 379-381 where Laskin, J.A. gave similar reasons for quashing a conviction.

Considering the evidence before the trial judge, I cannot say that a judge or jury acting judicially could not reasonably conclude that the appellant was guilty. This would turn on the trier of facts' assessment of the credibility of the Crown's witnesses and their assessment as to whether or not the facts warrant a finding of guilt of dangerous driving. We cannot, from our perch outside the trial arena, assess the credibility or lack of same of the Crown's witnesses who testified at the trial. Therefore, I would not enter an acquittal.

I am, however, satisfied that to allow the conviction to stand would constitute a miscarriage of justice given the trial judge's misapprehension of evidence that was critical in his reasoning process that led him to convict the appellant.

I would grant leave to appeal, allow the appeal, quash the conviction and order a new trial."

29. The situation in ***Miller*** is very different from that in this case. In ***Miller***, a dangerous driving case, the trial judge's decision turned on whether a motor vehicle had been hit once or twice. The trial judge found that two or three witnesses had said the vehicle was hit twice. That transcript disclosed that in fact only one witness had testified that the vehicle was hit twice. The Court of Appeal found that this misapprehension of evidence was critical in the trial judge's reasoning process and ordered a new trial.

30. In this case, I am satisfied that the trial judge did not misapprehend the evidence of S. T.. The trial judge clearly appreciated that the evidence of S. T. was inconsistent with that of the Complainant. He weighed the evidence of each witness and concluded that, in the context of all the evidence, the inconsistency did not impair the Complainant's credibility. He was entitled to do that. I am dismissing this ground of appeal.

31. ***Ground No. 3 - That the trial Judge erred by subjecting the testimony of the 16 year old complainant to a lower level of scrutiny for reliability than that of an adult and, in doing so, lowered the burden of proof.***

32. The law in this regard was reviewed by Justice Finlayson in ***R. v. Stewart***, [1994] O.J. No. 811 (Ont. C.A.) (Tab 5 - Appellant's Book of Authorities) at pages 7 and 8:

> "The Supreme Court of Canada has addressed the issue of the assessment of the evidence of child witnesses in two leading cases dealing with allegations of sexual abuse: R. v. B. (G.) (No. 2), [1990] 2 S.C.R. 30, 56 C.C.C. (3d) 200, and R. v. W. (R), [1992] 2 S.C.R. 122, 74 C.C.C. (3d) 134. In R. v. W. (R.), McLachlin J. comments that there have been two major changes in recent years in the approach that courts should take to the evidence of young children. The first is the removal of the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution. The second is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. With respect to the second change, she cites Wilson J. in R. v. B. (G.) (No. 2) at pp. 54-55 S.C.R., pp. 219-20 C.C.C., where Wilson J. advocates a common sense approach when dealing with the testimony of young children and advises judges not to impose the same exacting standards upon them as upon adults. Wilson J. emphasizes that the courts should continue to carefully assess the credibility of child witnesses and she does not suggest that the standard of proof beyond a reasonable doubt should cease to apply in criminal cases in which young children have been victimized. In R. v. W. (R.), McLachlin J. adds that we should not approach the evidence of children from the perspective of rigid stereotypes and we should adopt a 'common sense' approach which takes into account the strengths and weaknesses characterizing the evidence offered in the particular case.
>
> As I understand these two judgments, we must assess witnesses of tender years for what they are, children, and not adults. We

> should not expect them as witnesses to perform in the same manner as adults. ***This does not mean, however, that we should subject the testimony of children to a lower level of scrutiny for reliability than we would do adults. My concern is that some trial judges may be inadvertently relaxing the proper level of scrutiny to which the evidence of children should be subjected.*** The changes to the evidentiary rules were intended to make child evidence more readily available to the court by removing the restraints on its use that existed previously but were never intended to encourage an undiscriminating acceptance of the evidence of children while holding adults to higher standards. With respect, I think the case on appeal illustrates the latter approach." (Emphasis added)

33. The Appellant points to the following inconsistencies in the Complainant's testimony:

1. the inconsistency between her story and that which she told S. T.;

2. the inconsistency between her trial testimony and the statement that she provided to the police regarding whether she awoke to the Appellant "poking" at her (p. 35 Trial Transcript);

3. the inconsistency between her trial testimony and her statement to the police regarding whether she heard the Appellant "cursing" (pp. 37-38 Trial Transcript);

4. the inconsistency regarding whether there was any sexual touching after the phone rang (p. 46 Trial Transcript);

5. the inconsistency with respect to her testimony that she thought the sexual touching stopped when the alarm went off (pp. 49-51 Trial Transcript);

6. despite the fact that her father was a light sleeper and was in his bedroom not more than 30 feet from where the alleged incident occurred, the complainant did not call out to him or go to him (p. 41 Trial Transcript);

7. the fact that the complainant did not move from where she was laying even after the Appellant had gone to answer the telephone (pp. 42-43 Trial Transcript).

34. Counsel for the Appellant also suggests there were other difficulties with the Complainant's evidence, not the least of which was her acknowledgement that she had very little sleep by the time the incident occurred and that she admitted to being unclear with respect to many of the details surrounding the incident (pp. 46-48 Trial Transcript).

35. With the foregoing in mind, the Appellant argued that the trial judge's erroneous approach to Complainant's evidence is revealed in the following passages:

> "The fact that here today Ms. M. initially indicated in her direct examination and on cross-examination that Mr. M. touched her breast before that call and after and then subsequently on cross-examination was prepared to suggest that possibly there had not been any touching of her breast afterwards and that it had all been before, I do not consider as being an indication of lack of credibility.
>
> I am dealing with a 16 year old witness who was here, in my view, seeking to tell the truth and was prepared to entertain the possibility, if it was suggested to her, that on some occasions the positiveness, I guess, or degree of confidence with absolute

> assurety that she had in her recollections, she was prepared to suggest was not 100% and admit to certain possibilities that were suggested to her.
>
> That, in my view, is at least one indication of somebody who is not here to exaggerate but someone who was being, I thought, ***in the course of her testimony, extremely generous and prepared to accept some possible doubt in certain circumstances.*** There were certain things she was not prepared to accept any doubt about but there were some." (pp. 153-154 trial transcript) (Emphasis added)

36. I have reviewed the evidence and the submissions of Counsel. I agree with Crown Counsel that the noted inconsistencies do not amount to significant evidence which contradicts the Complainant's allegation. The case is therefore distinguishable from ***R. v. Stewart*** [1994] O.J. No. 811 (Ont. C.A.). In that case there was significant evidence which contradicted the Complainant's evidence that the Accused had ample opportunity to commit the alleged offence. The Court of Appeal found that the trial judge did not satisfactorily resolve this critical issue of opportunity. In particular, the court found that a positive finding of credibility on the part of the Complainant was not sufficient to support a conviction in a case of this nature ***where there was significant evidence which contradicted the Complainant's allegations***." The inconsistencies cited by the Appellant in this case do not amount to significant evidence contradicting the

Complainant's allegations. Inconsistencies are to be expected and do not necessarily impair credibility. Where the inconsistencies are arguably significant (e.g. the inconsistency with the evidence of S. T.), the trial judge satisfactorily resolved the issue. I am satisfied that the trial judge did not inadvertently relax the proper level of scrutiny to which the evidence of children should be subjected. I am dismissing this ground of appeal.

37. ***Ground No. 4 - That the trial Judge erred in his application of the burden of proof as set out in R. v. W.(D), [1991] 1 S.C.R. 742 (S.C.C.).***

38. I have reviewed the evidence and submissions of Counsel and have determined that this ground of appeal is without merit.

39. Justice Cromwell of the Nova Scotia Court of Appeal in ***R. v. Mah*** (2002) 207 N.S.R. (2d) 262 states at paragraphs 41 and 42:

> "The W.D. principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt: see ***R. v. Avetsan***, [2000] 2 S.C.R. 745;

> [2000] S.C.J. No 57 (Q.L.) at 756. As Binnie, J. put it in ***Sheppard***, the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.
>
> The judge did not expressly instruct himself in terms of the so-called W.D. formula nor did he at any point in his reasons state that he had considered all of the evidence in light of the reasonable doubt standard. However, as Matthews, J.S. said in ***R. v. Brown*** (1994), 132 N.S.R. (2d) 224; [1994] N.S.J. No. 269 (Q.L.)(N.S.C.A.) At para. 19, the failure of the trial judge to use the language of Cory, J. in ***R. v. W.(D.)*** does not of itself constitute reversible error. ***The question is whether, upon consideration of the whole of the judge's decision, it is apparent that the judge did not apply the proper test or did not address '... his mind, as he was required to do, the possibility that despite having rejected the evidence of the respondent, there might nevertheless ... be a reasonable doubt as to the proof of guilt*** ': Sheppard at para. 65." (Emphasis added)

40. I am satisfied upon consideration of the whole of the Judge's decision that it is apparent that the Judge did apply the proper test. In particular on page 157 of the transcript, the trial Judge stated in part "In my view Mr. M.'s testimony in many, many respects is contrived and designed to fit in with and meet the other circumstances that are put before the court to the point where credibility is stretched beyond the breaking point." It would be artificial in the extreme to now suggest that, in the face of such a finding,

the trial Judge should have gone on to say that such evidence was not capable of raising a reasonable doubt in his mind.

41. I am therefore dismissing the appeal and affirming the decision of the Trial Judge.

Order accordingly.

J.