SUPREME COURT OF NOVA SCOTIA
Citation: *R v. E.A.H.*, 2023 NSSC 386

Date: 20231206
Docket: 523276
Registry: Halifax

Between:

E. A. H.

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	August 28, 2023, in Halifax, Nova Scotia
Written Release:	December 6, 2023
Counsel:	Jonathan Hughes, for the Appellant Tiffany Thorne, for the Provincial Crown

By the Court:

[1] On April 27, 2022 the Appellant, EAH was tried in the Nova Scotia Provincial Court on charges which alleged that, on the 27th day of February, 2020, at or near Dartmouth, Nova Scotia, he committed a sexual assault on his grandson, KH, contrary to section 271 of the *Criminal Code*. He also faced a second charge, which alleged that, at the same time and place, he did touch KH, a person under the age of 16 years, for a sexual purpose, with a part of his body, to wit, his hand, contrary to section 151 of the Code.

[2] The Trial Judge reserved his decision, which he subsequently delivered on May 2, 2022. In so doing, he convicted EAH of the section 151 charge, and stayed the section 271 charge, having determined that it was an included offence.

[3] EAH appeals his conviction to this Court, sitting in its capacity as a Summary Conviction Appeals Court.

Factual background

[4] Briefly, the facts are these. The Appellant (sometimes referred to as "EAH" or "the grandfather") is the biological father of FH. FH, in turn, is the mother of KH. At the time of the alleged offence, FH (sometimes referred to as "the mother") was approximately 20 years old, and KH was approximately 3 ½ years of age.

[5] FH and KH were living with the Appellant and his wife, MH (sometimes referred to as "the grandmother"). Given that repairs were underway to KH's bedroom, he would regularly, at the time, sleep with his mother, FH, or his grandparents, in their bed.

[6] At 12:05 a.m. on February 27, 2020, FH texted a friend stating, in effect, that she had to leave her parents' residence because she had just witnessed her father "touching" KH. She then removed KH from her parents' bedroom and took him to her own.

[7] After FH confronted her mother the next day about what she said she had witnessed, MH contacted her husband, who denied the allegations. He has continued to do so to this day.

[8] FH left with her son the next day and did not return. The parties have filed an Agreed Statement of Facts (trial Exhibit 1). This simply acknowledges that, when KH was subsequently interviewed by a police officer and social worker, he disclosed no sexual touching.

[9] FH's police statement was to the effect that she believed she saw her father touching KH's penis, scrotum, and anus, all the while masturbating himself. She indicated that she saw this when she peeked into her parents' bedroom at the door to check on her son. Her ostensible purpose in getting up at that hour of the night was to get some food from the refrigerator in the kitchen, and she did not fully enter the room. She next told the police that she began stomping around in the hallway in an effort to alert her father that someone else was awake in the home, so that he would stop the assault on her son.

[10] The Appellant has highlighted differences between FH's testimony at trial (at least on direct), and what she said in her police statement. For example, note has been made of the fact that she did not mention on direct that she had noticed her father masturbating himself or touching her son's anus. There were also other alleged discrepancies, including whether, after seeing the alleged abuse, she stomped around in the hallway, or whether she moved furniture and other objects in her room (instead) to create noise to try to stop the incident.

[11] The Trial Judge also heard evidence of some animus between FH and her parents. Her mother, MH, testified that her daughter would often leave their home for days at a time, without providing any notice to them, and that she (MH) was effectively the primary caregiver for her grandson, generally feeding, clothing, bathing him, and putting him into bed. MH also testified that when her grandson went to bed, it was rare that he would not sleep with her and the Appellant.

[12] EAH himself, in addition to completely denying the allegations, expressed the view that he and his daughter did not have the best relationship. He added that he viewed her as lazy with respect to doing housework, and caring for KH. With that having been said, the defence did not raise a specific issue of motive to lie or hostile animus before the Trial Judge.

Issues

[13] The Appellant raises three issues for consideration by this court. My preference is to restate them, and add some discussion of the standard of review at the outset. The result follows:

A. What is the appropriate standard of review?

B. Are the Trial Judge's reasons sufficient to permit meaningful appellate review?

C. Did the Trial Judge correctly apply the test in *R. v. W.(D.)*?

D. Did the Trial Judge misapprehend or fail to consider the entirety of the evidence before him?

Law and Analysis

A. Standard of Review

[14] An allegation that the trial judge's reasons were too deficient to enable meaningful judicial review, amounts to an allegation that he committed an error of law (*R. v. Sheppard*, 2002 SCC 26 at para 28). Similarly, when an appellant raises an issue involving failure to properly apply *R. v W.(D.)* an alleged error of law is also involved (*R. v. Coburn*, 2021 NSCA 1).

[15] It follows that the first two issues must be reviewed on a standard of correctness.

[16] As to the final issue, there is no real disagreement between the parties. For convenience, I will quote from the Respondent:

> Misapprehension of evidence has a stringent standard of review. The misapprehension must go to the substance of the evidence, it must be material to the reasoning of the trial judge, and the misapprehension must play an essential part in the reasoning process resulting in a conviction. A misapprehension of evidence can encompass a failure to consider evidence relevant to an issue, a mistake about the substance of an item or items of evidence, or failure to give proper effect to evidence.
>
> *(Respondent's Factum, para. 21)*

[17] It, too, amounts to an alleged error of law, and attracts a correctness standard (stringently applied as per the above).

B. Are the Trial Judge's reasons sufficient to permit meaningful appellate review?

(i) The Decision Itself

[18] It is important to consider the Trial Judge's approach to certain aspects of the evidence in conjunction with this issue. For example, we have the following:

> Much of the question center [sic] around the possibility of what could you see from that [the mother's] position in the [bedroom] doorway. In fact, in his testimony, Mr. H at one point acknowledged that it could be possible that one could see from a position in the doorway. There were no pictures to indicate the layout. There were no measurements taken.
>
> *(Decision, Appeal Book, Tab 6, p. 184, lines 15-20; hereinafter only page and line references will be cited in conjunction with references to portions of the Decision)*
>
> . . .
>
> I am satisfied that it would be completely possible for the daughter who is ... indicated her height was five foot nine to see ... the child, in the bed. He was there between his grandfather closest to the door, he in the middle, the grandmother on the far side of the bed with the blankets over her facing the window, in other words facing away from the bed. The child at that point was about two feet and estimated to be somewhere 25 or 30 pounds depending on who was giving the evidence.
>
> *(Decision, p. 185, lines 19-21, p. 186, lines1-6)*
>
> . . .
>
> [The daughter's] evidence with respect to whether or not she could see her grandfather [sic – "father"] masturbating with his right hand would be a little bit more problematic since that wouldn't be far away from the rest of his body on the bed. It's a simple matter of anatomy. The mother was questioned about that and there was a certain lack of precision in her evidence, although her testimony was that she couldn't see the penis necessarily, she could see the hand and the motion. Whether or not he was masturbating is not necessarily key to the end result in the case if the evidence that Mr. H was touching … his grandson's penis and scrotum.
>
> *(Decision, p. 186, lines 10-20)*
>
> . . .
>
> Mr. H's testimony was that he had been playing with his phone in the room, there were games on his phone. Obviously the screen could have been on. He didn't dispute that the T.V. was on. There was evidence there was a light in the hall which was in the center of the hall at the landing. I take it the landing was near the doorway. When asked where the light was he said it would be behind one standing in the door. I'm satisfied that there was sufficient ambient light in the room that it was possible to see, in other words it wasn't complete darkness. There was also the issue of light coming in through the window on the far side of the bed.
>
> Mr. H said that when he got tired of his phone, he put his phone down on the bedside table between the door … doorway and the bed. He …KH up to that point had been up against him and he said he moved, sorry, the child over to the side next to his

grandmother and he then went to sleep. The grandfather indicated that he had no recollection of the mother coming in and checking on the child. She first picked up the sippy cup which apparently was the child's only sippy cup on the far side of the bed, and picked up the child, left the room. She said she then went and sent texts to one of her friends.

The time on that text is 12:05 a.m. as pointed out by Defence counsel. There wasn't a clear estimate of exactly how long between when she picked up her child and when she first made the observations which is why I made the statement earlier that these … the actual offence may have taken place shortly before midnight. The mother said when she observed the action between her father and … her son … she froze for a brief period of time which, in her estimate, is 30 seconds. She then made some noise in the hallway and then went back to her room and made some more noise.

She was cross-examined extensively as to why she … did that and why would she leave her … leave the child … in a position. Her answer was initially she was in shock and surprised. She testified that her … she didn't want to create a scene and felt that if she made noise, whatever was going on would cease and that was the reason for the noise and going back to her room and that would explain why shortly thereafter she decided to go back and pick up her … the child.

That explanation is logical and coherent. It's not necessarily the choice everybody would make. Some may have done other things. I don't think the explanation to my mind is suspect. One has to accept that not everybody will react the same way in the same situation, it's only if the response is illogical that it raises some concern.

The mother was … questioned about her statement to the police and differences regarding whether or not she had said at various points whether she had made noise with her slippers in the hall. She explained at one point that there were certain boards in the hall that creaked, she knew where they were, so she made sure she stepped on those to make a noise. Defence suggests that there was inconsistency between what she said and the order in which she did it in her statement to the police and her testimony. Just because people don't … give their evidence exactly the same way every time doesn't mean that the evidence is incorrect. The human mind is not a recording, things come into a mind that not [sic] necessarily in the same order.

The evidence focused on various other aspects of relationships within the house. The mother said she suffered from anxiety and depression. The grandfather, and to a lesser extent … He indicated to the Court that in his view his daughter was lazy about work, was lazy about school, was lazy about housework and caring for the child. The grandparents viewed themselves as the primary caregiver to the child. One has to bear in mind that the mother was 17 and a student when she got pregnant with the child.

[Emphasis added]

(Decision, p. 187, lines 8-21, pp. 188-189, p. 190, lines 1-16)

[19] Then the Trial Judge said this:

> I'm not sure any of that renders either party or any of the witnesses more or less capable of belief. It may be as simple as the fact that when people suffer from depression one of the symptoms of depression is a lack of energy and a difficulty of getting bed … in the morning and I noted the grandfather's testimony he said that he often gave the child breakfast in the morning because … the mother didn't get up. Perhaps the difference in perception is a lack of appreciation between the parties as to the effect of depression on one's behaviour.
>
> [Emphasis added]
>
> *(Decision, p. 190, lines 17-21, p. 191, lines 1-4)*

[20] The Trial Judge returned to his analysis of the appellant's evidence:

> Mr. H was questioned extensively as to why he didn't make inquiries about what touching meant. The grandfather said he understood what was meant by the allegations, he didn't have to ask. His position was he didn't have to ask because he hadn't done anything. But then he was cross-examined well, you did touch the child, you moved the child over towards his grandmother when you went to sleep. There was evidence that the grandfather kissed the child on the forehead. That questioning went round and round to the point of being somewhat confusing. I don't find that evidence in any way helpful in determining the veracity or lack of veracity of Mr. H. Similarly there were questions about the cell phone. I don't find any of that helpful in determining the veracity or lack of veracity of the grandfather.
>
> [Emphasis added]
>
> *(Decision, p. 191, lines 5-18)*

[21] Next, the Trial Judge considered MH's (the Appellant's wife) evidence:

> The grandmother surprisingly was asked by the Defence what her believe was in terms of the veracity of the allegations. I indicated that was a decision for the Court that was not a … question that would bring in relevant facts, it was asking for an [sic] opinion evidence. A witness' opinion as to guilt or not is not appropriate before the Court. Crown followed up on that with indicating it was an issue of credibility. If it did relate to credibility, in my view the grandmother was consistent in her evidence and candidly admitted although that was her belief, she indicated anything was possible and similarly stated gratuitously that anything was possible with respect to her daughter's evidence.
>
> I find that was a candid acknowledgment by the grandmother that although she had her beliefs, she could be wrong. So if anything, it enhanced her credibility. Unfortunately that doesn't help me decide the case because she was asleep through

> the entire incident and … her evidence only establishes that it was possible for the event to have taken place while she was asleep in the bed.
>
> [Emphasis added]
>
> *(Decision, p. 191, lines 19-21, p. 192, lines 1-16)*

[22] Moving on, the Trial Judge considered the dynamics of the relationship between FH and her parents:

> There were questions asked about her relationship with her daughter. There were problems with that relationship and particularly the current stage but before that night, it's not surprising when children either move back home with their own children, the whole dynamic of the household changes, it's not the same as when children are living there with their parents. For those who have been through the experience, it might, I suspect the vast majority, would think it would be best if children found their own … residence. It's time for the birds to leave the nest.
>
> So none of that helps me decide the issue of credibility. There is no physical evidence.
>
> [Emphasis added]
>
> *(Decision, p. 192, lines 17-21, p. 193, lines 1-7)*

[23] This brings us to the crux of the Trial Judge's decision:

> I find in this situation that doesn't give me any assistance in deciding which evidence is more credible. At the end of the day the burden is on the Crown to prove their case beyond a reasonable doubt. That burden never shifts, it always lies with the Crown.
>
> [Emphasis added]
>
> *(Decision, p. 193, lines 17-21)*

[24] The Trial Judge then states the test to be applied:

> So the Court is left with the grandfather's denial on one side and the mother's allegation on the other side. In summation, counsel for the Crown indicated that the mother's evidence should be accepted. As a result of this, she gave up or voluntarily moved out of the house, spent some … a week at her sister's house, then lost the support of her grandparents [sic – "parents"], both financial in terms of providing food, shelter, and care for the child when she either was at work or away from the home. There is no burden on the accused to provide a motive or explanation. The case boils down to whether or not … I am persuaded of the strength of the mother's evidence to such an extent that it forms the basis for disbelief of the grandfather's evidence to the extent that there is no room left for reasonable doubt.

(Decision, p. 194, lines 12-21, p. 195, lines 1-4)

[25] Which brings us to his decision:

> Much to my regret, I find that that is the situation here. I am not accepting [EAH's] denial and I find that the touching took place as described by the mother. In this case, subject to what counsel have to say, it seems that the 271 charge should be stayed and a finding of guilty on the 151 charge. Counsel have any comment on that?
>
> *(Decision, p. 195, lines 5-11)*

(ii) Analysis

[26] The Trial Judge's reasons must suffice both to explain what he decided, and why he did so, in a manner that permits meaningful appellate review. (*R. v. Preston*, 2022 NSCA 66, at para. 65). "Sufficiency of reasons" encompasses both factual and legal sufficiency. The former was discussed in *R. v. G.F.*, 2021 SCC 20:

> [71] . . . Factual sufficiency is concerned with what the trial judge decided and why: Sheppard, at para. 55. Factual sufficiency is ordinarily a very low bar, especially with the ability to review the record. Even if the trial judge expresses themselves poorly, an appellate court that understands the "what" and the "why" from the record may explain the factual basis of the finding to the aggrieved party: para. 52. It will be a very rare case where neither the aggrieved party nor the appellate court can understand the factual basis of the trial judge's findings: paras. 50 and 52.
>
> [72] *Sheppard* itself was such a case. The trial judge's reasons for conviction read, in their entirety:
>
> > Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged. [paras. 2 and 10]
>
> [73] This Court found that these reasons were factually insufficient because the pathway the trial judge took to the result was unintelligible: Sheppard, at para. 60. It was simply not possible for the parties, counsel, or the courts to determine why the trial judge found as he did: paras. 2 and 61-62.

[27] The court then addressed "legal sufficiency" in the following terms:

> [74] Legal sufficiency requires that the aggrieved party be able to meaningfully exercise their right of appeal: *Sheppard*, at paras. 64-66. Lawyers must be able to discern the viability of an appeal and appellate courts must be able to determine whether an error has occurred: paras. 46 and 55. Legal sufficiency is highly context

> specific and must be assessed in light of the live issues at trial. A trial judge is under no obligation to expound on features of criminal law that are not controversial in the case before them. This stems from the presumption of correct application — the presumption that "the trial judge understands the basic principles of criminal law at issue in the trial": *R.E.M.*, at para. 45. As stated in *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656, at p. 664, "Trial judges are presumed to know the law with which they work day in and day out": see also *Sheppard*, at para. 54. A functional and contextual reading must keep this presumption in mind. Trial judges are busy. They are not required to demonstrate their knowledge of basic criminal law principles.
>
> [Emphasis added]

[28] When sufficiency of reasons is challenged, in such a context as this, a reviewing Court must remain mindful of two things. First, in order for the trial judge's reasons to suffice, the threshold is very low.

[29] Second, a trial judge's findings of credibility necessarily attract considerable deference. This is not to say that the reasons need not be articulated. Rather, it simply acknowledges that the trial judge has had the benefit of conducting the trial and observing the witnesses. It is helpful to recall the words of the court in *R. v. Gagnon*, 2006 SCC 17, where it was noted, at para. 20-21:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in H.L., that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.
>
> This does not mean that an appeal court may abdicate its responsibility for reviewing the record to see whether the findings of fact are reasonably available. Moreover, where the charge is a serious one and where, as here, the evidence of one party contradicts the denial of an accused, the latter is entitled to know why the trial judge is left with no reasonable doubt. [paras. 20-21]

[30] As I am cautioned in *G.F.*, what is at issue is not so much the precise words that the trial judge used, but whether it appears that the trial judge turned his mind to "...the relevant factors that go to the believability of the evidence in the factual context of the case, including truthfulness and accuracy concerns. (*G.F.*, para. 82).

[31] This is consistent with the caution found in *R. v. R.E.M.*, 2008 SCC 51 where, McLachlin, C.J. (as she then was) observed:

> [56] ...The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law. Reasonable inferences need not be spelled out. … Finally, appellate courts must guard against simply sifting through the record and substituting their own analysis of the evidence for that of the trial judge because the reasons do not comply with their idea of ideal reasons.
>
> [Emphasis added]

[32] Closely contemporaneous with *R.E.M.*, was the Court's decision in *R. v. Dinardo*, 2008 SCC 24:

> [26] At the trial level, reasons "justify and explain the result" (*Sheppard*, at para. 24). Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error (see *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 23). As this Court noted in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, the accused is entitled to know "why the trial judge is left with no reasonable doubt".
>
> [Emphasis added]

[33] In *R. v. Jolibois*, 2022 SKCA 120, some factors similar to those arising in this case were addressed. There, the issue was also whether the Crown had proven the allegations of sexual touching and sexual assault beyond a reasonable doubt. The Court of Appeal concisely laid out the salient portions of the trial judge's reasons at para. 15, most of which are reproduced below:

> …
>
> With respect to the analysis of the evidence of timing of the complainant and -- claimant -- complainant and her mother's text to each other are extremely important for the analysis of the evidence. Except for noting the time on her phone when she woke up, the complainant says that the time of day were estimates. The same is true of the accused, and [C.S.'s grandmother's] evidence as for the time of day. However, the complainant's mother testified to precise times when she both sent and received text messages from her daughter. At 11:32, the complainant replied "later" to the question of being picked up. Forty minutes passed until she sent the text to her mother asking to be picked up, and that was at 11 -- 12:18 PM. Some of that time would have been taken up by her walking up the stairs, seated at the table,

> texting her mother. Even if that took five or ten minutes -- five minutes, that still leaves 35 minutes in which an assault could have taken place.
>
> The credibility of witnesses is always an issue. I have no doubt about the truthfulness of [D.J.'s mother's] evidence, which is very clear and to the point, nor do I have any doubt about the truthfulness of the complainant's testimony. She was clear and fairly precise. Her credibility is bolstered by her advising her mother of the assault, and by her giving her statement to the RCMP a very short time after the event. She said that she froze when the assault was occurring, which is understandable, and in no way reduces her credibility.
>
> [C.S.'s grandmother] says she seems normal, which is also understandable. The Court no longer requires a … cry from sexual assault complainants, nor does the law require a complainant to complain of the assault to the first possible person she encounters after the event. I can find no reason to disbelieve or doubt the complainant's evidence. I can see nothing in the evidence that suggests that she's making this all up, or that she is mistaken.
>
> I believed some of the accused's evidence, but not his evidence as to his sobriety or denial of the assault. The complainant said that the accused spoke the way drug [sic] people talk. [C.S.'s grandmother] said that he wasn't sober, but not that drunk. These are not descriptions of a sober person. He was testifying in court as the accused would have had the court believe.
>
> His denial of the assault is not aided by [C.S.'s] evidence on -- or that of [C.S.'s grandmother]. Perhaps [C.S.] is a -- a remarkably solid sleeper, but I find it is more likely that she kept her eyes closed and pretended to sleep. I did not believe her on this point.
>
> [C.S.'s grandmother] heard no -- no commotion from [the] basement because the complainant froze, and there's no evidence that the accused shouted or spoke in a loud voice demanding that she get back into bed. She said that he was angry with her and spoke in an angry voice.
>
> The accused's evidence is not believed, nor does it raise a reasonable doubt as to his guilt. No reasonable doubt exists on all of the evidence before the Court. I, thereby, find the accused guilty of both counts on the Information.
>
> [Emphasis added]

[34] After reviewing the relevant authorities, Tholl, J.A, writing for the Court of Appeal in *Jolibois*, observed:

> [36] An application of these principles to the matter at hand reveals that the trial judge's oral reasons, while relatively sparse, are sufficient. A reader of the Trial *Decision* is not left wondering *why* the trial judge convicted Mr. Jolibois. In short, after summarizing the evidence and the issues, he found D.J.'s evidence to be credible and reliable, he disbelieved Mr. Jolibois on the portions of his testimony related to his level of intoxication and whether he had entered C.S.'s bedroom and

> touched D.J., and – after applying the principles from *R v W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 – he found that he did not have a reasonable doubt as to guilt, based on all of the evidence. The trial judge was not required to overtly resolve every incongruence in the evidence or comment on all aspects of it.
>
> [37] On the key issue of credibility, and the assessment of the time periods when the offence was alleged to have been committed, the trial judge articulated his findings and expressed reasons that are sufficient to understand why he arrived at those determinations. He recounted the evidence regarding Mr. Jolibois's presence in the two bedrooms when he summarized the important evidence, reinforcing that he was aware of this issue. Given his discussion of the timelines, and the fact that Mr. Jolibois's bedroom was located scant feet away from C.S.'s bedroom, a failure to further explicitly mention Mr. Jolibois's ultimate location does not undermine the sufficiency of the reasons. The trial judge obviously inferred that Mr. Jolibois had quietly gone back to his own bedroom in the time that he had to do so. There was no requirement to further discuss this factor. In my view, it is readily apparent why Mr. Jolibois was convicted. There is a sufficient basis for appellate review. This ground of appeal cannot be given effect.
>
> [Emphasis added]

[35] In this case, the reasons for the Trial Judge's assessments of credibility are not nearly as apparent. One need only observe his parsing of the various pieces of evidence in the case, and the number of times in which consideration of some pieces of evidence were followed by a phrase to the effect of "however, this does not help me resolve the credibility issues", or some variation thereof. It is certainly true that the Trial Judge did come to the conclusion that "I'm satisfied beyond a reasonable doubt that given the right position of the child ... it would be possible for the mother to see what she said she saw." *(Decision, p. 187)*.

[36] It is also true, as has been remarked earlier, that the Trial Judge commented on the effect upon FH's credibility in terms of her admission in cross-examination that she did not intervene immediately when she saw the alleged abuse occurring to her son. Her evidence was to the effect that she did not wish to cause a scene. She said she first preferred to make a noise in the hope that "whatever was going on would cease." The Trial Judge observed that while her decision was not necessarily the one everybody would make, it was "logical and coherent" (*Decision, pp. 188–189)*.

[37] The Trial Judge proceeded to discuss some of the discrepancies between FH's statement to the police and her testimony on direct examination in the trial. He also discussed the grandmother's evidence that FH suffered from anxiety and depression and the strained interpersonal family dynamic. As we have seen, and in particular,

he commented upon the fact that the grandparents viewed themselves as a primary caregivers to the child. He then observed that it must be borne in mind "... that the mother was seventeen and a student when she got pregnant with the child." *(Decision, p. 190).*

[38] The Trial Judge then concludes that segment of the decision with:

> I'm not sure that any of that renders either party or any of the witnesses more or less capable of belief.
>
> *(Decision, p. 190).*

[39] As we have also seen, the Trial Judge then considered the Appellant's evidence. In particular, he noted EAH's response to a line of questioning centred around why he did not make inquiries about what "touching" meant in the aftermath of FH confronting her parents the day after the alleged incident. He mentioned that the Appellant said he already understood what was meant by the allegation. Moreover, he (EAH) said that he did not have to ask because he had not done anything.

[40] The Trial Judge then goes on to say:

> … But then he [the Appellant] was cross-examined well, you did touch the child, you moved the child over towards his grandmother when he went to sleep. There was evidence that the grandfather kissed the child on the forehead. That questioning went round and round to the point of being somewhat confusing. I don't find in any way helpful in determining the veracity or lack of veracity of [EAH]. Similarly there were questions about the cell phone. I <u>don't find any of that helpful in determining the veracity or lack of veracity of the grandfather</u>.
>
> [Emphasis added]
>
> *(Decision, page 191)*

[41] Next, the Trial Judge considered the grandmother (MH's) evidence, and made particular note of the fact that she was asked by the Defence, in chief, as to her belief in the veracity of her daughter (FH's) allegations. The Trial Judge observed that this was tantamount to seeking an opinion on the very issue that the Court would have to determine, although he did allow Crown follow up on the basis it could relate to credibility. As to MH's evidence on the point, he made particular note that "if it did relate to credibility, … [MH] was consistent in her evidence and candidly indicated … anything was possible and similarly stated gratuitously that anything was possible with respect to her daughter's evidence."

[42] The Trial Judge then added that although the concession enhanced MH's credibility, "… that does not help me decide the case because she was asleep through the entire incident and her evidence only establishes that it was possible for the event to have taken place while she was asleep in the bed." *(Decision, page 192)*

[43] The Trial Judge next considered MH's evidence as to the dynamics of FH's relationship with her parents. He adverts to the fact there were problems with their relationship well before the alleged incident and discusses the disruption that may result when children move back home with their own children. He concludes this sequence of his analysis "… it would be best if children found their own … residence. It is time for the birds to leave the nest." He then says (again) "none of that helps me decide the issue of credibility. There is no physical evidence." *(Decision, p. 193)*

[44] As I consider the foregoing, along with the Decision and record in its entirety, I remind myself of the Court's comments in *R. v. Gerrard*, 2021 NSCA 59, where Justice Hamilton explained:

> [44] The standard of review as it applies to cases turning on credibility assessments was clearly set out in *R. v. S.S.S.*, 2020 BCCA 180:
>
> > [24] **It is important to emphasize that while an appellate court is tasked with scrutinizing the reasons given by the trial judge, considerable deference is owed to the trial judge on issues of fact-finding and credibility assessment.** In *R. v. Howe* (2005), 2005 CanLII 253 (ON CA), 192 C.C.C. (3d) 480 (Ont. C.A.) Doherty J.A. outlined the rationale for the limited role of an appellate court:
> >
> > > [46] Careful scrutiny of the trial judge's reasoning process is not … to be equated with re-trying the case. **An appellate court must always bear in mind the significant advantage enjoyed by the trial judge when it comes to assessing credibility. … A lifeless transcript of the testimony cannot possibly replicate the unfolding of the narrative at trial.** Nor can oral argument and a selective review of the trial record possibly put an appellate court in as good a position as the trial judge when it comes to credibility determinations: see *R. v. Francois* (1994), 1994 CanLII 52 (SCC), 91 C.C.C. (3d) 289 at 296 (S.C.C.).
>
> [26] The need for deference, however, does not mean that appellate review is abandoned altogether. Where a judge's reasons demonstrate an error of principle in the assessment of credibility, or show that credibility has been assessed arbitrarily or using irrelevant criteria, appellate intervention may be required. [My emphasis]

[45] As the Supreme Court of Canada pointed out in *G.F.*:

> [79] To succeed on appeal, the appellant's burden is to demonstrate either error or the frustration of appellate review: *Sheppard*, at para. 54. Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 10-12, citing *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.), at pp. 523-25. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated: *Sheppard*, at para. 46. An appeal court must be rigorous in its assessment, looking to the problematic reasons in the context of the record as a whole and determining whether or not the trial judge erred or appellate review was frustrated. It is not enough to say that a trial judge's reasons are ambiguous — the appeal court must determine the extent and significance of the ambiguity.
>
> [Emphasis added]
>
> . . .
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> [81] As *Slatter* demonstrates, a trial judge's findings of credibility deserve particular deference. While the law requires some articulation of the reasons for those findings, it also recognizes that in our system of justice the trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial. Sometimes, credibility findings are made simpler by, for example, objective, independent evidence. Corroborative evidence can support the finding of a lack of voluntary consent, but it is of course not required, nor always available. Frequently, particularly in a sexual assault case where the crime is often committed in private, there is little additional evidence, and articulating reasons for findings of credibility can be more challenging. Mindful of the presumption of innocence and the Crown's burden to prove guilt beyond a reasonable doubt, a trial judge strives to explain why a complainant is found to be credible, or why the accused is found not to be credible, or why the evidence does not raise a reasonable doubt. . . . [My emphasis]

[46] Cases such as *R. v. Langan*, 2020 SCC 33, *R. v. Kishayinew*, 2020 SCC 34, *R. v. Slatter*, 2020 SCC 36, *R. v. Delmas*, 2020 SCC 39, *R. v. W.M.*, 2020 SCC 42 and *R. v. Cortes Rivera*, 2020 SCC 44, provide additional emphasis as to how considerable is the deference accorded to findings of credibility made by trial judges.

[47] As the analysis is conducted, I further remind myself that "It is not sufficient to "cherry pick" certain infelicitous phrases or sentences without enquiring as to whether the literal meaning was effectively neutralized by other passages." (*R. v.*

Davis, [1999] 3 S.C.R. 759, para. 103). Nor am I to substitute my own assessment of credibility for the result at which the Trial Judge arrived.

[48] But I must be able to understand, overall, why the Trial Judge made findings of credibility. It is not apparent, even after I have attempted a synthesis of the Trial Judge's articulation of his reasons, with the Record.

[49] The Trial Judge stated very clearly, on multiple occasions, what he did not find helpful to him as he assessed credibility. He did not, however, articulate why EAH's evidence did not raise a reasonable doubt as to his guilt. He essentially outlined the evidence, and concluded "I am not accepting [EAH's] denial and I find that the touching took place as described by the mother." *(Decision, p. 195, line 5-6).* The Trial Judge's reasons do not suffice to permit meaningful appellate review.

B. The WD Analysis

[50] If I have erred in concluding that the trial judge's reasons were insufficient, I would have concluded that his analysis of the evidence was not in accordance with the manner prescribed in *R v. W (D),* [1991] 1 SCR 742. The "bottom line" of *WD* is well-known: if the trial judge believes the evidence of the accused, the accused is entitled to an acquittal. If the trial judge does not believe the testimony of the accused but is still left in reasonable doubt by it, an acquittal should likewise follow. Finally, even if the accused's evidence does not raise a reasonable doubt, the trial judge can only convict the accused if convinced beyond a reasonable doubt of the guilt of the accused on the basis of the evidence which is accepted.

[51] It has been pointed out many times that this test does not require a merely formulaic or mechanical recital. Indeed, it is unnecessary for the judge to articulate the test in any prescribed form. However, what is necessary in a case, which turns entirely on credibility, is that the trial judge must have directed his "... mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (*Dinardo*, para. 23).

[52] I consider this issue mindful of the admonition provided by the court in *REM*, which follows:

> [48] The sufficiency of reasons on findings of credibility — the issue in this case — merits specific comment. The Court tackled this issue in *Gagnon,* setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella JJ., at para. 20, observed that "[a]ssessing credibility is not a science." They went on to state that it may be difficult for a trial judge "to articulate

> with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events", and warned against appellate courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's.
>
> [49] While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.
>
> [50] What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo,* where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility . . . the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo,* at para. 30.
>
> [51] The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.
>
> [Emphasis added]

[53] For ease of reference, the paragraph of the decision in which the test was articulated by the trial judge is completely reproduced below:

> So, the court is left with the grandfather's denial on one side and the mother's allegation on the other side. In summation, counsel for the Crown indicated that the mother's evidence should be accepted. As a result of this, she gave up her voluntarily moved out of the house, spent some... a week at her sister's house, then lost the support of her grandparents, both financial in terms of providing food, shelter, and care for the child when she either was at work or away from the home. There is no burden on the accused to provide a motive or explanation. The case boils down to whether or not... I am persuaded of the strength of the mother's

> evidence to such an extent that it forms the basis for disbelief of the grandfather's evidence to the extent that there is no room left for reasonable doubt. Much to my regret, I find that is the situation here. I am not accepting Mr. H's denial and I find that the touching took place as described by the mother. (Appeal book, tab 6, pages 194 – 195).
>
> [Emphasis added]

[54] I focus on the substance rather than the manner in which the *WD* test has been articulated. Certainly, it appears that the above articulation of the test evidences an awareness of requirement that, in order to convict, there must be no reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

[55] With that said, it appears that, in the event that the Trial Judge was found to have articulated a reason to convict, he appeared to have done so by accepting the argument of the Crown which he referenced above. Put differently, what he appears to have accepted this: why would FH voluntarily move out of the home, live with her sister for a week, give up the support of her parents (economic, shelter and childcare for her and her son) if EAH did not do what she says she saw him do to her son.

[56] With great respect, the effect of the trial judge's apparent acceptance of this argument is to reverse the burden of proof. As he himself stated, there was no onus cast upon the accused to prove or disprove or explain anything. Appearing, as it does, within the context of a decision in which the judge makes myriad statements to the effect that this or that “does not help me decide who was telling the truth or resolve the issue of credibility" raises the spectre that, notwithstanding the manner in which the WD test was articulated, in practical terms, it was not properly applied.

Conclusion

[57] Given my findings with respect to the second and third issues, it is unnecessary to deal with the fourth one. The appeal is allowed. The guilty verdict is set aside. As this court cannot resolve the credibility issues inherent in this case, the matter shall return to the Nova Scotia Provincial Court before a different Judge for retrial, should the Crown wish to do so.

Gabriel, J.