Date: 2013 07 11
Docket: S 1 CR 2012 000127

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARSHA COCKNEY

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Appeal from conviction and sentence.

Heard at Yellowknife, NT on May 17, 2013

Reasons filed: July 11, 2013

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE K. SHANER

Counsel for the Appellant: Caroline Wawzonek
Counsel for the Respondent: Roger Shepard

Cockney v. *HMTQ*, 2013 NWTSC 42

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REASONS FOR JUDGMENT

[1] On October 5, 2012 Marsha Cockney was convicted in Territorial Court of uttering a threat. She was sentenced to a prison term of two months, followed by one year of probation. The conviction followed a trial in which she and her co-accused, Mr. Dennis Rogers, each testified about events on May 9 and June 5, 2011, which resulted in charges being laid against both of them, and which concerned the same complainant, Chris Cook.

[2] Ms. Cockney was acquitted of the charges stemming from the May 9 events, but she was convicted of uttering a threat based on what occurred on June 5.

[3] Ms. Cockney appeals both the conviction and the sentence.

GROUNDS FOR APPEAL

[4] The conviction is appealed on two grounds. First, the Trial Judge failed to provide a discernible pathway to conviction. Second, he erred in applying the principles in *R. v. W. (D.),* [1991] 1 S.C.R. 742.

[5] The basis for the sentence is appeal is that the Trial Judge erred in applying the proportionality principle, resulting in a sentence that is disproportionately harsh in relation to Ms. Cockney's moral blameworthiness for, and the seriousness of, the offence.

BACKGROUND

[6] The evidence at trial reflected very different versions of what happened on each of May 9 and June 5 and consequently, it was necessary for the Trial Judge to make findings about credibility in order to reach a conclusion.

A. Evidence from Marsha Cockney and Dennis Rogers

[7] According to Ms. Cockney, she and Mr. Rogers spent the evening of May 8 and the early morning hours of May 9 trying to find marijuana to purchase in Inuvik. The town was "dry", however, and their efforts to purchase marijuana from people they knew were unsuccessful.

[8] Sometime in the early hours of May 9 Ms. Cockney saw that her sister was logged onto Facebook. She telephoned her sister to ask if she knew of anyone who might have marijuana. Her sister suggested that she contact Mr. Cook. According to Ms. Cockney, her sister gave her Mr. Cook's telephone number and she called him.

[9] Ms. Cockney testified that she knew who Mr. Cook was, but she did not know him "as a person". There had been no recent contact between them.

[10] After making contact, Ms. Cockney, Mr. Rogers and another individual, identified as "Colton" or "C.J.", drove to Mr. Cook's residence. Ms. Cockney had $200.00 in cash with her, which she placed into her sweatpants before proceeding up the stairs to Mr. Cook's door.

[11] When she got to Mr. Cook's door, she saw nothing in his hands. She said Mr. Cook was standing in the doorway and repeatedly asked her to come inside. She refused. She said that Mr. Cook then reached out, grabbed her arm and tried to pull her inside. She said Mr. Cook had a knife and he threatened to stab her unless she gave him her money.

[12] Ms. Cockney called for Mr. Rogers, who alit from the car and ran up the stairs to the landing where Ms. Cockney and Mr. Cook were struggling. In his own evidence, Mr. Rogers also said that Mr. Cook had a knife.

[13] Mr. Rogers said that he grabbed a red broom that was on the landing and hit Mr. Cook in the side of the head with it. He said that the end of the broom shattered into several pieces.

[14] Ms. Cockney described the event as "terrifying". She said that while Mr. Cook had her arm, she was pulling away from him. She kept her eyes cast downward.

[15] Ms. Cockney's evidence about what she saw of the broom was not clear. I will return to this later.

[16] The struggle ended after Mr. Rogers hit Mr. Cook with the broom. Ms. Cockney and Mr. Rogers then went back to the car. On the way, she dropped her cell phone somewhere on the property outside Mr. Cook's residence. They drove away, but returned five or ten minutes later to retrieve Ms. Cockney's cell phone. According to Ms. Cockney, the telephone was relatively new and cost approximately $1,000.00. She said that Mr. Rogers and C.J. retrieved the phone for her and she did not leave the vehicle.

[17] The next encounter between Ms. Cockney, Mr. Rogers and Mr. Cook came a few weeks later on June 5th. Ms. Cockney said she and Mr. Rogers were driving to a friend's home and they saw Mr. Cook walking on the street with his daughter. She testified that she did not stop the car, she did not open any of the car windows and there were no words exchanged with or said to Mr. Cook by either Ms. Cockney or Mr. Rogers.

B. Evidence from Mr. Cook

[18] Mr. Cook testified that he received a call from Ms. Cockney in the early morning hours of May 9th. She told him she wanted to buy marijuana. He told her he had some marijuana and he invited her to come to his residence.

[19] Mr. Cook testified on direct examination that he knew Ms. Cockney through her sister and that the two had drank together in the past. On cross-examination, however, Mr. Cook said that he and Ms. Cockney knew each other because they were both involved in the drug trade. Specifically, Ms. Cockney had dropped off

drugs to him from time to time in the past. He said they had each other's telephone numbers.

[20] When Ms. Cockney arrived at Mr. Cook's residence, he gave her a couple of tobacco cigarettes and some marijuana, also in the form of rolled cigarettes. After he gave Ms. Cockney these items, Ms. Cockney asked him if he had been talking to the RCMP about an individual named "CJ". According to Mr. Cook, "CJ" was a drug dealer in Inuvik. It is not clear if this was the same person who went to Mr. Cook's residence in the car with Ms. Cockney and Mr. Rogers.

[21] Mr. Cook told Ms. Cockney to leave. He saw her turn, but then saw Mr. Rogers get out of the car and approach the residence. According to Mr. Cook, it was Mr. Rogers who had the knife. The two men became involved in a physical struggle that ended with them falling to the landing. Mr. Cook was cut behind his ear with Mr. Rogers' knife.

[22] Shortly afterward, Ms. Cockney and Mr. Rogers left. Mr. Cook's uncle called the police. Mr. Cook went to the hospital and received medical treatment for the knife wound behind his ear.

[23] According to Mr. Cook and his uncle, who also testified, there was no broom.

[24] Mr. Cook testified that on June 5, he was walking with his young daughter to the convenience store. He saw Ms. Cockney's car pull out of a residential driveway and approach him and his daughter. Ms. Cockney and Mr. Rogers yelled at him from the car. Ms. Cockney said he was "dead".

[25] Mr. Cook said this made him feel threatened and that he felt "bad for his kids". He made up his mind to call the police and make a statement about the altercation on May 9th, as well as the threat.

C. Evidence from Agreed Facts

[26] A statement of agreed facts was tendered. It indicated that when the police attended to investigate shortly following the May 9 altercation, they observed neither a broom, nor any shattered objects on the landing outside of Mr. Cook's door.

APPEAL FROM CONVICTION

A. Sufficiency of Reasons

[27] Ms. Cockney argues that the reasons the Trial Judge gave for his decision are insufficient because they do not provide a discernible pathway to conviction. Specifically, in focusing on his conclusions about the evidence regarding the May 9th incident, the Trial Judge failed to provide the required analysis respecting the June 5th incident. Ms. Cockney argues she cannot, from the reasons provided, know why she was convicted of the June 5th threat.

[28] In *R. v. R.E.M*, [2008] 3 S.C.R. 3, McLachlin, C.J., summarized the three main purposes that reasons serve in a criminal trial:

> 1. They tell the parties affected by the decision why it was made;
>
> 2. They provide public accountability within the justice system; justice is not only done, but seen to be done;
>
> 3. They permit effective appellate review by allowing the appellate court "to discern inferences drawn, while at the same time inhibiting appeal courts from making factual determinations "from the lifeless transcripts of evidence, with the increased risk of factual error. . . " They also permit the appellate court to review the trial judge's interpretation of the law, and they allow the parties and lawyers an opportunity to determine if an appeal is warranted. [paragraph 11]

[29] Failure to provide sufficient reasons is an error of law and the standard of review is correctness. *R. v. Sheppard*, [2002] 1 S.C.R. 869; *R.E.M., supra.*

[30] An appellate court considering the sufficiency of reasons "should read them as whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered." *R.E.M., supra*, paragraph 16. It is not the appellate court's role to intervene "because it thinks the trial court did a poor job of expressing itself". *Sheppard, supra,* paragraph 26.

[31] The Trial Judge drew the following conclusions in relation to the threat charge against Ms. Cockney:

> With respect to the incident on June 5th, 2012 *[sic]*, I am aware that there is no evidence to corroborate one version versus the other. In the context, however, of

> my findings of credibility of Ms. Cockney and Ms. Rogers, I do not believe their version.
>
> In the context of what happened on May 9th, 2012 *[sic]*, and Mr. Cook's testimony of why he went to the police when Ms. Cockney and Mr. Rogers threatened him in front of his daughter, I find Ms. Cockney and Mr. Rogers uttered the threat to kill Mr. Cook.

Transcript of Reasons for Judgment, page 19, lines1 to 12

[32] If these conclusions stood alone, they would be deficient. As noted, however, they must be viewed in the context of the rest of the reasons, the submissions and all of the evidence. Within that context, the path to the conviction is clear. The Trial Judge did not find Ms. Cockney credible and therefore, he did not believe what she had to say about what happened on *either* occasion. In rejecting Ms. Cockney's evidence, the Trial Judge was left with the Crown's evidence. It is obvious from the context that it was based on this that he determined the Crown had proved the charge against Ms. Cockney beyond a reasonable doubt and it is clear that is why she was convicted.

[33] That said, there remain the two questions of whether there is a valid basis for the conclusions the Trial Judge reached about Ms. Cockney's credibility and whether there is a discernible path to those conclusions.

[34] In *R. v. Gagnon,* [2006] 1 S.C.R. 621, the Supreme Court of Canada concluded that in the absence of demonstrated palpable or overriding error, an appeal court must defer to the trial judge's findings on credibility. The rationale was articulated as follows:

> 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.[paragraph 20]

[35] Ms. Cockney argues that the Trial Judge made a number of errors in assessing her evidence. Specifically, he erred in applying evidence about what happened on May 9th to determine what happened June 5th; he made a number of errors in specific observations about her evidence; and he did not take into account that she was not cross-examined on her evidence respecting what happened on June 5th.

1. Application of Evidence from May 9th Event to June 5th Event

[36] Ms. Cockney argues that her evidence about what happened on May 9th was specific to what happened on *that* occasion, not what happened on June 5th. She should not be convicted for what happened on June 5th based on the evidence she gave about the altercation on May 9th.

[37] This argument ignores the context in which the Trial Judge made his decision. The charges from May 9th and June 5th were tried together. The bulk of the evidence from Mr. Cook, Ms. Cockney and Mr. Rogers concerned the May 9th incident. In determining what happened on May 9th, the Trial Judge concluded that Ms. Cockney was not credible and he did not believe her. In the circumstances it was logical for the Trial Judge to conclude, as he did, that her straight denial of making the threat on June 5th was equally incredible and unbelievable.

2. Specific Observations of the Trial Judge

[38] Ms. Cockney contends that the specific observations the Trial Judge made about her evidence are unjustified. These are addressed in turn.

a. How Ms. Cockney Came to Contact Mr. Cook

[39] The Trial Judge did not accept Ms. Cockney's testimony that she logged onto Facebook, saw her sister was also logged onto her own account and that she then called her sister, sometime between 2:30 and 4:00 a.m., to ask her if she knew anyone who had marijuana for sale.

[40] Ms. Cockney contends that there was no reason for the Trial Judge to reject her evidence about how she came to get Mr. Cook's name and contact information that night.

[41] The Trial Judge had two very different stories about how Mr. Cook and Ms. Cockney knew each other, how well they knew each other and how it was they came into contact on May 9.

[42] Ms. Cockney's evidence depicted an evening and early morning spent trying unsuccessfully to find marijuana, culminating in making contact with, and attending the residence of, Mr. Cook, someone she said she barely knew.

[43] By contrast, Mr. Cook's version was that the two knew each other from previous drug-related interactions and upon receiving her call in the early hours of the morning, he invited her to come over. When she did, he met her at the door and gave her tobacco and marijuana cigarettes.

[44] The Trial Judge was not required to accept Ms. Cockney's evidence and, in the context of the evidence, he would have been hard-pressed to find a rational basis for Ms. Cockney's explanation.

[45] The scenario Ms. Cockney depicted, that is, attending at the home of a virtual stranger in the middle of the night to buy drugs, is unlikely to the point that it defies common sense. It is even more unlikely that Mr. Cook would have invited someone he barely knew to come over to home and buy street drugs whilst his children, girlfriend, grandmother and uncles slumbered.

[46] As he was entitled to do, the Trial Judge assessed Ms. Cockney's testimony in the context of the entirety of the evidence, including Mr. Cook's evidence. He rejected her explanation and he stated his reasons for doing so. He found her explanation incredible. In the context, this conclusion is not an overriding or palpable error.

b. Ms. Cockney's Observation of the Broom

[47] The Trial Judge found Ms. Cockney's testimony about what she was able to observe on Mr. Cook's landing during the altercation and, in particular, her testimony that she saw Mr. Rogers hit Mr. Cook with a broom, was unbelievable. He also found that her testimony changed under cross-examination.

[48] Ms. Cockney argues that what she was able to see on the landing during the May 9th altercation was specific to what happened at that time. It happened during the dawn hours and her perceptions should not be relevant to her credibility as it relates to the June 5th incident, which happened in the middle of the day. She also argues that there was no drastic change in her testimony under cross-examination about what she observed on May 9th.

[49] Ms. Cockney described a scene where Mr. Cook was holding her arm with one hand and pulling her towards him. She said Mr. Rogers was behind her, so she was in the middle of the two men. Ms. Cockney said she had her head facing down, looking at the floor of the landing, the whole time, because she was afraid to

look. (*Transcript of Evidence*, page 121, lines 10 to 16; page 122, lines 21 to 23; page 123, lines 1 to 27).

[50] With respect to what she saw of a broom, the cross-examination revealed the following:

- She started out saying that she *did not see* Mr. Rogers swing the broom to hit Mr. Cook, but she *heard* it. (*Transcript of Evidence,* page 121, lines 17 to 23).
- Then she was asked to confirm that she *heard* Mr. Rogers swing the broom and she responded by saying she *saw* it while she was facing down. (*Transcript of Evidence*, page 121, lines 24 to 27).
- Later, Ms. Cockney confirmed that she *did not see* Mr. Rogers swing the broom because she was "facing the feet". (*Transcript of Evidence,* page 123, lines 2 to 5).
- Ms. Cockney next said she *saw* the broom when Mr. Rogers grabbed it because he made a swinging motion. (*Transcript of Evidence,* page 134, lines 12 to 20).
- She then said she *thought* she saw Mr. Rogers pick something up and that she heard the broom shatter. (*Transcript of Evidence*, page 135, lines 12 to 16).
- Next, she said she *did* see the broom. (*Transcript of Evidence,* page 135, lines 17 to 20).
- Finally, she said she saw the broom out of her peripheral vision. (*Transcript of Evidence*, page 136, lines 11 to 19).

[51] Ms. Cockney's evidence about what she saw of the broom is simply not clear, and I agree with the Trial Judge's conclusion that her evidence about the broom changed significantly throughout cross-examination.

[52] It will be recalled that both Mr. Cook and his uncle said there was no broom, and the Agreed Facts stated that the investigating officers did not see a broom or shattered objects in the area where the altercation took place. The Trial Judge also queried why Mr. Cook would say Mr. Rogers had a knife if Mr. Rogers had in fact attacked him with a broom.

[53] The Trial Judge ultimately found that there was no broom. In other words, he found that Ms. Cockney was untruthful in her assertion that she saw a broom.

[54] There was ample evidence to support this conclusion. The Trial Judge did not err.

c. Returning to Retrieve the Cell Phone

[55] The Trial Judge found Ms. Cockney's explanation for why she returned to Mr. Cook's home to retrieve her telephone within minutes of the altercation unbelievable.

[56] At trial Ms. Cockney said that she dropped her cell phone somewhere outside of Mr. Cook's residence as she and Mr. Rogers were leaving. Both she and Mr. Rogers testified that they returned to retrieve it five or ten minutes later.

[57] Under cross examination, Ms. Cockney said that she returned to Mr. Cook's residence to retrieve the telephone because it was brand new and had cost $1000.00. She also stated that she did not get out of the car. Rather, Mr. Rogers and another individual looked for and retrieved it from where it had been dropped.

[58] Ms. Cockney argues that there was no obvious reason for the Trial Judge to reject her evidence about why she returned to Mr. Cook's residence.

[59] Ms. Cockney gave a vivid description of the fear that the altercation on May 9th generated in her. She described Mr. Cook as looking "insane" and as if he had an "intention to hurt her". She said he had a knife and was threatening to stab her. The incident was "terrifying" and afterwards she was in as "state of shock". It was so terrifying that she had to keep her eyes cast downward to the ground because she could not look.

[60] Standing alone, it may be that Ms. Cockney presented a reasonable and plausible explanation. The telephone was new and it was costly. The plausibility of that explanation is diminished significantly, however, given the grave and dangerous events that Ms. Cockney described as happening mere minutes before.

[61] In the circumstances, the Trial Judge's conclusion cannot be said to be erroneous.

d. Evasiveness and the Use of Dramatic Language

[62] The Trial Judge found that both Ms. Cockney and Mr. Rogers were evasive in answering questions about attempts to find marijuana before they went to Mr.

Cook's residence. He pointed out that Ms. Cockney said they called *one* friend before contacting the complainant, while Mr. Rogers said they tried *all* (that is, more than one) of their sources.

[63] Ms. Cockney argues that given the type of transaction, it is not surprising that she would be evasive about her efforts to find drugs and that this should not undermine overall credibility.

[64] It may be that Ms. Cockney was reluctant to give evidence about what happened in the time leading up to the altercation because the activities were aimed at securing street drugs. She was under no obligation to testify, however. She chose to give evidence under oath and in doing so, it was up to her to put her best foot forward. She did not. Consequently, the Trial Judge noted her evasiveness and took it into account in assessing her overall credibility. He was entitled to do so.

[65] Ms. Cockney suggests that the Trial Judge also erred in finding that she was evasive in her answers to the Crown respecting interaction with Mr. Cook on June 5th. It is clear, however, that the Trial Judge was not referring to Ms. Cockney's evidence about interacting with Mr. Cook on June 5th. Rather, he was referring to an exchange between Ms. Cockney and the Crown counsel regarding whether she had been "socializing" the evening before the May 9th incident. He noted that Ms. Cockney said that "socializing" was a "big word" and he found that she feigned misunderstanding of it in the questions put to her by the Crown.

[66] The exchange between the Crown counsel and Ms. Cockney about "socializing" was as follows:

> Q. And that was pretty late at night. You guys already had a pretty full night before then, I take it?
>
> A. What does that mean?
>
> Q. You had been socializing?
>
> A. Okay, what are you talking about? Like we've been socializing with Chris?
> Q. Ma'am, listen to the question, okay? Prior to going out that night you've been socializing, correct?
>
> A. Not me.
>
> Q. Not at all?

A. No.

Q. So, why were you awake at 4 a.m.?

A. Oh, socializing. You mean – okay. No, I was not. Yes, I was looking for weed. Yes, I was socializing. Using big words.

Transcript of Evidence, page 116, lines 21 to 27, page 117, lines 1 to 10

[67] In my view, Ms. Cockney's answers can be readily characterized as evasive.

[68] The Trial Judge pointed to Ms. Cockney's use of dramatic language to describe what happened on May 9th and concluded that her intent in doing so was to convince the court that her co-accused had not used a knife and to support his story.

[69] Ms. Cockney argues that all of the witnesses used dramatic words or descriptions in parts of their evidence, so it should not count against her exclusively.

[70] Ms. Cockney used the words "terrifying" and "state of shock" to describe the altercation on May 9th and her reaction to it. She described Mr. Cook as appearing "insane". These phrases are colourful and properly described as "dramatic".

[71] I pause to reiterate the point in *R. v. Gagnon*, *supra,* that in reviewing the record to determine of the Trial Judge erred in his assessment of these two points, it is incumbent on me to exercise deference. In this case, the Trial Judge had the benefit of observing Ms. Cockney's demeanor, listening to her tone and her inflections of voice, and hearing her answers in the context of the other evidence tendered at the trial. He was able to assess her responses to determine if they seemed contrived or genuine. He could determine if the words and phrases he considered "dramatic" seemed out of place or inappropriate, given the entirety of her evidence and the language she used in other parts of her testimony.

[72] The Trial Judge did not err in finding that Ms. Cockney was evasive or that she used dramatic language in describing events.

e. Comments on the Relationship with Mr. Rogers

[73] Ms. Cockney submits it is unclear why the Trial Judge commented on the relationship between herself and Mr. Rogers and why it appears to have been held against her.

[74] She states that there was no attempt to hide this relationship during the trial. I agree. There are several places in the transcript where either Ms. Cockney or Mr. Rogers referred to each other as "boyfriend" or "girlfriend". I note, however, that the evidence did not include information about the details of their relationship, such as how long it had been in existence or if it was a relationship of some permanence.

[75] Viewed in context, it is apparent that the Trial Judge's comments about the relationship must be read together with his comments about Ms. Cockney's use of dramatic language.

[76] Oral judgments are a necessary part of the justice system. Decisions must be rendered orally in many instances, particularly on busy court circuits, where the luxury of time is simply not there. An obvious disadvantage of oral judgments, however, is that the judge does not have the benefit of being able to proof read and reflect on whether any given point is as clear as possible, or to consider if the structure of the judgment is as ideal as it could be. Regardless of how articulate an orator the judge may be, there are bound to be some things which, while making perfect sense orally, do not translate easily onto paper.

[77] That appears to be what happened here. The confusion flows from the addition of a different subparagraph number following the remarks about Ms. Cockney's use of dramatic language.

[78] The portion of the judgment is as follows:

> . . .Her intent in testifying was apparently to try and convince the Court that her boyfriend did not use a knife, as testified by Christopher Cook, and to support the story told by her boyfriend.
>
> h. I use the word "boyfriend" even though the nature of the relationship between Mr. Rogers and Ms. Cockney was not brought out in evidence. It was clear to me, however, from the interaction between the two accused in the courtroom that there is a close relationship between them. During the course of the trial and during the submissions of counsel, including their own, there was a constant communication between the accused who were sitting at counsel table, although

> separated by defence counsel, through facial expressions, mouthed words, and gestures exchanged between the two. The attention of Ms. Cockney during the trial was on Mr. Rogers; the attention of Mr. Rogers during the trial was on Ms. Cockney. It is clear that theirs is more than just a casual relationship.
>
> *Transcript of Reasons for Judgment*, page 12, lines 3 to 24

[79] Read in isolation, subparagraph "h" seems an irrelevant consideration. Read together with the preceding paragraph, however, it is clear that the Trial Judge was confirming Ms. Cockney's relationship with Mr. Rogers to illustrate why she would be motived to use dramatic language to support Mr. Rogers' story.

[80] The relationship that a witness has to an accused or another witness is a relevant and proper consideration in assessing credibility. It must not be the sole factor, of course, and in the case of an accused witness, the trier of fact must not offend the presumption of innocence by assuming an accused witness will lie to secure an acquittal. *R. v. Laboucan*, [2010] 1 S.C.R. 397 at paragraphs 11 to 13.

[81] The relationship between Ms. Cockney and Mr. Rogers was not the sole basis upon which the Trial Judge based his conclusions on Ms. Cockney's credibility, nor did he make an assumption that Ms. Cockney was not to be believed because of her interest in the outcome for both herself and Mr. Rogers. The relationship between Ms. Cockney and Mr. Rogers was just one of a number of considerations upon which the Trial Judge based his conclusions about credibility. He was entitled to take it into consideration and he did not err in the manner in which he did so.

f. Comments on the Drug Transaction

[82] The Trial Judge said Ms. Cockney's testimony about not showing her money to Mr. Cook before he showed her the drugs did not make sense. He said it would make more sense for a person wanting to purchase drugs to display the money before the product was offered.

[83] Ms. Cockney argues that there was no basis for this finding and it would not be appropriate to take judicial notice of it.

[84] It does not appear that the Trial Judge purported to take judicial notice of how a drug transaction would ordinarily take place; however, it does appear that the Trial Judge misapprehended the extent of the evidence about this.

[85] Ms. Cockney gave evidence, in response to questions from Crown counsel, about why she did not show Mr. Cook her money, but her answers did not go into how a drug purchase would ordinarily be transacted. Nor was there any evidence about this tendered through other witnesses.

[86] This was not a valid basis upon which to assess Ms. Cockney's credibility, but this one error does not invalidate any of the other conclusions on her credibility.

3. Absence of Cross-Examination

[87] At the appeal hearing, Ms. Cockney's counsel pointed out that Ms. Cockney was not cross-examined in relation to the June 5th incident and therefore, it was incumbent upon the Trial Judge to exercise caution in assessing the credibility of her evidence on that incident.

[88] The case of *R. v. I.I.,* 2013 ABCA 2 is offered in support of this argument. The appellant in that case was not cross-examined on material aspects of her evidence, but only on collateral matters. Nevertheless, Crown counsel invited the jury to draw an adverse conclusion about her credibility and no limiting instruction on this was provided by the trial judge. On appeal it was determined that the trial judge erred in failing to instruct the jury that the appellant, not having been cross-examined on material matters, did not have the potential benefit of being able to demonstrate that she was credible.

[89] In *R. v. I.I., supra,* it was emphasized that there is no hard and fast rule on this point. "The circumstances of each case will determine whether the import of the failure of the Crown to cross-examine should be addressed by the presiding judge in his her charge to the jury". [paragraph 18]

[90] The circumstances of the case at bar are significantly different than those in *R. v. I.I., supra.* Unlike Ms. Cockney's trial, the accused in *I.I.* was tried by judge and jury, the latter being dependent on the judge to instruct them on the law, including principles of trial fairness. Trial judges, on the other hand, are presumed to know the law and need not state every single legal principle they use in making decisions. *R. v. C.L.Y., supra.*

[91] The Trial Judge did not err in rejecting Ms. Cockney's evidence about what happened on June 5th even though she was not cross-examined on it.

[92] The Trial Judge provided a discernible path to conviction. He did not believe Ms. Cockney and he articulated cogent and supportable reasons for this. The findings he made about her credibility respecting the May 9 incident formed a valid basis for rejecting the evidence about what happened June 5. Accordingly, this ground of appeal fails.

B. Application of *R. v. W. (D.)*

[93] The second ground of appeal is that the Trial Judge erred in the manner in which he applied the principles in *R. v. W.(D.)*, *supra*, resulting in the burden of proof shifting from the Crown to Ms. Cockney.

[94] In *R. v. W. (D.), supra*, the Supreme Court of Canada set out a reasoning process on which juries are instructed and which trial judges must apply when an accused gives evidence. Its purpose is to protect the presumption of innocence by ensuring that the burden of proof does not shift to an accused by reason of an accused giving evidence. The trier of fact is forbidden to compare the evidence of a complainant and an accused and reject an accused's evidence simply because the complainant is believed. Instead, the trier of fact must ask whether, based on all the evidence, there is a reasonable doubt as to guilt. *R. v. C.L.Y.*, [2008] 1 S.C.R. 5, at paragraph 8.

[95] Cory J., set out the reasoning process in *R. v. W.(D.), supra*, as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused. [at 758]

[96] Appellate courts are concerned with substance over form and thus, trial judges are not required to follow this reasoning process slavishly. *R. v. C.Y.L., supra; R. v. Minuskin*, [2003] O.J. No. 5253 (C.A.). "The key is whether the correct burden and standard of proof were applied, not what words were used in applying them". *R. v. C.Y.L., supra*, at paragraph 8.

[97] It is clear from the face of the transcript that the Trial Judge understood his obligation to employ the *W. (D.)* reasoning and what that reasoning entailed. He reminded himself of the presumption of innocence and the Crown's burden of proof (*Transcript of Reasons for Judgment,* page 5, lines 20 to 25) and he articulated the requirements of *W. (D.)* (*Transcript of Reasons for Judgment,* page 6, lines 4 to 27; page 7, lines 1 to 3).

[98] Ms. Cockney submits that in using his findings of credibility about the May 9th incident as the basis for rejecting Ms. Cockney's evidence about what happened on June 5th, the Trial Judge offended the principles in *W. (D.)* in two ways.

[99] First, not believing her evidence about the May incident cannot lead to the conclusion that her evidence about the June incident should be disbelieved. She contends that the two incidents were completely separate from each other and it is only Mr. Cook who draws a link between them. She says her denial of the June incident was plausible and it was corroborated by her co-accused. Accordingly, her evidence should have been accepted.

[100] Second, in relying on Mr. Cook's testimony that he contacted the police about both incidents because of the threat on June 5th the Trial Judge failed to consider other exculpatory explanations. Ms. Cockney suggests two other possibilities: (a) that seeing her in close proximity to himself and his daughter created a sense of fear in Mr. Cook such that he *felt* threatened and therefore decided to complain to the police; or (b) that Mr. Cook may have complained of a threat on June 5th to bolster his complaint about the May 9th incident.

[101] With respect to the first argument, as I stated earlier, the Trial Judge did not find that Ms. Cockney uttered a threat on June 5th because of what happened on May 9th. He found her credibility to be in such a diminished state as to make the whole of her evidence, with respect to both events, unbelievable, and he rejected *all* of it.

[102] The basis of his disbelief is found primarily within Ms. Cockney's own testimony, although the Trial Judge did assess it, as he was entitled to do, in light of all of the evidence, including that of Mr. Cook. His conclusions about her evidence were articulated so strenuously that there is also no question that in addition to finding it unbelievable, her evidence failed to raise a reasonable doubt. He determined that the Crown proved the charge of uttering a threat beyond a reasonable doubt and, consequently, he found Ms. Cockney guilty.

[103] The Trial Judge found Mr. Rogers to be equally incredible as a witness, so it is of no help to Ms. Cockney that her evidence about what happened on June 5th was corroborated by him.

[104] The problem with Ms. Cockney's second argument is that it would have required the Trial Judge to engage in speculation and conjecture about the *possibility* of exculpatory explanations in the absence of evidence to support them or evidence from which he could draw an inference.

[105] In *Parlee v. McFarlane*, [1999] N.B.J. No. 88 (C.A.) the New Brunswick Court of Appeal succinctly stated the difference between conjecture and inference:

> Once again, we must underscore the fundamental difference between conjecture and inference. The first is not a reliable fact finding tool for the simple reason that it does not rest upon a compelling evidentiary foundation. As such, it has not place in judicial decision-making. The second is the product of a time-honoured fact-finding process. This process involves the extraction of a logical conclusion from cogent evidence. As such, it is unquestionably a reliable weapon in the judicial fact finding arsenal. [paragraphs 42 and 43].

[106] There was no evidence upon which the Trial Judge could have drawn an inference that Mr. Cook was motivated to go to the police for any reason other than the threat. All he had before him was Mr. Cook's evidence that he went to the police on June 5th and reported both incidents. Mr. Cook said Ms. Cockney and Mr. Rogers threatened him, in the presence of his daughter.

[107] Read in context, I find that Trial Judge correctly and fairly applied the reasoning in *R. v. W.(D.), supra*, when he assessed Ms. Cockney's evidence. He did not merely compare her evidence to that of Mr. Cook and prefer the latter. Rather, he conducted a thorough and thoughtful analysis of Ms. Cockney's credibility and provided logical and cohesive reasons for rejecting her evidence entirely, and for finding that the Crown had proved the case against her beyond a reasonable doubt.

[108] The appeal from conviction is dismissed.

APPEAL FROM SENTENCE

[109] Ms. Cockney was sentenced to two months incarceration, followed by a year of probation. She was twenty-two years old when the sentence was imposed and this was her first offence.

[110] Ms. Cockney says the sentence is demonstrably unfit because it is disproportionately harsh in relation to the severity of the offence. In other words, it violates the principle of proportionality. She argues that the Trial Judge placed too much emphasis on the presence of the drug-subculture while relegating mitigating factors, such as her young age and lack of a criminal record, to the background.

[111] In the absence of an error in principle, a failure to consider relevant factors or undue emphasis on certain factors, or the sentence itself is demonstrably unfit, a trial court's sentencing decision should not be disturbed. *R. v. Shropshire,* [1995] 4 S.C.R. 227 (S.C.C.); *R. v. McDonnell,*[1997] 1 S.C.R. 948. The rationale for this deferential standard was articulated by Iacobucci, J. in *Shropshire* as follows:

> 48 An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[112] The Trial Judge appreciated and took into account the principles and objectives of sentencing. He noted Ms. Cockney's young age and expressed his view that he must exercise restraint in sentencing her. (*Transcript of Reasons for Judgment*, page 30, lines 12 to 22). He also took into account that she had no criminal record, had a part-time job and had returned to school (*Transcript of Reasons for Judgment*, page 29, lines 12 to 25). He noted that she had the potential for rehabilitation (*Transcript of Reasons for Judgment*, page 30, lines 14 and 15).

[113] Nevertheless, the Trial Judge found that in all of the circumstances, some period of incarceration was required to achieve the objectives of general and specific deterrence as well as denunciation.

[114] Given the unquestionable role the drug trade appears to have played in both the May and June incidents, it cannot be said that the Trial Judge placed too much emphasis on it. The drug trade was a central theme that permeated the entire trial. It was an illegal drug transaction that brought Ms. Cockney and Mr. Rogers in contact with the complainant on May 9. There Mr. Cook was, among other things, accused by Ms. Cockney of "ratting out" an alleged drug dealer in Inuvik to the

RCMP. The Trial Judge was entitled to find that this was a factor that made the June 5 threat more serious and, consequently, worthy of a more severe sentence.

[115] The Trial Judge did not restrict the aggravating factors to the context of the drug trade. Rather, he took into account that when Ms. Cockney made the threat, she knew where the complainant lived, having been to his residence in May, and she made the threat in the presence of the complainant's young daughter.

[116] Incarceration is a serious penalty, but it is one that that must be imposed where the sentencing judge determines that nature of the criminal act, as well as the principles and objectives of sentencing, call for it.

[117] Combined with the other aggravating factors, the circumstances of this offence were serious enough that the Trial Judge was justified in imposing the sentence that he did. Accordingly, the Trial Judge made no error in principle, nor is the sentence imposed demonstrably unfit.

[118] The appeal from sentence is therefore dismissed.

K. Shaner
J.S.C.

Dated at Yellowknife, NT
this 11th day of July, 2013.

Counsel for the Appellant: Caroline Wawzonek
Counsel for the Respondent: Roger Shepard

S 1 CR 2012 000127

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

MARSHA COCKNEY
Appellant

-and-

HER MAJESTY THE QUEEN
Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE K. SHANER
