
CANADA / JUDGMENT

R. v. Dinardo

2008 SCC 24

COURT

Supreme Court of Canada

DECIDED

9 May 2008

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R. v. Dinardo

Collection

Supreme Court Judgments

Date

2008-05-09

Neutral citation

2008 SCC 24

Report

[2008] 1 SCR 788

Case number

31918

Judges

Bastarache, Michel; Binnie, William Ian Corneil; LeBel, Louis; Deschamps, Marie; Fish, Morris J.;
Abella, Rosalie Silberman; Charron, Louise

On appeal from

Quebec

Subjects

Criminal law

Notes

SCC Case Information: 31918

Decision Content

SUPREME COURT OF CANADA

Citation: R. v. Dinardo, [2008] 1 S.C.R. 788, 2008 SCC 24

Date: 20080509

Docket: 31918

Between:

Jean Dinardo

Appellant

and

Her Majesty The Queen

Respondent

Coram: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

Reasons for Judgment:

(paras. 1 to 41)

Charron J. (Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ. concurring)

R. v. Dinardo, [2008] 1 S.C.R. 788, 2008 SCC 24

Jean Dinardo Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Dinardo

Neutral citation: 2008 SCC 24.

File No.: 31918.

2008: January 25; 2008: May 9.

Present: Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for quebec

Criminal law — Trial — Judgments — Duty of trial judge to give reasons — Credibility of complainant — Accused convicted of sexual assault and sexual exploitation of a person with a disability — Complainant's testimony containing inconsistencies — Whether trial judge's reasons sufficient for meaningful appellate review on question of credibility — Whether trial judge sufficiently explained why he rejected accused's denial of guilt and how he resolved significant issues of credibility concerning complainant's testimony.

Criminal law — Evidence — Prior consistent statements — Credibility of complainant — Accused convicted of sexual assault and sexual exploitation of a person with a disability — Complainant's testimony containing inconsistencies — Trial judge considering contents of complainant's prior consistent statements to corroborate her testimony — Whether trial judge's improper use of statements caused prejudice to accused.

The accused was convicted of sexual assault and sexual exploitation of a person with a disability after the complainant alleged that she was assaulted by the accused while she was a passenger in his taxi. At the commencement of the trial, a voir dire was held to determine whether the complainant, who is mildly mentally challenged, was competent to testify. The trial judge concluded that although the complainant's deficiency was apparent, it did not mean that she could not testify and that it would be up to him to determine her credibility. At trial, the complainant provided essentially consistent answers on the central parts of her allegations. However, on many points, the complainant gave contradictory answers, much as she had done during the course of her voir dire testimony. She also gave conflicting testimony about inventing the allegations. The accused testified and denied the allegations against him.

In his reasons for judgment, the trial judge noted that the accused testified well. However, he rejected the accused's argument that the configuration of his car would have made it impossible for him to touch the complainant without leaning over. In assessing the complainant's credibility, the trial judge emphasized that the complainant did not contradict herself on the important aspects of her allegations. Moreover, her evidence at trial was corroborated by her out-of-court statements made shortly after the alleged incident. The accused was convicted of both offences. A majority of the Court of Appeal upheld the convictions on the basis that the trial judge's reasons, although succinct, made it clear why the trial judge disbelieved the accused. Although the inconsistencies in the complainant's testimony were not specifically addressed by the trial judge, they related primarily to peripheral matters and the evidence allowed for appellate review of the correctness of the decision. While the trial judge erred in using the complainant's prior consistent statements to corroborate her evidence, the majority concluded that the improper use of the statements did not justify a new trial because the accused suffered no prejudice. The dissenting judge would have allowed the appeal and ordered a new trial. He held that the trial judge did not sufficiently explain why he rejected the accused's denial of guilt or how he resolved the significant difficulties in the complainant's testimony to reach a verdict beyond a reasonable doubt.

Held: The appeal should be allowed and a new trial ordered.

The inquiry into the sufficiency of the trial judge's reasons should be directed at whether the reasons respond to the case's live issues. In this case, the complainant's truthfulness was very much a live issue. The trial judge erred by failing to explain how he reconciled the inconsistencies in the complainant's testimony, particularly on the issue of whether she invented the allegations. The defence rested on the overall lack of credibility and reliability of the complainant's testimony, as well as on the accused's testimony denying her allegations. In this context, it was incumbent upon the trial judge to explain, even in succinct terms, how he resolved these difficulties to reach a verdict beyond a reasonable doubt. His failure to do so deprived the accused of his right to a meaningful appeal. Where the trial judge's reasoning is not apparent from the reasons or the record, the reviewing court should not substitute its own analysis of the evidence for that of the trial judge, as the majority of the Court of Appeal did here. [27] [29] [31-32]

The Court of Appeal correctly concluded that the trial judge erred by using the complainant's prior consistent statements to corroborate her testimony at trial. However, the Court of Appeal was incorrect in holding that the accused suffered no prejudice from the trial judge's improper use of the statements. The trial judge relied heavily on the corroborative value of the complainant's prior consistent statements in convicting the accused. He was clearly of the view that the complainant's consistency in recounting the allegations made her story more credible. [40]

Cases Cited

Applied: *R. v. G.C.*, [2006] O.J. No. 2245 (QL); referred to: *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252; *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *R. v. Stirling*, [2008] 1 S.C.R. 272, 2008 SCC 10; *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 153.1(1) , 271(1) (a).

Authors Cited

Hill, S. Casey, David M. Tanovich and Louis P. Strezos, eds. *McWilliams' Canadian Criminal Evidence*, vol. 1, 4th ed. Aurora, Ont.: Canada Law Book, 2003 (loose-leaf updated March 2008, release 10).

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Rochon and Côté JJ.A.), J.E. 2007-551, SOQUIJ AZ-50418375, [2007] Q.J. No. 1320 (QL), 2007 CarswellQue 1206, 2007 QCCA 287, upholding the convictions entered by Rancourt J.C.Q. Appeal allowed.

Marco Labrie and Catherine Sheitoyan, for the appellant.

Henri-Pierre La Brie and Magalie Cimon, for the respondent.

The judgment of the Court was delivered by

Charron J. —

1. Overview

- [1] Mr. Dinardo was convicted of sexual assault and sexual exploitation of a person with a disability. He appealed his conviction on the grounds that the trial judge misdirected himself on the issue of credibility and failed to provide sufficient reasons to allow for meaningful appellate review. The majority of the Court of Appeal dismissed Mr. Dinardo's appeal. Chamberland J.A., in dissent, would have allowed the appeal and ordered a new trial based on two errors of law. First, the trial judge did not sufficiently explain why he rejected Mr. Dinardo's denial of guilt. Second, he failed to explain how he resolved some significant difficulties in the complainant's testimony to reach a verdict beyond a reasonable doubt. Mr. Dinardo appeals to this Court as of right on these two grounds.
- [2] I agree with Chamberland J.A. that the trial judge erred in law by failing to explain how he resolved the significant issues of credibility concerning the complainant's testimony, particularly in light of Mr. Dinardo's evidence at trial. While a trial judge is presumed to know the law, I conclude that in the context of the evidence and the issues in this case, the trial judge's reasons are insufficient to allow for meaningful appellate review on the question of credibility. Accordingly, I would allow the appeal and order a new trial.

2. The Facts and Proceedings Below

- [3] In September 2004, Mr. Dinardo, a cab driver, picked up the complainant at a home for mentally challenged persons in Longueuil called the "Auberge" and drove her to the "Maison des jeunes" in Boucherville. During the 15-minute drive to the Maison des jeunes, the accused allegedly touched the complainant's breasts, put his finger inside her vagina and said [translation] "That smells good" (A.R., at p. 137). The complainant further alleged that Mr. Dinardo invited her to touch his penis, which she refused.
- [4] The complainant, who was 22 years old at the time of trial, is mildly mentally challenged and suffers from Tourette syndrome. When the alleged incident occurred, she was residing at the Auberge during the week. It was common for residents of the home to visit the Maison des jeunes for activities during the day. As a general rule, residents were transported back and forth in taxis.
- [5] When the complainant arrived at the Maison des jeunes, she spontaneously recounted the alleged events to a teacher. When she returned to the Auberge that afternoon, she made a similar statement to an employee of the home. The taxi driver who dropped off the complainant witnessed this statement. Later that day, the complainant told the same story to a second employee of the home.

- [6] Mr. Dinardo was charged with sexual assault and sexual exploitation of a person with a disability contrary to ss. 271(1) (a) and 153.1(1) of the Criminal Code, R.S.C. 1985, c. C-46 . At the commencement of the trial, the court held a voir dire to determine whether the complainant was competent to testify. During the course of her testimony on the voir dire, the complainant contradicted herself on the question of whether she knew what it meant to tell the truth. She first stated that she did not understand the importance of telling the truth. She subsequently testified that she knew what it meant to lie and that lying was wrong. She stated that if she did not remember the answer to a question, she would simply say [translation] “I don’t remember” (A.R., at pp. 110-11).
- [7] When the complainant was asked on cross-examination whether she ever invented stories, she stated that she sometimes invented stories [translation] “[to] be funny” (A.R., at p. 112). An example of the [translation] “silly things” she sometimes said was that a friend “kicked me in the ass . . . in the behind, but it’s not true” (A.R., at p. 112). The complainant provided inconsistent answers on the frequency with which she told these types of stories, but said that her foster family reprimanded her when she did so.
- [8] In response to defence counsel’s argument that it was apparent that [translation] “she can be made to say almost anything” (A.R., at p. 123), the trial judge held that while the complainant’s deficiency was apparent, it did not mean that she could not testify and it would be up to him to determine her credibility. He therefore ruled that the complainant was competent to testify on a promise to tell the truth. No issue is raised with respect to this ruling; however, the obvious difficulties demonstrated during the course of the complainant’s voir dire testimony and the trial judge’s acknowledgement that any issue of credibility would have to be ultimately resolved by him at trial provide relevant context for assessing the sufficiency of the trial judge’s reasons on appellate review.
- [9] The complainant testified at trial and provided essentially consistent answers on the central parts of her allegations. She also identified the accused by his first name (Jean) and by a tattoo on his right arm. However, on many points, the complainant gave contradictory answers, much as she had done in the course of her voir dire testimony. She also gave this troubling evidence on cross-examination (A.R., at pp. 174-75):

[translation]

Q This story you told Ms. Thériault on arriving at the Maison des Jeunes, is it possible that it, that the story was made up?

A Yes.

Q Why did you make the story up?

A Well, I made it up to say he touched me.

Q You made it up to say he touched you?

A Yes.

Q Why? You didn't like him?

A No, I didn't like him.

Q Why?

A I was afraid of him.

Q You were afraid of him. Because he had tattoos?

A Yes.

[10] In re-examination, the complainant testified as follows (A.R., at pp. 181-82):

[translation]

Q . . . listen to me carefully. He said: "Is it possible that you made up the story you told Nicole Thériault?"

A Oh, I didn't make it up.

Q Okay. But you said yes. Do you know . . . what do you mean by that? What is . . . explain that, about that.

A I didn't make it up.

Q Okay. Your sentence, it was: "I made it up – after what he said to you – to say he touched me".

A Yes.

Q What do you mean by that?

A He touched me.

Q Okay. But when you told her that, told Nicole Thériault that, was it made up? Had you made it up?

A No.

[11] At the end of the complainant's testimony, the trial judge asked the following questions (A.R., at p. 182):

[translation]

BY THE COURT

I have one, X. Can you tell me what it means to "make something up"?

A I don't know.

Q You don't know, eh? So when you answered earlier that, that you made it up, you don't know what that means?

A No.

- [12] Four witnesses gave evidence at trial regarding the complainant's account of the allegations. Ms. Thériault, a teacher at the Maison des jeunes, testified that the complainant stated immediately upon her arrival that [translation] "[t]he taxi driver touched me" (A.R., at p. 210). The taxi driver who brought the complainant back to the Auberge at the end of the day stated that during the trip, the complainant told him that [translation] "[t]his morning, the driver who brought me here, he touched my breast" (A.R., at p. 246). When they arrived at the Auberge, the driver witnessed the complainant recount the alleged events to Ms. Lussier, the assistant director of the home. Ms. Duquette, the complainant's [translation] "attendant" at the Auberge, stated that the complainant confided to her that same day that she had been "assaulted" by the taxi driver (A.R., at p. 284). Ms. Duquette discussed the allegations with the assistant director of the home, and according to Ms. Duquette, [translation] "the story was the same for both of us" (A.R., at p. 285).
- [13] Two of the witnesses also testified that the complainant had a history of lying. Ms. Thériault stated that she did not initially believe the complainant [translation] "because she is manipulative" (A.R., at p. 214). She also stated that the complainant lied from time to time when she was looking for attention. When she lied, however, [translation] "she admitted it. She knew the difference" (A.R., at p. 229). This led Ms. Thériault to believe that there was some truth to the allegations. Ms. Duquette also testified that the complainant had a history of lying. When she was being untruthful, she would blush or confuse what she was saying. On this occasion, however, the complainant had repeated the same story several times to different people. For this reason, Ms. Duquette believed that the complainant was being truthful. Both witnesses also testified that the complainant's behaviour on the date of the alleged offence was out of character.
- [14] Mr. Dinardo testified and denied the allegations against him. He stated that when he arrived at the Auberge, the complainant was brought out to the taxi and an employee of the home fastened her seatbelt. The employee placed the complainant's hands between her legs to prevent her from hitting herself or the cab driver because of her condition. He testified that her hands remained between her legs for the duration of the trip.
- [15] Mr. Dinardo also testified that the configuration of the car was such that it would have been impossible for him to touch the complainant without leaning over. Mr. Dinardo testified that he had no prior convictions of this nature, and had never had any complaints as a taxi driver.
- [16] In his reasons for judgment, the trial judge summarized the evidence of the witnesses for the Crown and the defence: C.Q. Longueuil, No. 505-01-053038-044, March 30, 2006. After recalling the test in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, and the Crown's burden of proof beyond a reasonable doubt, the trial judge made his findings on credibility. He stated that while the accused had [translation] "testified well" (para. 46), he did not believe the accused's "argument" that [translation] "it was impossible for him to touch the passenger because of

the console, the coffee cup and his note book” (para. 54). He rejected this argument on the basis of the photographs produced by Mr. Dinardo and the fact that the complainant had been able to see the tattoo on his right forearm.

- [17] The trial judge then considered the complainant’s credibility. He did not refer to the evidence that the complainant, by her own admission, had a tendency to lie. Rather, he observed only that [translation] “[w]hen cross-examined by counsel for the accused, she never contradicted herself on important facts, only on certain details that the Court does not consider important enough for the contradictions to affect her credibility” (para. 70). He placed significant emphasis on the fact that the complainant’s version of the events was consistent, noting that [translation] “in this case, there is a form of corroboration in the facts and statements of the victim, who never contradicted herself” (para. 68). He also noted that the complainant’s statement was made spontaneously upon her arrival at the Maison des jeunes. The accused was convicted of both offences.
- [18] A majority of the Court of Appeal dismissed the appeal: [2007] Q.J. No. 1320 (QL), 2007 QCCA 287. Rochon J.A., Côté J.A. concurring, held that although the trial judge’s reasons were succinct, they made it clear why the trial judge disbelieved Mr. Dinardo. While the trial judge did not explicitly direct himself on the second step of W. (D.), the test is not a [translation] “sacrosanct formula” (para. 29). It was implicit in the trial judge’s rejection of the accused’s evidence that his evidence did not raise a reasonable doubt. While it may have been preferable to state this explicitly, his failure to do so was not an error of law.
- [19] The majority then observed that the complainant’s testimony should be evaluated having regard to her mental disability. Rochon J.A. reviewed ten inconsistencies in the complainant’s evidence identified by Mr. Dinardo, including the complainant’s testimony about inventing stories. None of these inconsistencies were specifically addressed by the trial judge. Rochon J.A. concluded that the inconsistencies related primarily to peripheral aspects of the case. With respect to the complainant’s testimony about telling stories, the majority stated that [translation] “[e]ven if I were to conclude that this last piece of evidence required an explanation by the judge, a review of the evidence on these questions would enable a court of appeal to review the soundness of the decision” (para. 73).
- [20] The majority also held that the trial judge erred in using the complainant’s prior consistent statements to corroborate her evidence that a crime had been committed. The majority concluded, however, that the improper use of the statements did not justify ordering a new trial because the accused suffered no prejudice.
- [21] Chamberland J.A., in dissent, noted that despite stating twice that the accused had [translation] “testified well”, the trial judge found Mr. Dinardo guilty without explaining why he rejected Mr. Dinardo’s denial of guilt. Although he explained why he disbelieved Mr. Dinardo’s evidence that he could not have touched the complainant because of the configuration of his car, the trial judge did not discuss the most important aspect of Mr. Dinardo’s testimony — that is, his denial of the allegations.

[22] Chamberland J.A. also concluded that the trial judge erred in failing to explicitly consider the second step of the W. (D.) test — even if he did not believe the “argument” of the accused, he failed to consider whether he was left in reasonable doubt by the accused’s testimony. There was no corroborating evidence in the case and the complainant’s testimony was problematic. Chamberland J.A. was particularly concerned about the exchange at the end of the complainant’s cross-examination in which she stated that she invented the allegations [translation] “to say he touched me” (para. 116). Chamberland J.A. noted that more than one witness testified that the complainant had a history of lying. In the circumstances, it was incumbent upon the trial judge to explicitly address the accused’s denial of the allegations. Chamberland J.A. would have ordered a new trial.

3. Analysis

[23] The majority rightly stated that there is nothing sacrosanct about the formula set out in W. (D.). Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in W. (D.); it will depend on the context (para. 112). What matters is that the substance of the W. (D.) instruction be respected. In a case that turns on credibility, such as this one, 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. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused’s guilt beyond a reasonable doubt. In my view, the substantive concerns with the trial judge’s decision in this case can better be dealt with under the rubric of the sufficiency of his reasons for judgment.

3.1 Sufficiency of Reasons

[24] In *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, this Court confirmed that courts have a duty to give reasons. Reasons serve many purposes; in particular, they explain the court’s disposition of the case and facilitate appellate review of findings made at trial. The content of the duty will, of course, depend upon the exigencies of the case. As this Court has noted, “the requirement of reasons is tied to their purpose and the purpose varies with the context” (*Sheppard*, at para. 24).

[25] *Sheppard* instructs appeal courts to adopt a functional approach to reviewing the sufficiency of reasons (para. 55). The inquiry should not be conducted in the abstract, but should be directed at whether the reasons respond to the case’s live issues, having regard to the evidence as a whole and the submissions of counsel (*R. v. D.* (J.J.R.) (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 32). An appeal based on insufficient reasons will only be allowed where the trial judge’s reasons are so deficient that they foreclose meaningful appellate review: *Sheppard*, at para. 25.

[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":

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 a court of appeal can 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 a child contradicts the denial of an adult, an accused is entitled to know why the trial judge is left with no reasonable doubt. [paras. 20-21]

[27] Reasons "acquire particular importance" where the trial judge must "resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record" (*Sheppard*, at para. 55). Here, the complainant's evidence was not only confused, but contradicted as well by the accused. As I will now explain, it is my view that the trial judge fell into error by failing to explain how he reconciled the inconsistencies in the complainant's testimony on the issue of whether she invented the allegations. I also conclude that the trial judge's failure to provide such an explanation prejudiced the accused's legal right to an appeal.

[28] It is evident from a review of the record that the complainant's testimony concerned the trial judge. After she was cross-examined on whether she knew what it meant to "make up" a story, Rancourt J.C.Q. asked several follow-up questions of his own (*A.R.*, at pp. 182-83). In his reasons for judgment, however, he did not explain why the complainant's conflicting testimony did not cause him to doubt her credibility. Instead, he concluded as follows:

[translation] When cross-examined by counsel for the accused, she never contradicted herself on important facts, only on certain details that the Court does not consider important enough for the contradictions to affect her credibility. [para. 70]

[29] It cannot be said that the complainant's testimony wavered only on the trivial details of the allegations. Her testimony wavered on the central issue at trial: that is, whether Mr. Dinardo committed the acts for which he was charged, or whether the story was invented. I disagree with the majority of the Court of Appeal that [translation] "the defence evidence related to peripheral aspects of the case" (para. 32). The defence rested on the overall lack of credibility and reliability of the complainant's testimony and, of course, on Mr. Dinardo's own testimony denying her allegations. In this context, it was incumbent upon the trial judge to explain, even in succinct terms, how he resolved these difficulties to reach a verdict

beyond a reasonable doubt.

- [30] I would like to emphasize that although the trial judge's reasons fell short of the standard required to allow for meaningful appellate review in this case, there is no general requirement that reasons be so detailed that they allow an appeal court to retry the entire case on appeal. There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel (Braich, at para. 38). As Binnie J. stated in Sheppard:

[I]n the vast majority of criminal cases both the issues and the pathway taken by the trial judge to the result will likely be clear to all concerned. Accountability seeks basic fairness, not perfection, and does not justify an undue shift in focus from the correctness of the result to an esoteric dissection of the words used to express the reasoning process behind it. [para. 60]

- [31] As I explained at the outset of the analysis, the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues. In this case, the complainant's truthfulness was very much a live issue — the trial judge recognized it as so during the voir dire to determine whether the complainant was competent to testify. At trial, two of the witnesses testified that the complainant could be untruthful and manipulative. While it was open to the trial judge to conclude that he was convinced beyond a reasonable doubt of the guilt of the accused, it was not open to him to do so without explaining how he reconciled the complainant's inconsistent testimony, particularly in light of the accused's own evidence denying her allegations.
- [32] This Court emphasized in Sheppard that no error will be found where the basis for the trial judge's conclusion is "apparent from the record, even without being articulated" (para. 55). If the trial judge's reasons are deficient, the reviewing court must examine the evidence and determine whether the reasons for conviction are, in fact, patent on the record. This exercise is not an invitation to appellate courts to engage in a reassessment of aspects of the case not resolved by the trial judge. Where the trial judge's reasoning is not apparent from the reasons or the record, as in the instant case, the appeal court ought not to substitute its own analysis for that of the trial judge (Sheppard, at paras. 52 and 55).
- [33] In my view, the majority's reassessment of the complainant's credibility went beyond the approach advocated in Sheppard and is inconsistent with the standard of review of credibility findings (*R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131). Rather than asking whether the reasons for conviction were obvious from a review of the record, the majority satisfied itself that the trial judge did not fall into error by engaging in its own analysis of the evidence, including the complainant's evidence about inventing stories. The majority examined the troubling testimony, which Rochon J.A. referred to as [translation] "surprising comments" (para. 70), as well as the trial judge's follow-up questions to the complainant at the end of her testimony. The majority held that the trial judge's questions [translation] "helped clarify some of the victim's answers that might at first glance seem troubling" (para. 73), and concluded that meaningful appellate review was possible on the record.

[34] With respect, I find it difficult to understand how a review of the trial judge's questions to the complainant could have clarified her conflicting testimony. On the contrary, the questions expose the very real obstacle to appellate review posed by the trial judge's failure to state explicitly why he accepted the complainant's evidence despite its difficulties. The complainant provided inconsistent testimony throughout the proceedings on the issue of whether she knew what it meant to invent a story; the complainant's answers to the trial judge's questions provide little clarification in this regard. Without some explanation in his reasons for judgment, there is simply no way to know how the trial judge satisfied himself that the complainant was a credible witness.

[35] The majority also stated that [translation] "[t]he judge's comments about the victim's testimony must be considered in light of the fact that the victim has a mild intellectual disability" (para. 48). While I agree that the complainant's testimony must be assessed in the light of her mental disability, this does not lower the standard of proof or absolve the trial judge of his responsibility to explain how he reconciled the complainant's difficult testimony. I do not mean to suggest that a more detailed credibility analysis is required in the case of witnesses with mental disabilities; as with any witness whose evidence presents serious difficulties, however, some explanation is required if the evidence is to form the basis for convicting the accused. The words of this Court bear repeating:

[The] accused is entitled to know why the trial judge is left with no reasonable doubt.

(Gagnon, at para. 21)

The only indication of the trial judge's reasoning process is his reliance on the corroborative value of the complainant's prior consistent statements. This, as the majority of the Court of Appeal correctly found, constituted an error of law. As I will now explain, having regard to the reasons as a whole and the context of the trial, I cannot agree with the majority's conclusion that no harm was occasioned by the use of these statements.

3.2 Prior Consistent Statements

[36] As a general rule, prior consistent statements are inadmissible (*R. v. Stirling*, [2008] 1 S.C.R. 272, 2008 SCC 10). There are two primary justifications for the exclusion of such statements: first, they lack probative value (*Stirling*, at para. 5), and second, they constitute hearsay when adduced for the truth of their contents.

[37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility" *McWilliams' Canadian Criminal Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see

also *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).

[38] In *R. v. G.C.*, [2006] O.J. No. 2245 (QL), the Ontario Court of Appeal noted that the prior consistent statements of a complainant may assist the court in assessing the complainant's likely truthfulness, particularly in cases involving allegations of sexual assault against children. As Rouleau J.A. explained, for a unanimous court:

Although properly admitted at trial, the evidence of prior complaint cannot be used as a form of self-corroboration to prove that the incident in fact occurred. It cannot be used as evidence of the truth of its contents. However, the evidence can “be supportive of the central allegation in the sense of creating a logical framework for its presentation”, as set out above, and can be used in assessing the truthfulness of the complainant. As set out in *R. v. F. (J.E.)* at p. 476:

The fact that the statements were made is admissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look to the content of the statements as proof that a crime has been committed.

The trial judge understood the limited use that could be made of this evidence as appears from his reasons:

[I]t certainly struck me while the fact that you go and tell somebody that you were molested doesn't confirm the fact that you were molested. I'm struck by the manner or the way it came out, tends to confirm [the complainant's] story — how they were reading this book, and how the thing came up about child sexual abuse.

In cases involving sexual assault on young children, the courts recognize the difficulty in the victim providing a full account of events. In appropriate cases, the way the complaint comes forth can, by adding or detracting from the logical cogency of the child's evidence, be a useful tool in assisting the trial judge in the assessment of the child's truthfulness. This was such a case. [Emphasis added; paras. 20-22.]

[39] The Ontario Court of Appeal's reasoning in *G.C.* applies equally to the facts of this case. The complainant's prior consistent statements were not admissible under any of the traditional hearsay exceptions. Thus, the statements could not be used to confirm her in-court testimony. However, in light of the evidence that the complainant had difficulty situating events in time, was easily confused, and lied on occasion, the spontaneous nature of the initial complaint and the complainant's repetition of the essential elements of the allegations provide important context for assessing her credibility.

[40] The Court of Appeal correctly concluded that the trial judge erred when he considered the contents of the complainant's prior consistent statements to corroborate her testimony at trial, noting in his judgment that [translation] “there is a form of corroboration in the facts and statements of the victim, who never contradicted herself” (para. 68). I am unable to agree with the majority, however, that the accused suffered no prejudice from the trial judge's improper use of the statements. The trial judge relied heavily on the corroborative

value of the complainant's prior statements in convicting Mr. Dinardo. He was clearly of the view that the complainant's consistency in recounting the allegations made her story more credible. Accordingly, I would also allow the appeal on this basis.

4. Disposition

[41] I would allow the appeal and order a new trial.

Appeal allowed.

Solicitors for the appellant: Catherine Sheitoyan, Montréal; Marco Labrie, Longueuil, Quebec.

Solicitor for the respondent: Poursuites criminelles et pénales du Québec, Longueuil, Quebec.

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Prepared on 26 October 2026 · Esheria