
CANADA / JUDGMENT

R. v. J.A.A.

2011 SCC 17

COURT

Supreme Court of Canada

DECIDED

8 April 2011

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R. v. J.A.A.

Collection

Supreme Court Judgments

Date

2011-04-08

Neutral citation

2011 SCC 17

Report

[2011] 1 SCR 628

Case number

33782

Judges

McLachlin, Beverley; Binnie, William Ian Corneil; Deschamps, Marie; Fish, Morris J.; Charron, Louise; Rothstein, Marshall; Cromwell, Thomas Albert

On appeal from

Ontario

Subjects

Criminal law

Notes

SCC Case Information: 33782

Decision Content

SUPREME COURT OF CANADA

Citation: R. v. J.A.A., 2011 SCC 17, [2011] 1 S.C.R. 628

Date: 20110408

Docket: 33782

Between:

J.A.A.

Appellant

and

Her Majesty The Queen

Respondent

Coram: McLachlin C.J. and Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.

Reasons for Judgment:

(paras. 1 to 16)

Dissenting Reasons:

(paras. 17 to 68)

Charron J. (McLachlin C.J. and Binnie, Fish and Cromwell JJ. concurring)

Rothstein J. (Deschamps J. concurring)

R. v. J.A.A., 2011 SCC 17, [2011] 1 S.C.R. 628

J.A.A. Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. J.A.A.

2011 SCC 17

File No.: 33782.

2011: February 22; 2011: April 8.

Present: McLachlin C.J. and Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for ontario

Criminal law — Evidence — Fresh evidence — Charge of sexual assault — Wound on accused's finger — Complainant alleging to have bitten accused during assault — Police officer at trial giving lay evidence as to wound being a bite wound — No expert testimony as to nature of wound led at trial — Accused, on appeal, wishing to introduce evidence of forensic dentist — Whether fresh evidence should be admitted.

The accused was convicted of sexual assault and sexual assault with a weapon, both offences arising from an alleged confrontation with his wife. The accused denied sexually assaulting the complainant and testified that the sexual relations were consensual. The complainant, however, testified that the accused had sexually assaulted her repeatedly and that she had bitten one of his fingers very hard during the assault. The attending police officer testified, without objection on the part of the defence, that he saw a cut that looked like a tooth mark on one of the accused's fingers.

The trial judge was satisfied beyond a reasonable doubt of the accused's guilt. On appeal, the accused argued that the trial judge erred by placing too much emphasis on the complainant's post-offence demeanour, in his approach to assessing credibility and in relying on the injury to his finger as corroborative evidence. He moved to introduce as fresh evidence the report of a forensic dentist, who had concluded that the mark on his finger was not the result of a bite mark, arguing that this fresh evidence strongly undermined the trial judge's reasons and verdict. A majority of the Court of Appeal dismissed the application as well as the other grounds of the appeal. The main issue is whether or not the application to introduce fresh evidence should be allowed.

Held (Deschamps and Rothstein JJ. dissenting): The appeal should be allowed. The fresh evidence should be admitted, the convictions set aside and a new trial ordered.

Per McLachlin C.J. and Binnie, Fish, Charron and Cromwell JJ.: The criteria for admitting fresh evidence, established in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, include the requirements that the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial and that the fresh evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. Although the accused essentially conceded that he failed to meet the due diligence criterion, as this evidence obviously could have been adduced at trial, this factor should not trump the other *Palmer* criteria, particularly in circumstances such as here where trial counsel's strategy was not unreasonable given the nature of the anticipated Crown evidence. Neither the Crown nor the defence had contemplated calling expert evidence about the mark on the accused's finger.

The proposed expert evidence could reasonably be expected to have affected the result. The trial judge viewed this case as a close one and, while he found the complainant to be credible, he also commented favourably on the accused's testimony. In ultimately rejecting the accused's testimony, he twice mentioned the injury to the accused finger, clearly regarding it as corroborative. The fresh evidence reveals that reliance on this evidence is misplaced and, if accepted, would not only vitiate one of the bases for the trial judge's reliance on the

complainant's testimony and his rejection of the appellant's version of events but also would arguably undermine the complainant's credibility. While the officer was qualified to describe the injury he saw, his evidence arguably exceeded the proper boundaries of lay opinion evidence. In light of the expert's direct refutation of the officer's opinion, the prejudicial effect of its erroneous admission is brought into sharp focus. When considered in the context of the other evidence at trial and the trial judge's reasons as a whole, the fresh evidence was sufficiently cogent that it could reasonably be expected to have affected the verdict. It was not necessary to address the other grounds of appeal.

Per Deschamps and Rothstein JJ. (dissenting): Although the due diligence criterion should not trump the other Palmer criteria, neither should it be ignored. Lack of due diligence at trial is a consideration weighing against reception of the new evidence on appeal.

The expert evidence, even if believed, could not reasonably be expected to affect the result which was the conviction of the accused for sexual assault and sexual assault with a weapon. The biting issue was minor at trial and defence counsel did not consider it sufficiently important to object to the admission of the officer's evidence as to the mark or to have considered calling expert evidence at the time. Several other factors also supported the complainant's version of events and the rejection of that of the accused: (i) the evidence of her post event demeanour; (ii) the evidence of the condition of the home and the items located in it; (iii) the evidence relating to the existence of the dull knife; (iv) the manner in which the accused described his interaction and control over the complainant during the sexual activity; and (v) the general internal and external logic and consistency of the complainant's version as opposed to the accused's version of events. An examination of the trial judge's reasons, and the factors that he considered in coming to the conclusion that the accused's evidence was "not capable of belief" all demonstrate the minor nature of the biting evidence.

Evidence of post-event demeanour of a sexual assault complainant can be used as circumstantial evidence to support a complainant's version of events and it was entirely appropriate for the judge to have regard to the demeanour evidence as part of all the evidence considered by him. On the basis of uncontested evidence and the internal and external logic and consistency and detail of the complaint's description of events as opposed to the evidence of the accused, the post-event demeanour evidence was not the sole basis for the credibility determination.

Finally, the trial judge properly applied the steps in the analysis conducted pursuant to *R. v. W. (D.)*, [1991] 1 S.C.R. 742. He kept his eye firmly on the proper standard and burden of proof, expressly instructed himself of the *W. (D.)* factors set out in, and then tracked the steps of that analysis in his reasons. His reasons carefully reviewed and evaluated the testimony of the various witnesses in support of his conclusion on credibility.

Cases Cited

By Charron J.

Applied: *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

By Rothstein J. (dissenting)

R. v. W. (D.), [1991] 1 S.C.R. 742; Palmer v. The Queen, [1980] 1 S.C.R. 759; R. v. M. (P.S.) (1992), 77 C.C.C. (3d) 402; Murphy v. The Queen, [1977] 2 S.C.R. 603.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, s. 683(1) (d).

APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Goudge and MacPherson JJ.A.), 2010 ONCA 491, 261 C.C.C. (3d) 125, 265 O.A.C. 304, 78 C.R. (6th) 40, [2010] O.J. No. 2902 (QL), 2010 CarswellOnt 4840, upholding the accused's convictions. Appeal allowed, Deschamps and Rothstein JJ. dissenting.

Marie Henein and Matthew Gourlay, for the appellant.

Kimberley Crosbie, for the respondent.

The judgment of McLachlin C.J. and Binnie, Fish, Charron and Cromwell JJ. was delivered by

- [1] Charron J. — This is an appeal as of right. The appellant, J.A.A., was convicted of sexual assault and sexual assault with a weapon (a knife), both offences arising from an alleged confrontation with his wife, S.A., on June 8, 2007. The couple had agreed to separate as of May 1, 2007, but continued to live together in the family home at the time of the incident. It is admitted that they had sexual relations over the course of one and a half to two hours on the morning in question. However, the parties present drastically different versions of the circumstances surrounding these events.
- [2] S.A. testified that J.A.A. sexually assaulted her repeatedly, at one point showing her a knife and threatening to kill himself and her as well. She also testified that she bit one of his fingers during the assault “very hard”, “as hard as I could”. When the events ended, S.A. drove immediately to a friend's home and the police were called. The neighbour and one of the police officers testified that the complainant was crying, distraught and appeared terrified. A police officer who interviewed J.A.A. that afternoon testified that he saw a cut that looked like a bite mark on one of J.A.A.'s fingers. The officer then explained in more detail why he thought it was a tooth mark. Defence counsel did not object to the officer's opinion evidence but cross-examined him on his lack of expertise in this area and on the failure to retain an expert on dental marks. J.A.A. denied sexually assaulting the complainant. He provided considerable detail about the events in question but testified that the sexual relations were consensual. He also denied that S.A. bit him at any time.
- [3] The trial judge found the complainant credible (2008 CarswellOnt 9505 (Ct. J.)). He also found no reason to reject J.A.A.'s testimony, when taken in isolation. However, the trial judge was ultimately satisfied beyond a reasonable doubt of J.A.A.'s guilt based on the complainant's evidence, her post-event demeanour, the injury to J.A.A.'s finger, photographs taken of the

home when investigated by the police which were consistent with her testimony as to where various items of clothing were left, the existence of the knife and the general internal and external logic and consistency of her description of the events.

- [4] J.A.A. appealed his convictions to the Court of Appeal for Ontario on the grounds that the trial judge improperly rejected his evidence without any basis or foundation and erred in law in his approach to assessing credibility. J.A.A. contended that the trial judge placed too much emphasis on the post-event demeanour of the complainant as a factor in conviction. In particular, he argued that evidence of her emotional reaction when she saw him two days after the events as he was escorted by police to the house to gather his personal belongings was of no probative value and should not have been admitted. J.A.A. also argued that the trial judge erred in relying on the injury to his finger as corroborative evidence, as the officer's lay opinion evidence that it was a bite mark was inadmissible. On this latter point, J.A.A. moved to introduce as fresh evidence the report of Dr. Wood, a forensic dentist, who concluded that the mark on his finger was not the result of a bite mark. In addition, Dr. Wood concluded that, based on the complainant's testimony, he would have expected to find evidence of a bite mark. J.A.A. argued that this fresh evidence strongly undermined the trial judge's reasons and verdict.
- [5] The majority of the Court of Appeal dismissed J.A.A.'s application to introduce fresh evidence, holding that Dr. Wood's evidence, even if believed, could not reasonably be expected to have affected the result (2010 ONCA 491, 261 C.C.C. (3d) 125). The majority added that the due diligence criterion, which the appellant essentially conceded he could not meet, "cannot be ignored or wished away" as it plays an important role in the administration of criminal justice (para. 34). The majority also rejected the other grounds of appeal and upheld the convictions. Winkler C.J.O., dissenting, would have allowed the application to introduce fresh evidence. He would also have ordered a new trial on the basis that the trial judge improperly admitted lay opinion evidence on the bite mark and demeanour evidence of the complainant, and misdirected himself as to the manner in which he applied the criminal onus of proof.
- [6] I would allow the application to introduce fresh evidence.
- [7] The criteria for admissibility of fresh evidence, established in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, are well known: (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial; (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (3) the evidence must be credible in the sense that it is reasonably capable of belief; and (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [8] The appellant essentially concedes that he cannot meet the due diligence criterion, as this evidence obviously could have been adduced at trial. He submits, however, that this factor should not be determinative. Trial counsel explained in an affidavit that he did not consider

retaining any kind of expert to examine the photos of the mark on his client's finger, as it seemed to him that "the mark was a minor generic scratch" which in fact appeared inconsistent with the complainant's testimony. Further, the Crown did not contemplate calling expert evidence about the mark. I agree that the due diligence criterion should not trump the other Palmer criteria, particularly in circumstances such as here where trial counsel's strategy was not unreasonable given the nature of the anticipated Crown evidence.

[9] The Crown concedes that criteria (2) and (3) are met: Dr. Wood's report is relevant and reasonably capable of belief. Dr. Wood's credentials are impressive; indeed, after cross-examining him and consulting another expert, the Crown presented no evidence in response to the fresh evidence. The application therefore turns on the final criterion.

[10] I respectfully disagree with the majority below that Dr. Wood's evidence could not reasonably be expected to have affected the result. As I read the trial judge's reasons, he viewed this case as a close one. While he found the complainant credible, he also commented favourably on the appellant's testimony. After instructing himself on the appropriate standard of proof, the trial judge explained how he resolved the credibility issue, stating as follows:

I found the evidence of the complainant compelling, straightforward, credible, and supported by her demeanour after she left the house, in her contact with her neighbour, and shortly after when her husband attended to retrieve his clothing; and as well at the hospital and the Mountain Station when giving her initial statements. Her evidence was also supported by the injury to the accused's finger, and the general condition of the home when investigated by the police; including the location of various items of clothing, and the existence of the dull knife.

The accused's evidence was articulate, responsive to the questions asked, and generally unshaken in cross-examination. Taken in isolation, there was little in the substance of his evidence, or in the manner in which it was given, that suggested it was untrue.

...

Stacked beside [S.A.'s] evidence, the evidence of the complainant's demeanour after the attack, the evidence of injury to the accused's finger, their evidence with regard to the accused's possession of the knife, and their shared knowledge that the knife was dull, the manner in which the accused described his interaction with the complainant during the event, and the manner in which he described his control of her, all of which I find supportive of the complainant's evidence, and the general internal and external logic and consistency of the complainant's description of the events, as opposed to the accused's evidence as outlined in the Crown's submissions, I find the accused's evidence is not capable of belief.

Considering all of the evidence, I am satisfied beyond a reasonable doubt that the accused is guilty of the offence of sexual assault and sexual assault with a weapon. [Emphasis added; paras. 86-90.]

- [11] Crown counsel at trial urged the trial judge to accept the officer's testimony that the injury to J.A.A.'s finger was a bite mark and argued that this evidence corroborated S.A.'s version of events. The Crown now seeks to downplay the importance of the bite mark evidence. However, in ultimately rejecting J.A.A.'s testimony, the trial judge twice mentioned the injury to J.A.A.'s finger, clearly regarding it as corroborative. The fresh evidence now reveals that reliance on this evidence is misplaced. Dr. Wood's evidence, if accepted, not only vitiates one of the bases for the trial judge's reliance on the complainant's testimony and his rejection of the appellant's version of events, but it also arguably undermines the credibility of S.A.'s testimony that she bit down on J.A.A.'s finger "as hard as [she] could". While the officer was qualified to describe the injury he saw, his evidence arguably exceeded the proper boundaries of lay opinion evidence. As the appellant fairly concedes in his factum, "If the opinion stood unchallenged, the error may have been of little consequence." However, in light of Dr. Wood's direct refutation of the officer's opinion, "the prejudicial effect of its erroneous admission is brought into sharp focus" (A.F., at para. 43). It is not necessary to decide on this application to what extent the officer's testimony may have been inadmissible. For our purposes, it suffices to say that it appears to have been clearly wrong. Thus, the trial judge's reliance on this item of evidence is of much concern.
- [12] It is apparent, and understandable, from the trial judge's reasons that he looked closely at any item of physical evidence that could assist him in determining the credibility issue. For example, I note that in another part of his reasons, he referred to a photograph showing a possible scratch in the accused's pubic area, commenting that the mark was not directly on the penis. As the complainant had testified that she scratched J.A.A.'s penis, the trial judge stated, "It is troubling to me, that the officers who were there when the photograph was taken, saw no indication of an injury" on the penis (para. 80). He therefore resolved that he would treat this item of evidence as essentially neutral.
- [13] When considered in the context of the other evidence at trial and the trial judge's reasons as a whole, I agree with Winkler C.J.O. that Dr. Wood's evidence "is sufficiently cogent that it could reasonably be expected to have affected the verdict" (para. 80).
- [14] In my respectful view, it would be unsafe to uphold the convictions on the strength of the other factors which the trial judge considered supportive of his conclusion. The majority in the Court of Appeal found two of these factors to be "particularly powerful": "the complainant's physical and emotional state in the minutes and hours after the event" and "the logic of the complainant's testimony", as opposed to the appellant's version of consensual sex (para. 38). I agree with counsel for the appellant that it would be dangerous for this Court to uphold the convictions and thus resolve the credibility issue in this case on the strength of demeanour evidence, or on the basis that one party's version was less plausible than the other's. While one may reasonably view the appellant's version of consensual sex implausible in the circumstances outlined by the majority (para. 38), counsel aptly points out that the same could be said about the complainant's version. It also seems implausible that the appellant, who had never been depressed, violent, or aggressive in the

19 years the parties spent together, suddenly turned into the suicidal, violent rapist described by the complainant. J.A.A. adamantly denied ever having had suicidal thoughts, stating in response to the complainant's testimony on the subject that he did not "even know what she's talking about" (A.R., vol. II, at p. 107). In this regard, I find the trial judge's observations at the time of sentencing noteworthy. He stated the following:

All of the character letters and the pre-sentence report describe a responsible father with a good work history, no criminal record or prior involvement with the law, and no history whatsoever of violence either towards intimate partners or strangers.

In comparing the offender, who I have found committed these offences, with the person described in the reference letters and the pre-sentence report, I can only come to the conclusion that these offences are entirely out of character for this accused, and on the date in question, he snapped when he committed these most grievous offences. [A.R., vol. I, at pp. 34-35]

[15] As Winkler C.J.O. concluded, the weight the fresh evidence ought to be given will ultimately be "a question for a trier of fact, after cross-examination and in the context of the other evidence that may be adduced" at the new trial (para. 81).

[16] Having found that the fresh evidence should be admitted, I do not find it necessary to deal with the other grounds of appeal. I would allow the appeal, set aside the convictions, and order a new trial.

The reasons of Deschamps and Rothstein JJ. were delivered by

Rothstein J. (dissenting) —

I. Introduction [17] This appeal arises from sexual activity that took place on June 8, 2007, between a married couple in the process of separating. The issue is whether that activity was consensual.

[18] By way of background, the undisputed evidence was that this couple had not had sexual relations for at least 18 months prior to the incident. The accused was aware that the complainant was not interested in sexual relations with him. For some years prior to the incident, the couple only had sexual relations twice a year. Six months prior to the incident, the accused had taken up a bedroom in the basement of the matrimonial home, and was no longer sleeping in the same room as the complainant. The separation was against the wishes of the accused and had been initiated by the complainant. At trial, the accused testified that he was concerned about the complainant's possible infidelity.

[19] On the morning of the incident, the couple were in the matrimonial home and the complainant was preparing to go to work. Her evidence, accepted by the trial judge, was that the accused grabbed her from behind, forced her to his bedroom in the basement, and then forced her to have sexual intercourse and oral sex. When the accused put his hand over her mouth to stop her from screaming, she testified that she bit his finger as hard as she could. She also says that at one point during the sexual activity, the accused threatened to kill

himself with a knife, and also threatened to kill her. Immediately after the sexual activity ended, the complainant dressed and drove to the home of a friend, where she disclosed that she had been raped. She was observed to be in an hysterical and terrified state.

- [20] The police were called, and the accused was arrested and charged with sexual assault and sexual assault with a weapon. The accused said that the sexual activity was initiated by the complainant and was entirely consensual. He denied that the complainant had bitten his finger. At trial, a police officer testified that he had observed what he believed to be a bite mark on the index finger of the accused.
- [21] The accused was convicted. Included as one of a number of the trial judge's findings was the fact that the complainant had bitten the accused's finger as he was taking her to the basement (2008 CarswellOnt 9505 (Ct. J.)).
- [22] The accused now wishes to introduce fresh evidence of a forensic dental expert, who would testify that the mark on the accused's finger could not have been a bite mark. That evidence would have been available at trial, but was not adduced. The accused concedes that he cannot satisfy the due diligence test, one of the criteria for the admission of fresh evidence. However, he submits that this fresh evidence could reasonably have been expected to have affected the result of the trial had it been introduced at the time.
- [23] I have had the opportunity to read the draft reasons of Charron J. She concludes that the application of the accused to introduce fresh evidence ought to be allowed, the fresh evidence admitted and a new trial ordered. I am of the respectful opinion that the expert evidence, even if believed, could not reasonably be expected to affect the result which was the conviction of the accused for sexual assault and sexual assault with a weapon. For this reason, as well as for the reasons I will outline relating to the issue of post-event demeanour evidence and the application of the W. (D.) analysis raised by the accused (*R. v. W. (D.)*, [1991] 1 S.C.R. 742), I would dismiss the appeal. I am in agreement with the reasons and conclusion of the majority of the Court of Appeal (2010 ONCA 491, 261 C.C.C. (3d) 125).

II. Issue 1: Fresh Evidence [24] Section 683(1) (d) of the Criminal Code, R.S.C. 1985, c. C-46 , allows a Court of Appeal to receive fresh evidence when it is in the "interests of justice" to do so. The four criteria for the admissibility of fresh evidence under this section of the Criminal Code are set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

- [25] Only two of the *Palmer* criteria are at issue in this case. The first criterion is that fresh evidence should not generally be admitted if by due diligence it could have been adduced at trial. The expert evidence the accused now seeks to have admitted could have been adduced at trial and this is conceded by him. I am in agreement with the majority of the Court of Appeal that the due diligence criterion plays an important role in the administration of justice and with the explanation provided by Doherty J.A. in *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 411:

The interests of justice referred to in s. 683 of the Criminal Code encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the Code recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed

[26] I agree with Charron J. that the due diligence criterion should not trump the other Palmer criteria. Neither, however, should it be ignored. In this case, lack of due diligence at trial is a consideration that weighs against reception of new evidence on appeal.

[27] I now turn to the fourth Palmer criterion. We are concerned here with an application to adduce fresh evidence and with whether that evidence, when taken with the other evidence adduced at trial, could reasonably be expected to affect the result of the trial. To answer this question it is necessary to consider the importance of the issue addressed by the new evidence in the context of the other evidence adduced at trial and in that context whether the new evidence could be expected to affect the result arrived at by the trial judge.

[28] From a review of the transcript, it is clear that the defence itself did not see the bite mark as an important fact. The complainant testified that she bit a finger of the accused. In cross-examination, defence counsel had the complainant reconfirm her evidence-in-chief that she had bitten one of the accused's fingers when he had placed his hand over her mouth to stop her from screaming:

Q: And you said you bit him hard?

A: I bit him as hard as I could.

Q: Okay. And you recall it was the middle finger you bit as far as you can tell?

A: As far as I can tell, it was. I didn't look at his finger. [A.R., vol. II, at p. 16]

[29] Counsel only asked two questions of the detective who had testified that he thought he observed a bite mark on the index finger of the accused:

Q: And the evidence you gave with respect to the injury you observed on his index finger, you have given your opinion as to it being consistent with a tooth mark, but just so we're clear I take it that's your lay opinion; you have no particular expertise in dental marks or bite marks?

A: That's correct.

Q: Okay. And a dental mark was not retained in any way to look at that bite mark?

A: No. [A.R., vol. II, at p. 82]

- [30] In direct examination, defence counsel simply asked the accused whether the complainant had bitten him and he said she had not.
- [31] That was the totality of the evidence counsel considered necessary to adduce with respect to the issue. I think this is indicative of how minor the biting issue was during the course of a two-day trial. I would think it logical that if the defence considered this a critical issue, more would have been made of it. To refute the complainant's evidence and the evidence of the officer who testified about the bite mark, it would be logical that the defence would have considered calling expert evidence at that time. At the very least, counsel could be expected to have objected to the admission of the officer's evidence. However, defence counsel apparently did not consider it sufficiently important to do so.
- [32] To place the bite mark evidence in context, I turn to the other evidence adduced at trial.
- [33] Culver J. recognized (at para. 88) that the "central issue in the end is one of consent" and that he was faced with two competing versions of events: the accused's version, in which the sexual activities were consensual, and the complainant's version in which the sexual activities were non-consensual. He ultimately accepted the complainant's version of events, and concluded that "the accused's evidence is not capable of belief" (para. 89).
- [34] As the majority of the Court of Appeal observed, "The clear anchor of the trial judge's reasons for judgment was his belief of the complainant's testimony" (para. 27). The trial judge found her evidence to be "compelling, straightforward and credible" (ibid.).
- [35] However, the trial judge did not rely solely on his belief that the complainant was credible when arriving at his conclusions. In addition to the bite mark, he also relied on a number of additional factors to support her version of events and reject the accused's version of events.
- [36] The trial judge's reasons state that beside the bite mark he relied on the following factors to support the complainant's version of events and to reject the accused's version: (i) the evidence of her post-event demeanour; (ii) the evidence of the condition of the home and the items located in it; (iii) the evidence relating to the existence of the dull knife; (iv) the manner in which the accused described his interaction and control over the complainant during the sexual activity; and (v) the general internal and external logic and consistency of the complainant's version as opposed to the accused's version of events.
- [37] The first factor was the evidence of the complainant's post-event demeanour. There were three separate incidents that make up this post-event demeanour evidence: (i) immediately after the event she arrived at her friend's house, and was incoherent, crying, hysterical, terrified and disclosed that she had been raped; (ii) later that same day, after the police were called, she was observed to be visibly distraught at the hospital (where a rape kit was collected) and at the police station; and (iii) two days after the event, two police officers

observed that the complainant had a visibly panicked reaction when the accused arrived at the matrimonial home to retrieve his property.

- [38] This post-event demeanour evidence is consistent with a sexual assault having occurred. For the first incident in particular, there was no time lapse. The complainant was observed within minutes of her leaving the matrimonial home; this evidence was reflective of the complainant's reaction to the events that had just occurred. The fresh evidence would not bear in any way on this evidence.
- [39] Defence counsel at trial argued that the post-event demeanour evidence "jar[red] somewhat" with the fact that the complainant did not take a shower, clean her teeth or put clean clothes on in order to preserve evidence (R.R., at pp. 10-11). However, the only place the complainant could have changed her clothes, cleaned her teeth or showered was at the matrimonial home, where the sexual assault had just taken place, and where the accused remained. The fact that she fled the scene of the sexual assault and the accused without taking time to clean herself up is entirely consistent with the conclusion that she had just been sexually assaulted and wanted to escape from her attacker.
- [40] I agree with the majority of the Court of Appeal that this post-event demeanour evidence was "strong evidence indeed" (para. 38). This Court has long held that evidence of the demeanour of a sexual assault victim can be used as circumstantial evidence to corroborate the complainant's version of events. In *Murphy v. The Queen*, [1977] 2 S.C.R. 603, Spence J., writing for the majority and the unanimous Court on this point, found (at pp. 612-13):

The respondent's factum, I believe, sets out the proper view as follows:

Independent testimony of a rape complainant's emotional condition is capable at law of corroboration where it is sufficiently damning that it may be considered by a jury to be more consistent with her denial of consent than with the existence of consent, or, to put it another way, where a reasonable inference can be drawn by a jury, considering all the circumstances, that there is a causal relationship between the assault and the complainant's distraught emotional condition.

... Her mental condition was most marked and very convincing evidence thereof was given by both the cousin and the policeman. I am of the opinion that such evidence could qualify as corroboration within the provisions of s. 142 of the Criminal Code . The weight which should be given to such evidence was, of course, a matter for the jury and it must be presumed that the jurors did assess its weight in accordance with their sworn duty.

- [41] *Murphy* dealt with the now repealed s. 142 of the Criminal Code . That section required a judge to warn a jury that it was unsafe to find the accused guilty in a rape case in the absence of corroborating evidence, if the only evidence implicating the accused was the testimony of the complainant. This corroboration requirement no longer exists. Nonetheless, the reasoning in *Murphy* still supports the use of post-event demeanour evidence as circumstantial evidence to support a complainant's version of events. If evidence of a sexual

assault victim's post-event demeanour was capable of being corroborative then, it is certainly capable of constituting relevant circumstantial evidence now. In my respectful opinion, in this case, it was entirely appropriate for the judge to have regard to the demeanour evidence as part of all the evidence considered by him.

[42] A second factor that the trial judge considered was evidence of the complainant and the accused with regard to the dull knife. The trial judge recounted the complainant's evidence as follows:

She testified that he spoke of killing himself at one point. He got out an Army knife with a large blade, the entire knife being about 12 inches long, with a six to eight inch blade. She testified she was aware of him having it, but wasn't sure what he used it for. She testified that he forced her to look at the knife, and said he was going to kill himself with it. He was lying behind her at the time, and put the blade in front of her face about one foot away from her, pointing at her. He wanted her to hold the handle of the knife, and told her he took out life insurance and that it* covered suicide. He gave her instructions on how to get access to the insurance policy, which was in a safe. She tried to distract him with comments about the children, and testified that she was very afraid of the knife. At one point he said, "I might as well kill you too", when the knife was in front of her face.

She stated that she was so afraid of the knife, that she said if they went upstairs she would have sex with him, if the knife was put away. She testified that she hated sex being forced on her, but hated the talk of suicide and the knife more. [paras. 13-14]

[43] He then summarized the evidence of the accused:

He admitted that there was a knife in his room underneath his bedroom table. In February or March of 2007, the complainant heard noises in the house at the front door and in the kitchen when the accused was not home. His son was apparently worried about him, namely the accused, living in a basement, so the son suggested the knife for protection.

After the last occasion they had intercourse in the basement, he testified the complainant said she felt chilly. He suggested they go upstairs to the bedroom, and she agreed. He sat her up, wrapped her in a comforter, and stated he told her why the knife was in his bedroom. He testified that he told her if it upset her that he would put it away, which he did later in the morning. He testified that he never threatened her with the knife, and testified that he put the knife away after she went to work, by putting it in a toolbox. [paras. 44-45]

[44] The significance of what the trial judge wrote is that on either view of the events, if the sexual activity was entirely consensual on the part of the complainant, why would there be any discussion of a knife at all and why would it have made her uncomfortable?

[45] But there is more. How did the complainant know the knife was dull? The complainant's evidence was:

The Court: Sorry, "Touch the blade . . ."

A: The blade of the knife.

The Court: Yes?

A: He had the blade on the chest freezer in front of my face. He was behind me. We both bent over in front of the knife and he said, "Put your finger along the blade. See how dull it is. This is really going to hurt when I kill myself." And I didn't want to touch the blade. I wouldn't touch the blade. I -- he made me touch the handle but I wouldn't touch the blade. [A.R., vol. I, at pp. 143-44]

[46] The accused confirmed, in cross-examination, that the knife was dull:

Q: And [the knife] had become dull over time as a result, correct?

A: Yeah I imagine it was, you could call it dull. [A.R., vol. II, at p. 152]

[47] But the evidence of the accused with regard to what occurred with respect to the knife would leave no room for the complainant to discover that the blade was dull.

Q: All right. And while you're in the basement with [the complainant] she sees this knife, right?

A: Eventually, yes.

Q: Okay. And you could sense that she didn't feel comfortable about this knife and asked her, "If you want me to remove it, I'll remove it" right?

A: I told her if it made her uncomfortable I'd remove it, yes. [A.R., vol. II, at p. 153]

[48] If the complainant just looked at the knife she would not have known it was dull. The evidence of the accused is inconsistent with his own acknowledgment that the knife was dull and with the complainant's knowledge that it was dull.

[49] A third factor was the manner in which the accused described the sexual activity. The trial judge considered the fact that the accused described his involvement as being more controlling to support the conclusion that the sexual activities were not initiated by the complainant and were not consensual. In the words of the trial judge:

Of some note, however, from time to time during [the accused's] testimony, many of the words he used to describe the sexual activity were descriptions of the accused manipulating the complainant's body. For instance, although he testified on cross-examination in the basement he pushed the complainant gently on the shoulder and she rolled over, his original testimony was that he rolled her over. Again in the basement, he asked her if she was cold, and he sat her up and wrapped her in a blanket, although he testified he didn't mean to say that he grabbed her and pulled her up.

There are other occasions in his evidence that have him describing himself as the more active partner than her in positioning her body for intercourse. [paras. 51-52]

- [50] The inference drawn by the trial judge that this evidence indicated the sexual relations were not consensual would not be affected in any way by the fresh evidence.
- [51] A final factor was what the trial judge called “the general internal and external logic and consistency of the complainant’s description of the events, as opposed to the accused’s evidence as outlined in the Crown’s submissions” (para. 89). The trial judge had earlier outlined the Crown’s submissions on the logic and consistency of the complainant’s version of events as opposed to the accused’s version, where he wrote:

The Crown also urges me to find that the accused’s version of events does not make sense, and points out a number of illogical or inconsistent facts. The Crown contends, for a number of reasons, that it is illogical that the complainant would become a consenting and willing partner. She wanted a separation, and the process was clearly underway. He had refused to participate in marriage counselling. They had visited a mediator and a pension evaluator. A shared parenting plan had been considered. They had not had sexual relations for at least 18 months, and he knew that she was not interested in sexual relations; he had taken up a bedroom in the basement six months prior. These events occurred after she was dressed for work and was getting ready to leave. She was expected at work, with many people reporting to her. They had been arguing over the daughter’s Wonderland trip.

All of these, the Crown urges me to find, are inconsistent with a sudden change in her attitude towards the accused.

The Crown also argues that the accused’s contention that the complainant was spontaneous, sexual and passionate, yet he couldn’t say she initiated any of the acts; that she had oral sex with him after gagging during oral sex; and that it was a hot day, yet she was cold in the basement, are unlikely and illogical. [paras. 67-69]

- [52] I would agree with the majority of the Court of Appeal when it found that the logic of the complainant’s testimony was a “particularly powerful” factor considered by the trial judge and that “[t]he constellation of these contextual facts lends substantial credence to the complainant’s ‘compelling, straightforward, credible’ testimony” (para. 38).
- [53] Charron J. says that “it would be dangerous for this Court to uphold the convictions” based on one version of events being more plausible than the other. She observes that although “one may reasonably view the [accused’s] version of consensual sex implausible in the circumstances outlined by the majority (para. 38), counsel aptly points out that the same could be said about the complainant’s version” (para. 14).
- [54] I cannot agree. In addition to the findings of the trial judge I would add the following. The undisputed evidence is that for some years this couple had sexual relations twice a year, once on the accused’s birthday and once in the summer; hardly suggestive of a spontaneous, passionate advance by the complainant on June 8, 2007.

[55] Further, the complainant was in the process of arranging to leave the matrimonial home. She had just told the accused that morning that she had contacted a real estate agent. The accused testified that he recalled that the complainant had mentioned that she was dealing with a realtor to find a new premises for herself. The marriage break-up was against the accused's wishes, it was imminent and he was concerned about the complainant's fidelity. He testified that during the events of June 8, 2007 he questioned the complainant about being unfaithful. As the Crown argued, this pointed to a motive for the accused "to have the complainant sexually one last time before the final breakup, which was imminent" (para. 82).

[56] Charron J. says, "It also seems implausible that the appellant, who had never been depressed, violent, or aggressive in the 19 years the parties spent together, suddenly turned into the suicidal, violent rapist described by the complainant" and that he "adamantly denied ever having had suicidal thoughts" (para. 14). However, in cross-examination, the complainant, in some detail, indicated that the accused had previously made threats of suicide when upset over the imminent breakdown of their marriage:

Q: All right. And he never threatened to commit suicide before?

A: That's not true, he had. One time, it was after I told him I wanted to separate. I can't tell you exactly when it was but he was -- we were both in the basement. I was in the room where we have a TV set and the only TV set we owned and I was watching TV and he was upset and he was walking from the TV room which you have labelled as "Family room" and he was walking to what you have labelled as "Game room" back and forth and saying he was going to kill himself.

Q: Okay.

A: Sort of as a rant, "I'm going to kill myself", "I'm just going to kill myself."

Q: All right. He had never been treated for depression as far as you know?

A: I have no knowledge of that.

Q: Any idea why he would want to kill himself? I mean it looked like he was going to get more money out of this separation than you were?

A: That was my understanding and that was what came through at the mediation and it is also what I informed him came through with my discussions with several lawyers. So I was -- I disclosed all of -- to the best of my ability all of my assets, and as I understand he had disclosed what he had as well; so the plain numbers were yes, there would be an advantage to him.

[Emphasis added; A.R., vol. II, at p. 24.]

[57] Having regard to the context, it is apparent that the threats of suicide were made to intimidate and cause distress to the complainant in response to her wanting to separate from him. He testified that he "definitely did not want a separation or a divorce, not at all. I loved my wife and I didn't want it" (A.R., vol. II, at p. 104). While the accused may not have been depressed, his threats of suicide were consistent with his motive — demonstrated

when he indicated he did not want the divorce and when he questioned the complainant about infidelity — to exercise power over the complainant, and have her sexually one last time before the end of the marriage. Or in the words of the complainant:

Q: Okay. And had you said anything to him up to this point in time when you pulled your pants off?

A: I said -- I only remember saying “Don’t do this, this is rape, stop”.

Q: All right. And what did he say?

A: I don’t remember everything he said at that point. I recall he had told me that he deserved one last meal. That’s what he was calling this ordeal was a last meal. [A.R., vol. I, at pp. 135-36]

[58] My colleague says that the significance of the bite mark is illustrated by the fact that the trial judge “looked closely at any item of physical evidence that could assist him in determining the credibility issue” (para. 12). However, as I have outlined, the trial judge relied on much more than just the biting evidence to resolve the credibility issue.

[59] In sum, an examination of the trial judge’s reasons, and the factors that he considered in coming to the conclusion that the accused’s evidence was “not capable of belief”, all demonstrate the minor nature of the biting evidence. These factors, and the undisputed evidence, discussed in detail above are:

- The post-event demeanour evidence of the complainant which was consistent with a sexual assault having occurred;
- The reference to the knife, which is inconsistent with the sexual activity having been consensual;
- The complainant’s awareness that the knife was dull;
- The trial judge’s observations as to the controlling manner in which the accused described the sexual activity;
- The complainant wanted a separation, contrary to the wishes of the accused, and the process was underway. The morning of the events, the complainant told the accused that she had contacted a real estate agent;
- The complainant and accused were sleeping in separate rooms for six months prior to the event;
- The complainant was uninterested in sex;
- The couple had not had sex for at least 18 months before the event. Prior to this, the couple had sex twice a year: once on the accused’s birthday and once during the summer;
- The complainant was dressed to leave for work, where she was expected by people who reported to her, and made no call when the event began to indicate that she would be late;

- The couple had, just prior to the event, been arguing over their daughter's trip;
- The accused could not say that the complainant had initiated any of the sex acts;
- The accused said that the complainant had oral sex with him after gagging during oral sex;
- During the events, the accused questioned the complainant about being unfaithful;
- The accused used threats of suicide to intimidate the complainant in response to her wanting to separate from him, which was against his wishes, both during the events and prior to the events; and
- The accused's motive, to exercise power over the complainant one last time prior to the end of the marriage.

For these reasons, I cannot agree that the fresh evidence "could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result" (Palmer, at p. 775). I would dismiss the fresh evidence application.

III. Issue 2: The Post-Event Demeanour Evidence [60] The second issue on appeal concerns the trial judge's use of the evidence of the complainant's post-event demeanour. As I have already discussed, it is well established that the evidence of post-event demeanour of a sexual assault complainant can be used as circumstantial evidence to support a complainant's version of events (Murphy, at p. 612).

- [61] The accused submits that when the bite mark evidence is taken out of the picture the other evidence considered by the trial judge "hold[s] little water" (A.F., at para. 89). He says the trial judge "was left with little more" than the complainant's post-event demeanour when corroborating her version of events (A.F., at para. 95). The accused asserts that "[t]he evidence of a teary-eyed complainant, without more, ought not to constitute convincing evidence of guilt beyond a reasonable doubt" (A.F., at para. 98).
- [62] In his dissent, Winkler C.J.O. was concerned about the post-event demeanour evidence, but for another reason. Winkler C.J.O. was concerned that the trial judge "improperly admitted this circumstantial evidence which was not relevant, thus committing an error of law" (para. 100).
- [63] However, Winkler C.J.O.'s concerns about the inadmissibility of the demeanour evidence were not pursued by the accused before this Court. In oral argument, counsel for the accused acknowledged that "in appropriate circumstances, this kind of evidence is admissible or it is admissible and it can be probative" (transcript, at p. 35). The position of the accused was that "in a case like this, the demeanour evidence cannot be determinative of guilt beyond a reasonable doubt" (transcript, at p. 34).

[64] The accused's argument about the post-event demeanour evidence, therefore, comes down to the argument that the trial judge erred by relying exclusively on this evidence. However, as I have outlined, on the basis of uncontested evidence and the internal and external logic and consistency and detail of the complaint's description of events as opposed to the evidence of the accused, the post-event demeanour evidence was not the sole basis for the credibility determination.

[65] I would dismiss this ground of appeal.

IV. Issue 3: The W. (D.) Analysis [66] The final issue on appeal concerns the trial judge's application of the second step in the W. (D.) analysis. The accused submits that we should agree with Winkler C.J.O. who found that the trial judge had erred by not asking "whether, even if you do not believe the evidence of the accused, it raises a reasonable doubt" (para. 105).

[67] I would also dismiss this ground of appeal. It is apparent that the trial judge kept his eye firmly on the proper standard and burden of proof. He wrote that "[i]n analyzing the evidence, the question remains whether, on the whole of the evidence, I am left with a reasonable doubt about the guilt of the accused" and that "throughout the analysis, it must be remembered that the burden of proof is always on the Crown" (paras. 83-84). The trial judge expressly instructed himself of the W. (D.) factors, and then tracked the steps of that analysis in his reasons. His reasons carefully reviewed and evaluated the testimony of the various witnesses, in support of his conclusion on credibility. It is apparent that the trial judge properly applied the steps in the W. (D.) analysis.

V. Conclusion [68] I would dismiss the appeal.

Appeal allowed, Deschamps and Rothstein JJ. dissenting.

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Solicitor for the respondent: Attorney General of Ontario, Toronto.

* See Errata [2011] 2 S.C.R. iv

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Prepared on 28 October 2026 · Esheria