

CANADA / JUDGMENT

R. v. J.T.

2019 BCCA 180

COURT

British Columbia Court of Appeal

DECIDED

23 May 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCCA 180 R. v. J.T.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. J.T.,

2019 BCCA 180

Date: 20190523

Docket: CA45136

Between:

Regina

Respondent

And

J.T.

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4(2.2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of information that could identify a victim under the age of 18 years. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice D. Smith

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated November 17, 2017 (R. v J.T., 2017 BCSC 2273,

Vancouver Docket No. 27173).

Counsel for the Appellant:

M. Shah

Counsel for the Respondent:

C. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

April 8, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 23, 2019

Written Reasons by:

The Honourable Madam Justice D. Smith

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Hunter

Summary:

The appellant appeals his convictions for assault and assault causing bodily harm. The convictions were founded largely on the testimony of the appellant's wife, son, and wife's parents. Credibility was the central issue. On appeal, the appellant contends the trial judge erred in: (1) her credibility assessment by rejecting the appellant's evidence for impermissible reasons, shifting the burden of proof, and failing to provide adequate reasons; and (2) failing to draw an adverse inference with respect to his wife's credibility. Held: appeal dismissed. The judge correctly applied the W.(D.) requirements, did not engage in impermissible reasoning, and provided comprehensive reasons. She was alive to the substantive issues regarding the credibility and reliability of the witnesses, and she did not reject the appellant's evidence or find that it failed to raise a reasonable doubt because of his general denial of most of the alleged assaults. She based her findings on the totality of the evidence that she accepted. The judge was not required to draw an adverse finding of credibility against the appellant's wife based on the wife's inadvertent destruction of personal notes she had prepared for a police interview.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

- [1] The appellant, J.T., was charged in a 17-count indictment that alleged numerous offences of violence against his wife, T.S., and two of their three children, G and B. The alleged offences were said to span the period between 2001 and 2015, during the couple's 16-year marriage. Credibility was the central issue at trial.
- [2] On November 17, 2017, in reasons indexed at 2017 BCSC 2273, J.T. was convicted by a judge alone of ten counts of assault (counts 2, 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, and 16) and two counts of assault causing bodily harm (counts 10, and 11), contrary to ss. 266 and 267(b), respectively, of the Criminal Code. Seven of the counts of assault and the two counts of assault causing bodily harm were offences against his wife. Of the additional four counts of assault, two were against his eldest son G and two were against his second son B. J.T. was not charged with any offences against his youngest child W, a daughter. The remaining charges in the indictment were dismissed, including one count of criminal harassment against his wife, two counts of causing unnecessary pain to his dogs, and one count of failing to comply with a condition of his undertaking.
- [3] J.T. appeals his convictions on the grounds that the trial judge erred: (1) in her assessment of credibility; and (2) in failing to draw an adverse inference against T.S. for destroying relevant evidence.

Background

- [4] J.T. and T.S. were married in 1999; they separated in September 2015. They have two sons and a daughter: G born in 1999, B born in 2001, and W born in 2009.
- [5] T.S. alleged that, throughout their 16-year marriage, J.T. repeatedly assaulted her, G and B, and kicked the family dogs.
- [6] Over the course of the eight-day trial, the Crown called as witnesses T.S., her parents, a friend, and G. Each described various incidents in which J.T. allegedly assaulted T.S., G and B.
- [7] J.T. testified in his own defence. He denied that most of the alleged incidents had occurred. The few that he acknowledged as "maybe" having occurred, he described as involving minimal or no acts of aggression. He also raised the defence of self-defence to justify his actions in relation to counts involving minor transgressions by the children G and B.
- [8] J.T. also applied pursuant to ss. 7 and 24(1) of the Charter for an order that the court draw an adverse inference with respect to T.S.'s credibility. He alleged as a basis for his application that T.S. deliberately destroyed relevant notes that she had prepared before giving her statement to the police, despite several requests for her to produce them. The judge dismissed J.T.'s application in reasons indexed at 2017 BCSC 2277, which she released after convicting J.T. on 12 counts in the indictment.

The Trial Judgment

- [9] The judge began her analysis with an overview of her general findings with respect to the credibility and reliability of each witness's testimony. She began with J.T., finding that his testimony appeared artificial, contrived and defensive, and did not raise a reasonable doubt:
- [9] I did not find [J.T.] to be a credible or reliable witness. His evidence was contrived and artificial. He admitted and apologized for various types of misconduct; ignoring his family members, or being verbally abusive to his wife. He flatly denied almost all of the instances of physical assault. Those that he admitted were minimized or excused. He said that there was one instance in which he could remember striking or blocking [T.S.'s] attack. That was an instance not described by anyone else's evidence and not put to [T.S.] in cross-examination. He said that she attacked him while they were driving down the road. He was forced to strike out at her, to block her attacks, because of his concern to keep the car on the road. He also acknowledged having touched [B], juggling him back and forth the between him what has been referred to as the "burr incident". In cross-examination, he also admitted to punching [T.S.'s] boot, which was shown in one of the videos. He denied the evidence of assault given by the other witnesses.
- [10] [J.T.] did not give his evidence in a manner consistent with the evidence of the other witnesses. In other words, these were not circumstances where one or more of the witnesses described some form of physical confrontation, and [J.T.] had a different but innocent version of events, except for the burr incident.
- [11] In almost every case, he simply denied that those physical confrontations had occurred. In some cases, such as the incident described by others of an injury to the back of [T.S.'s] head, one would expect [J.T.] to be able to give specific evidence about the offence but he did not. His general version of events, that he was verbally but not physically abusive, is contrary to the evidence of [T.S.] and G.
- [10] With respect to the evidence of T.S., the judge stated:
- [15] [T.S.] described many specific assaults by [J.T.] on herself or the boys. She conceded that she had argued with [J.T.], had spat on him, had thrown dishes, had broken an Xbox, and had smashed a stool in Crescent Beach. She admitted that their arguments often involved alcohol. She acknowledged that she had pursued [J.T.] with a frying pan when she was trying to recover her cellphone.
- [11] The judge found G to be a very credible and persuasive witness:
- [16] [G] testified that his father was aggressive, "he would hit, charge, grab us, and throw us around"; "us" being him, [B], his mother and the dogs. This occurred for as long as he could remember. He could not remember how many times he was hit; "it was fairly regular". [B] was hit about as frequently as he was and his mother was hit more often. He said there was frequent conflict between his parents after they had been drinking. Their drinking increased toward the end of their relationship. His mother would drink half a bottle of wine.

His father's drinking was worse. They would yell, swear, and insult one another. His father was always the one who escalated it to a physical thing.

[19] I was particularly impressed with the evidence of [G]. He gave his evidence in a balanced manner, giving difficult evidence in a way that was fair to each of his parents. I found his evidence very persuasive.

[12] The judge also found the evidence of T.S.'s parents to be credible and reliable:

[17] [The parents] each testified to assaults on [B] and to an occasion when they helped [T.S.] because she was unwell in bed with a large lump on the back of her head. [The mother] said that she never saw [J.T.] do anything abusive to [W], but if the boys did not do what he wanted, he would kick out at them. He may make contact. The boys became quite good at dodging his kicks.

[18] I found each of the [parents] to be an honest, credible witness recalling events which took place in some instances several years ago, and in some cases were quite traumatic. I found that they did not exaggerate their evidence and made reasonable concessions.

[13] The judge then considered the credibility and reliability of the evidence with respect to each count individually and in response to the submissions of the defence. She found J.T. guilty of the following nine counts of assault, beginning with the most recent to the last in time:

· Count 14: The judge found that between September 21-28, 2015, J.T. punched B repeatedly in the head and upper body with a closed fist for putting burrs in W's hair (at paras. 25-44); T.S. said J.T. became enraged, pounded B, pushed him against the barn wall and punched him with a closed fist in the head and shoulder area; T.S.'s mother observed B to just stand there, motionless with no expression on his face while J.T. struck him with "so much anger"; she described the incident as "overwhelming". T.S.'s father observed J.T. holding the child's arm and punching him in the back of the head with a closed fist, with the child looking stunned; J.T. said he slapped B's shoulders, jostling him back and forth like a football coach; he admitted that he was angry but denied that he hit B in the head. The judge rejected J.T.'s evidence as not credible, reliable or raising a reasonable doubt, noting that his version of the event was not put to any of the other witnesses on cross-examination, and finding the witnesses' evidence was generally consistent with one another. She also rejected J.T.'s defence that his conduct fell within the scope of s. 43 of the Criminal Code (which allows correction of a child by reasonable force as set out in *Canadian Foundation for Children, Youth, and the Law v. Canada*, 2004 SCC 4).

· Count 16: The judge found that on or about September 2015, J.T., while intoxicated, punched T.S. in the foot and lunged at her with a "Superman" punch (his arm straight out) with the intention of striking T.S. (at paras. 45-62). T.S. used her cellphone to video tape part of the incident; she said J.T. kicked the dog, which he regularly did to annoy her. T.S. also said that she picked up a small decorative four-inch bucket; J.T. responded by screaming that she was going to kill him; he lunged at her swinging a beer bottle, and kicked her in the boot; G testified that J.T. struck his mother and maybe the dog; J.T. admitted that he was angry, struck the dog and kicked T.S. in the

boot, but denied lunging at T.S. with an attempted "Superman punch" (not captured by the video) while admitting that his conduct was appalling. The judge found T.S.'s evidence of the incident to be credible and consistent with the video clips from her cellphone that recorded parts of the incident.

· Count 13: The judge found that between June 1 and September 28, 2015, J.T. punched T.S. in the upper body rendering her unconscious (at paras. 63-70). G was the sole Crown witness. He described an incident where both parents were drinking and screaming at one another and then J.T. hit his mother who fell to the floor unconscious with his father claiming that his mother was "faking it". He said he stayed with his mother until she regained consciousness and helped her to the guest bedroom. J.T. denied the incident occurred. The judge found G to be a very credible witness who gave his evidence in a balanced way; when pressed by the defence about a preceding physical confrontation between his parents, he conceded that possibility although he said he did not see such an incident. The judge also found that his inconsistent statements to the police (one in which he admittedly lied) about the incident did not affect his credibility because she accepted his explanation about wanting to avoid having the Ministry of Children and Families involved as had occurred in 2013.

· Count 12: The judge found that between January 1 and January 31, 2015, J.T. kicked out T.S.'s injured knee, which caused her to fall screaming to the floor, because she wanted to ice her knee rather than make dinner (at paras. 71-78). She said J.T. accused her of "faking it" and that the boys helped her downstairs. J.T. acknowledged that T.S.'s knee had been injured but denied the alleged incident, pointing to some sympathetic emails he sent T.S. about her knee injury and noting that sometimes they would wrestle and fall to the ground. The judge did not find J.T.'s denial of the incident credible or capable of raising a reasonable doubt and accepted T.S.'s evidence of the incident, given her detailed recollection of it.

· Count 9: The judge found that between July 15 and August 31, 2013, J.T. repeatedly kicked T.S. between the knee and hip area (at paras. 79-91). This was at a time after J.T. quit his job, became a mixed martial arts promoter, and began exhibiting bizarre behaviour, which led to a short-term involuntary committal under the Mental Health Act. T.S. testified that after his release, they both were drinking and began to argue when J.T. took her cellphone. J.T. refused to return the phone and was kicking at her. Eventually she was able to call the police who returned J.T. to the hospital. On cross-examination, she could not recall if she had picked up a frying pan but said that J.T. told her she had. J.T. testified that he had difficulty recalling the entire incident but remembered defending himself when T.S. was pursuing him with a frying pan. He also said that T.S. had hit him over the head with a little wooden chair causing him injury; the judge noted this allegation was never put to T.S. on cross-examination. The judge rejected his assertion that T.S. was threatening him with a frying pan. She found T.S.'s account of the incident made sense and her testimony was not shaken on cross-examination. The judge also found T.S. gave credible explanations for the inconsistencies in her statements to the police regarding this incident.

- Count 8: The judge found that between April 1 and 31, 2013, J.T. punched T.S. hard in the stomach causing her pain that lasted a couple of hours (at paras. 92-94). T.S. said that J.T. was upset about something; she tried to calm him down by extending her arm to place her hand against his chest when he punched her hard in the stomach. At the time, J.T. suggested to T.S. that he was acting in self-defence as T.S. was coming at him. J.T. denied that he hit his wife and did not specifically address this incident. His evidence did not raise a reasonable doubt. The judge accepted T.S.'s evidence finding it made sense and was not shaken on cross-examination.
- Count 7: The judge found that between January 1 and December 31, 2011, J.T. repeatedly punched T.S. in the back of the head (about 20 times). T.S. testified that J.T. was angry with her and started punching her. She said she was crying and went to the bathroom after and threw up. T.S. said she felt so sick that she called her mother to help her. She had a headache for more than four days and had difficulty getting up and walking. Her mother testified about the condition she found T.S. in. She said T.S. was confined to her bed, dizzy, and nauseous; she also said she felt a lump on the back of T.S.'s head. T.S.'s father also testified about T.S.'s condition and seeing the lump on T.S.'s head (at paras. 95-105). J.T. did not address this incident when he testified. The judge accepted T.S.'s evidence and the evidence of her parents who corroborated her evidence of the injury to the back of her head and her condition.
- Count 3: The judge found that between January 1, 2009 and January 1, 2010, (i) J.T. hit B forcefully because the child had touched the food on J.T.'s plate, causing B to fall to the floor where he curled into a fetal position crying, and (ii) J.T. kicked B in the stomach hard enough that he fell backward (at paras. 106-117). The judge rejected J.T.'s general denial of both incidents. With respect to the first, the judge accepted T.S.'s evidence and the evidence of her parents both of whom witnessed the event. With respect to the second incident, the judge accepted T.S.'s evidence and her mother's evidence. The mother responded to T.S.'s call for help, drove to the family residence, and saw B hunched over holding his stomach. The mother was so concerned that she went to speak to J.T. and told him he could not hit or kick a child. J.T. responded that he was under attack and had acted in self-defence.
- Count 5: The judge found that between January 1, 2009 and January 1, 2010, J.T. pushed G's face into a plate of spaghetti because G was not eating it or not eating it quickly enough (at paras. 118-121). J.T. denied the incident occurred saying that he never used physical discipline on the children when they would not eat, but if the incident was found to have occurred his conduct fell within the scope of permissible conduct under s. 43 of the Criminal Code. The judge rejected J.T.'s denial of the incident and his alternative defence that what occurred was reasonable physical discipline, and accepted T.S.'s evidence.
- Count 2: The judge found that between September 2001 and December 2004, J.T. repeatedly kicked G when J.T. was angry, stressed, or short-tempered. T.S. and G testified on this count. The judge accepted the evidence of T.S. and G, who said that this occurred on a regular basis as far back as he could remember, and that B was hit about the same and his mother was hit more (at paras. 122-124, 129-133). J.T. denied the assaults occurred saying he was busy attending law school. The judge rejected J.T.'s evidence as raising a reasonable doubt and accepted T.S.'s and G's

evidence.

[14] The judge then addressed the two counts of assault causing bodily harm against T.S. She convicted J.T. of both counts.

· Count 10: The judge found that between June 1, 2014, and June 30, 2014, J.T. struck T.S. in the back, in the area of her liver, which caused T.S. to fall to the ground in what T.S. described as "incredible pain". T.S. testified about this incident. She believed she lost consciousness and said the blow caused her pain for about a year (at paras. 139-143, 154). J.T. denied the incident. He maintained that T.S.'s evidence was not credible as it was not corroborated. The judge rejected J.T.'s evidence and accepted T.S.'s evidence, which she found to be credible, detailed, and not shaken on cross-examination.

· Count 11: The judge found that between November 1, 2014, and November 30, 2014, J.T. threw T.S. into a flower planter, which caused her to suffer a broken rib, and then punched her in the eye, giving her a black eye (at paras. 144-154). T.S. testified about this incident and said the following night J.T. punched her in the eye again and in the rib area. A friend who visited her two or three weeks later confirmed that T.S. had a black eye at that time. J.T. testified that he did not recall the planter incident and denied punching T.S. in the eye. He claimed T.S.'s evidence was not reliable as her account of it to her father was inconsistent with her evidence, and if she had been injured as alleged, her friend would have observed other symptoms relating to those injuries. The judge did not find J.T.'s evidence to be credible or raise a reasonable doubt. She accepted T.S.'s evidence, which she found credible and to some extent corroborated by her friend who witnessed T.S.'s black eye several weeks later.

[15] On those counts where T.S. was the main witness, her evidence was consistently detailed about the incidents themselves and also about the dates, places, ages of the children and any significant events that were happening in their lives at those times.

[16] The judge acquitted J.T. of one count of assault (count 1 at paras. 122-128), two counts of causing unnecessary pain and suffering to animals (counts 4 and 15 at para. 155), one count of harassment (count 6 at paras. 156-163), and one count of breaching an undertaking not to contact his children (count 17 at paras. 164-165). Count 1 was the oldest in time. The judge found: "Although I think it likely that [J.T.] kicked [T.S.] on this occasion, her statements about this event are inconsistent and I am not satisfied of this charge beyond a reasonable doubt" (at para. 128). Counts 4 and 15 alleged that J.T. kicked their two dogs causing them unnecessary pain and suffering. The judge found that J.T. would regularly kick the dogs but she was not satisfied it resulted in the pain and suffering contemplated by s. 445.1 of the Criminal Code (at para. 155). With respect to the criminal harassment charge in Count 6, the judge found that while J.T. demeaned T.S., threatened to kill her, threatened to place her in a mental institution, and assaulted her and the boys, and that T.S. feared for her safety and the safety of the children, the judge was not satisfied that T.S. consistently feared for her and the children's safety. Therefore, the judge found that "the link between her fear and [J.T.'s] conduct was not sufficiently clear to warrant conviction for harassment" (at para. 163). As to

Count 17 that charged J.T. with breach of a condition of his undertaking that he have no contact with G, the judge found that J.T.'s explanation raised a reasonable doubt that he intended to do so.

Reasons on Charter Application

- [17] The judge found that T.S. did not destroy her notes with the intention of depriving J.T. of their content. In particular, the judge accepted T.S.'s evidence that she: (i) had prepared the notes for the benefit of her legal aid lawyer in the family proceedings; (ii) had thrown them out when she thought she did not need them any more; and (iii) could not retrieve them when asked as she no longer had access to the email account in which the notes were produced. She had also contacted the RCMP and a resource worker to determine if they had a copy but they did not.
- [18] The judge concluded that while the defence may have suffered some prejudice in the sense that he would not be able to challenge T.S.'s credibility on the notes, the prejudice was limited and did not warrant the remedy of an adverse finding of credibility against T.S.:
- [27] Although the defence has suffered some prejudice, in that had [T.S.] produced these documents there would have been another document on which to challenge her credibility, it would have been only one of a number of statements available to the defence to challenge [her] credibility. They have had two statements that she gave to police as well as her evidence at the preliminary inquiry on which to challenge her credibility.
- [29] The limited prejudice suffered by the defence does not satisfy me that it is appropriate that I put a "black mark" beside the evidence of [T.S.] or conclude that her evidence cannot be rehabilitated by the evidence of other witnesses, etc.
- [19] In the result, the judge held T.S.'s destruction of her notes was "simply one of the factors that I consider when assessing her evidence and her credibility" (at para. 29).

Issues on Appeal

- [20] The appellant raises two grounds of appeal. He submits:
1. The judge erred in law in her assessment of the appellant's credibility by rejecting his evidence for impermissible reasons, including: rejecting his evidence because of his general denials of most of the alleged incidents; shifting the burden of proof to the appellant; and failing to provide adequate reasons; and
 2. The judge erred in failing to draw an adverse inference with respect to T.S.'s credibility.
1. Credibility Assessment
- [21] It is common ground that a trial judge's credibility findings are entitled to significant deference on appellate review absent palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 24; *R. v. Gagnon*, 2006 SCC 17 at paras. 10, 20; and *R. v.*

Vuradin, 2013 SCC 38 at para. 11). Stated otherwise, an appellate court should not intervene unless a trial judge's findings "cannot be supported on any reasonable view of the evidence" (see *R. v. R.P.*, 2012 SCC 22 at para. 10, citing *R. v. Burke*, [1996] 1 S.C.R. 474 at para. 7).

- [22] A finding of fact can amount to an error of law where the assessment of credibility that results in a finding of guilt is based on impermissible reasoning. A judge's assessment of credibility based on an error of law is not owed deference and is reviewable on a standard of correctness.
- [23] The appellant submits the judge erred in law in finding guilt based on impermissible reasoning in her assessment of J.T.'s credibility. In particular, he submits the judge erred in law by: (i) contrasting his denial of the alleged offences and inability to give specific details with the Crown witnesses' specific and detailed evidence of those offences, citing *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193 at para. 91 and *R. v. A.J.S.*, 2011 ONCA 566 at para. 17; (ii) shifting the burden of proof, citing *R. v. Dick*, 2018 BCCA 343 at para. 27; and (iii) providing inadequate reasons with respect to her negative assessment of his credibility that appeared to rely principally on demeanor, citing *R. v. Sandhu*, 2012 BCCA 500 at paras. 31-33.
- [24] The three alleged errors of law have a common thread: whether the judge correctly applied the approach for assessing the credibility of an accused who elects to testify, as set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. The three-step framework is summarized at 758:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

A. Did the judge convict based solely on her rejection of the appellant's denial and lack of specific response to most of the alleged incidents?

- [25] The Supreme Court of Canada described the often amorphous exercise of assessing credibility in *Gagnon* at para. 20:
- [20] 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 an listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L. v. Canada (Attorney General)*, 2005 SCC 25, that in the absence of palpable and overriding error by the trial judge, his or her perceptions should be respected.

- [26] However, an accused is entitled to know why the trial judge is left with no reasonable doubt, particularly when a Crown witness's evidence contradicts the denial of an accused (Gagnon at para. 21). A judge may not reject an accused's evidence simply because the accused denies the alleged offences and/or fails to respond with specific details of the alleged offences.
- [27] In A.J.S., the Court allowed an appeal from conviction based on the trial judge's rejection of the accused 15-year old's "unvarnished denial" of sexual activity with the 5-year old complainant because the accused's denial: (i) failed to have a ring of truth to it; (ii) was "inherently improbable and implausible" and on the whole of the evidence "cannot be true"; and (iii) was contrary to "common sense and everyday experience" (at paras. 5-7). The Court held that the approach taken by the judge discounted the appellant's denial without explaining why it did not raise a reasonable doubt:
- [17] In rejecting the appellant's denial as one "of convenience", the trial judge did not acknowledge that it is very difficult for anyone to prove a negative. To the contrary, he seemed to require the appellant to interpret "what may have happened", i.e., to effectively speculate about why the complainant said what he did. Nor does the trial judge explain how someone who denies that anything happened could give "an interpretation of what may have happened".
- [18] As stated by the Supreme Court of Canada, the appellant was entitled to understand why his evidence did not raise a reasonable doubt. The three reasons the trial judge gives for rejecting the appellant's evidence are generic and conclusory, and provide no insight into his reasoning or the basis for reaching the conclusion he did.

Similarly in Neinstein, the Court observed:

- [91] The Hearing Panel also mischaracterizes Mr. Neinstein's evidence when it refers, somewhat pejoratively, to his "blanket denials". Mr. Neinstein contended that none of the events testified to by S.G. happened. An individual cannot be expected to give details of events that the individual says never occurred.
- [28] This Court framed the issue in Sandhu (at para. 36), where the trial judge rejected the accused's evidence on an assessment of his demeanor alone, and then convicted the accused based on the complainant's evidence without addressing the inconsistencies in the complainant's evidence, stating:
- [36] [I]t is my view that the trial judge erred in holding that the inconsistencies were immaterial because he believed the complainant. The question is not whether belief in the evidence of a witness disposes of concerns about her inconsistencies [but] whether the evidence is believed despite those inconsistencies." [Emphasis in original.]
- [41] The assessment of Mr. Sandhu's credibility thus rests on two shaky foundations. First, the trial judge's reasoning was illogical in that he rejected the appellant's credibility based largely on a comparison of his demeanor at two points in time that were seven years apart and under different circumstances. Second, apart from the dubious common sense

inference of this proposition, his ultimate rejection of Mr. Sandhu's testimony is not explained in the reasons for judgment other than to say that the complainant was credible and therefore believed.

- [29] Similarly, in *R. v. T.J.B.*, 2017 BCCA 49, this Court allowed an appeal based on a trial judge's negative credibility findings regarding an accused's assertion as to his sexual orientation:
- [24] By describing the appellant's testimony with respect to his sexual orientation to be "disingenuous and contrived", I can only conclude she found it to be deliberately untruthful. I do not know how she came to that conclusion, there being no evidence to contradict the appellant's description of his sexual orientation other than the allegation that he engaged in homosexual acts with the complainant (which, being the allegation in question, cannot be assumed to be true for the purposes of weighing the appellant's credibility).
- [30] In short, an accused is entitled to know "why" his evidence was rejected or failed to raise a reasonable doubt with the trial judge even where that evidence amounts to a bare denial of the alleged offence.
- [31] Some factors to consider in assessing credibility include: a witness's demeanor in the witness box, although it is recognized that it would be dangerous to rely wholly on demeanor to convict; internal inconsistencies in a witness's testimony at trial and/or external inconsistencies in a witness's testimony with prior testimony or out-of-court statements; any explanation by the witness for the inconsistencies; any consistent evidence or corroborating evidence to support the witness's evidence, although corroboration is not a requirement; and how a witness withstands cross-examination.
- [32] The judge did not reject J.T.'s evidence simply because J.T. denied most of the alleged physical assaults or because his evidence lacked detail. She was alive to the requirements of *W.(D.)*, the principle of reasonable doubt, and the substantive issues regarding the credibility and reliability of T.S.'s and G's evidence raised by J.T. in his submissions.
- [33] The judge provided a structured approach to her credibility assessments. First, she provided a general overview of her credibility findings with respect to each witness. She supplemented those findings with specific findings in relation to each count, addressing many of the factors outlined in para. 31 above. She assessed all of the witnesses' credibility, including J.T.'s, in this bifurcated manner. Last, she weighed the totality of the evidence and her findings in reaching her verdict on each count.
- [34] On those counts where J.T. denied the incident occurred or said he was unable to recall the incident, the judge factored that evidence into her weighing of the totality of the evidence. She observed that in some instances "one would expect [him] to be able to give specific evidence about the offence but he did not" (at para. 11). She gave an example of such an instance: where T.S. testified that J.T. repeatedly punched her on the back of the head, which left her with a lump on her head and concussion symptoms, both of which were observed by her mother who had to care for her bedridden daughter and the children. There were other

incidents that were also corroborated in some manner by T.S.'s parents, friend, and in one instance video clips from a cellphone to which J.T. gave a limited response.

- [35] After finding that J.T.'s evidence did not raise a reasonable doubt, the judge then turned to the evidence of the Crown witnesses to address any inconsistencies in their evidence, any explanation for those inconsistencies provided by them, and any consistent or corroborating evidence that would support their testimony. The judge did not expressly rely on the witnesses' demeanor in assessing credibility. If she did so implicitly, she did not rely on that factor to the exclusion of other relevant factors including that: the witness's evidence "ma[de] sense"; the witness's concession about misconduct on their part; or the witness not being shaken on cross-examination.
- [36] In my view, the structure of the judge's analysis does not demonstrate any impermissible reasoning. She did not reject J.T.'s evidence or find that it failed to raise a reasonable doubt because of his general denial of most of the alleged physical assaults, but based on the totality of the evidence that she accepted.

B. Did the judge shift the burden of proof to the appellant?

- [37] In her general overview of the witnesses' credibility, the judge correctly instructed herself on the legal test from *R. v. W.(D)*. and then turned to J.T.'s submission that T.S.'s evidence lacked credibility:
- [8] The defence argues that [T.S.'s] testimony was a pattern of overstatement, embellishment, and exaggeration. The defence identified various areas in which the defence says that [T.S.] was inconsistent, exaggerated, or minimized her evidence. The defence argues that [T.S.'s] testimony showed an extreme bias against [J.T.]. She did not describe events in a fair and balanced way. The defence says that there are a number of significant internal and external inconsistencies in [T.S.'s] evidence and that [T.S.] had a tendency to describe events without having personal knowledge. The defence argues that [J.T.] was balanced, reasonable, and made concessions in his evidence. This should promote confidence in his evidence. He was forthright about his own wrongdoing and misconduct, there were no material inconsistencies, and he was not evasive on questioning.
- [38] The judge did not accept J.T.'s position for the reasons stated in paras. 9-11 as reproduced in para. 9 above, and explained why J.T.'s evidence did not cause her to have a reasonable doubt. The judge found that most of the concerns raised by J.T. for why T.S.'s evidence should not be believed were applicable to his evidence. She then turned to the Crown's evidence to determine if the totality of the evidence supported a finding of guilt on each count. In that process, the judge found that four of the counts were not established beyond a reasonable doubt and she acquitted J.T. of those counts. She found that the remaining counts were proven beyond a reasonable doubt based on the totality of the evidence on each count.

[39] I find no error in the judge's application of W.(D.) that shifted the burden of proof to T.S. on any of the counts for which J.T. was found guilty.

C. Were the judge's reasons inadequate regarding her assessment of the appellant's credibility?

[40] This ground of appeal will only be allowed "where the trial judge's reasons for judgment are so deficient that they foreclose meaningful appellate review": *R. v. Sheppard*, 2002 SCC 26 at para. 25. An appellate court must adopt a functional approach when reviewing the sufficiency of reasons for judgment: *Sheppard* at para. 25. The pathway to the judge's verdict should be discernible: *R. v. R.E.M.*, 2008 SCC 51 at para. 35. Even if reasons fail to demonstrate a discernible pathway to conviction, the basis for conviction may be apparent where the Crown's case is overwhelming or the accused's testimony is patently incredible or unreliable: *Dick* at para. 25.

[41] Reasons for judgment should demonstrate the basis for conviction or why the trial judge was not left with a reasonable doubt: *Gagnon* at paras. 13, 21. Reasons will not be adequate if an appellant's right to meaningful appellate review has been prejudiced by the failure to show why the judge decided as he or she did: *R. v. Dinardo*, 2008 SCC 24 at paras. 27-32; *Vuradin* at para. 12. Examples of inadequate reasons for conviction include: significant inconsistencies in a material witness's evidence that were not addressed in the reasons (*Dinardo* at paras. 25-27); or, reasons that failed to respond to the live issues in the case and/or the parties' key submissions (*R. v. Walker*, 2008 SCC 34 at para. 20).

[42] In this case, the judge's reasons for finding why J.T.'s evidence did not raise a reasonable doubt are evident from the record when they are considered in the context of: (i) the totality of the evidence; and (ii) the judge's general credibility assessment of J.T.'s evidence as supplemented by her specific credibility assessment of his evidence on each count. The pathway to her guilty verdicts are clearly discernible: J.T.'s evidence, when weighed with the totality of the evidence, was not credible and did not raise a reasonable doubt, while the overwhelming evidence of the Crown's witnesses was credible and established the alleged offences for which J.T. was convicted beyond a reasonable doubt. I find no merit in this submission.

[43] In my respectful view, the judge correctly applied the legal test from W.(D.), did not engage in impermissible reasoning as alleged, and provided comprehensive reasons that provide a discernible pathway for her convictions and permit meaningful appellate review. I would not give effect to this ground of appeal.

2. Charter Application

- [44] The Crown admits that J.T.'s s. 7 Charter right was infringed by T.S.'s inadvertent destruction of the personal notes she had made in preparation for her police interview. The judge found that J.T. suffered limited prejudice from those actions. She declined to grant the remedy J.T. requested, namely an adverse finding of credibility against T.S. The judge did allow for a consideration of T.S.'s inadvertent destruction of the notes in assessing T.S.'s evidence and credibility.
- [45] J.T. submits the judge erred in failing to provide him with a remedy under s. 24(1) of the Charter, noting that there is nothing apparent in her reasons for judgment that reflects a consideration of this issue in her assessment of T.S.'s credibility.
- [46] Section 24(1) of the Charter provides:
- 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- [47] Section 24(1) gives a right to apply in a court of competent jurisdiction for a remedy where a Charter right has been infringed, but gives the court a wide and unfettered discretion to do what is "just and appropriate in the circumstances": *Mills v. The Queen*, [1986] 1 S.C.R. 863. The Court added (at 965): "It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion." In *R. v. Garnot*, 2018 BCCA 107, this Court held that prejudice caused by lost evidence could be remedied by simply considering the issue in the context of the third step of W.(D.): whether the Crown has met its burden of proving the alleged offence beyond a reasonable doubt.
- [48] The judge's exercise of discretion in determining a "just and appropriate remedy" in the circumstances of this case is to be accorded deference. The impugned conduct was inadvertent, the prejudice to the appellant limited. While the wording of the judge in para. 29 of her Charter reasons could have been clearer, I interpret her to have said that she took the Charter breach into account when assessing T.S.'s credibility, and I accept that she did. It is evident from the acquittal on Count 1 that, while she found T.S. generally to be credible, she did not accept all of her evidence. I would not accede to this ground of appeal.

Disposition

[49] In the result, I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Mr. Justice Hunter"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/19/01/2019BCCA0180.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-j-t-2019>

Prepared on 29 October 2026 · Esheria