

CANADA / JUDGMENT

R. v. M.D.**2021 BCCA 339**

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 339 R. v. M.D.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. M.D.,

2021 BCCA 339

Date: 20210924

Docket: CA46676

Between:

Regina

Respondent

And

M.D.

Appellant

Restriction on publication: A publication ban has been imposed under section 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify complainants or witnesses, referred to in this judgment by the initials Y.D. and K.D. This publication ban applies indefinitely unless otherwise ordered.

Restriction on publication: A publication ban has been automatically imposed under section 110(1) of the Youth Criminal Justice Act restricting the publication of information that would identify a young person referred to in this judgment by the initials M.D. This publication ban applies indefinitely, unless the information is published by that young person under s. 110(3) or the court has ordered publication.

Restriction on publication: A publication ban has been automatically imposed under section 111(1) of the Youth Criminal Justice Act restricting the publication of information that would identify young persons, referred to in this judgment by the initials Y.D. and K.D., as having been a victim or witness. This publication ban applies indefinitely, unless the information is published by that young person under s. 111(2) or the court has ordered publication.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated June 7, 2018 (R. v. [M.D.], Fort St. John Dockets 3187-1, 3187-2-A).

Counsel for the Appellant, appearing via videoconference:

B. Zargarian

Counsel for the Respondent, appearing via videoconference:

L. Bantourakis

Place and Date of Hearing:

Vancouver, British Columbia

November 12, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 24, 2021

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant challenges his conviction for two counts of sexual touching based on multiple grounds: the judge's alleged misapprehension of the evidence; erroneous inflation of the weight of a complainant's evidence; failure to apply R. v. W.(D.) correctly; and insufficient reasons. Held: Appeal dismissed. Nothing suggests the judge misapprehended the evidence and her findings on

credibility are entitled to appellate deference; she did not inflate the weight of the evidence improperly; she did not err in analyzing reasonable doubt; and she sufficiently explained the basis for the verdict.

Reasons for Judgment of the Honourable Madam Justice Dickson:

- [1] This appeal concerns the manner in which the trial judge treated evidence and reached conclusions on two sexual touching charges involving young children. The appellant, M.D., was 12 to 13 years old when the alleged touching occurred. The complainants, his neighbours, Y.D. and K.D., were five to six years old and four to five years old, respectively. By the time of trial, the appellant was 16, Y.D. was 10 and K.D. was eight.
- [2] The judge found that, despite certain frailties, the evidence of the complainants was credible and reliable on the essential elements of the offences. She also found the appellant's evidence denying the allegations was "not implausible" and that it was unclear "how many times [the appellant] engaged in sexual touching of Y.D. and K.D." Nevertheless, the judge was satisfied on the whole of the evidence that the appellant's bare denial did not raise a reasonable doubt and that there were "at least" two incidents described by Y.D. and two described by K.D. which occurred "substantially in the manner that they outlined in their testimony". As a result, she found the appellant guilty of both counts with which he was charged.
- [3] On appeal, the appellant contends that the judge misapprehended the evidence, failed to grapple with its weaknesses and erroneously inflated the weight to which some of it was entitled. He also contends that she erred in applying the principles enunciated in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 and failed to provide sufficient reasons to justify her lack of reasonable doubt. In my view, the judge made no such errors and her reasons are sufficient. To explain that view, I will outline the salient details of the evidence, the impugned reasons and the positions of the parties, then address the governing principles and their application in this case.

Background

- [4] The appellant lived with his parents on the outskirts of a small city in northern British Columbia throughout the period in question. Their home was located in a somewhat isolated area and the appellant was homeschooled. Y.D. and K.D. were young brothers who lived next door and, like the appellant, were homeschooled. Despite their age difference, until the alleged sexual touching was reported the three boys played together frequently at the appellant's home.

- [5] In March 2015, Y.D. told his mother that the appellant had touched him and K.D. sexually. Approximately four weeks later, she reported the disclosure to the police. Shortly thereafter, an officer trained in child interviewing techniques interviewed Y.D., then seven years old, and K.D., then six years old. The interviews were videotaped. Based on their content, the appellant was charged with sexually touching Y.D. and K.D. between June 2013 and December 2014.

Evidence at Trial

- [6] The trial took place over four days in August 2017 and January 2018. The evidence was presented on a voir dire to enable rulings to be made on the admissibility of Y.D. and K.D.'s videotaped statements to police and their hearsay statements to their mother. Crown counsel called the interviewing officer, the complainants' mother, and Y.D. and K.D., and played the videotaped statements while Y.D. and K.D. were testifying. Defence counsel called the appellant, his father and his mother. After the witnesses were examined and cross-examined, the judge invited the parties to make their closing submissions in writing, which they did.
- [7] The judge ultimately admitted the videotaped statements of Y.D. and K.D. for the truth of their contents under s. 715.1 of the Criminal Code. However, citing *R. v. Khelawon*, 2006 SCC 57, she ruled their hearsay statements to their mother regarding the sexual touching were inadmissible because they were not necessary. As a result, while the adult witnesses provided some peripheral evidence, the evidence that dealt directly with the sexual touching allegations was that of Y.D. and K.D. in their videotaped statements and their viva voce testimony, and the testimony of the appellant denying the allegations.

Y.D.

- [8] Y.D. was seven years old when the officer interviewed him. It was obvious from his statement that he was reluctant to speak to her about the sexual touching allegations. In the early stages of the interview, Y.D. said that he had told his mother about "it" and did not want to talk about "it" ever again. He also said that he was too embarrassed to talk about "it" and he felt "like I'm going to like a place for bad people."
- [9] As the interview progressed, Y.D. identified various body parts on a cartoon image of a boy. When doing so, he pointed to the penis and commented that he had seen the appellant's penis two or three times when he was "peeing" outside. Shortly thereafter, he told the officer "it happened in the shed sometimes it happened behind the shed and it happened behind the giant water barrel". In response to follow-up questions, he said that "it" had happened "three one and four times" and agreed with the officer that added up to "eight times".
- [10] On further questioning, Y.D. told the officer that "it" first happened "two summers ago" in the shed after "[the appellant] was kind of talking about talking about talking about it and then I'm like stop it then he's like I'm not gonna be your friend anymore and then I'm like okay I'll do it". At that point, Y.D. was still unwilling to say what "it" was, but he did agree to

draw a picture. Then he drew a picture and told the officer it showed the appellant putting his penis in Y.D.'s mouth when they were inside the shed, where, he remarked, there was "a big mountain of stuff" and a window. He also said that after this happened the appellant told him "well done", they left the shed and they jumped on the trampoline.

- [11] Y.D. went on to say the second time "it" happened was that same summer when he and the appellant were hiding behind the shed by the hedges. On this occasion, he said, the appellant "sticked his penis my butt" for "half a minute", which "kind of hurted". He also said that, while this was happening, the appellant's "penis was growing" and "then he he he um took it out then he wiped it", after which "it just hurted painfully then it then it stopped in a minute". When the officer asked if there was anything else Y.D. could remember, he replied "and I sucked his balls", which he said happened "one winter ago" in the greenhouse when the appellant told him "do it" and "I won't be your friend" so "then I did it". After making this statement, Y.D. agreed with the officer that he had told her about three times and confirmed, "there's no more times".
- [12] Y.D. also spoke about other matters during the police interview. For example, he told the officer that when he did not tell the truth at home "I just get away with it" and that "one time I stealed candy" from the table. Near the end of the interview, Y.D. said that his brother, K.D., had done "worsor things" with the appellant, but that he (Y.D.) did not see them happen. Rather, he said, K.D. "told me" and could "tell you hisself".
- [13] As I have noted, Y.D. was ten years old when he testified. Near the beginning of his testimony, he told the judge that it was hard to talk about what had happened and that he thought the appellant "was my friend" but he "did this to me and my brother". While he was testifying, Crown counsel played Y.D.'s videotaped statement, which he adopted as true with a few minor corrections. When Crown counsel asked if there was anything else Y.D. wanted to tell the judge that he had not told the officer, he replied "no".
- [14] On cross-examination, defence counsel asked Y.D. questions about some of his general behavioural habits before addressing the sexual touching allegations. During the general questioning, Y.D. testified that he and K.D. sometimes called one another "a liar". In answering questions regarding sexual matters, he said that he saw the appellant's penis around ten times when he (the appellant) was not "peeing". He agreed with defence counsel that this was more times than he told the officer.
- [15] Y.D. said there was "one thing" that he did not mention to the officer, namely, that the appellant would sometimes get angry with him for doing things like asking too many questions. When this happened, he said, the appellant would pin him down on the bed, pull down his own pants and yell "shut up". He also said he had seen the appellant's penis so many times that he really could not remember, but "all I know is that it's happened way more times than eight". In explaining the change in his account, he testified that he was "little" when he spoke to the officer and he did not remember then how many times it had happened, but that he remembered better now.

[16] Near the end of the cross-examination, defence counsel asked Y.D. if he remembered a time when he walked into the appellant's home screaming "penis, penis, penis, penis". Y.D. replied "yeah", then "no, I told -- I didn't do that". When defence counsel asked, "what did you do then", Y.D. replied "where did you -- who -- who told you that". Then he said he did not think he had done that, but there was a time when the appellant told him to take off his pants, he refused and he told the appellant's mother, who responded by calling him a liar.

K.D.

[17] K.D. was six years old when the officer interviewed him. Like his brother, he was reluctant to speak about the sexual touching allegations. Near the beginning of the interview, the officer raised the topic of the truth, at which point K.D. stated "whatever my brother did I did it" and "I did lies before I did a bad thing and then I runned away and that was a lie". When the officer asked why he was there, K.D. replied "because I don't wanna talk about it".

[18] K.D. went on to describe the appellant as a "bad friend", but when the officer asked why he said that he would not or could not talk about "it". As the interview progressed, he agreed to draw a picture and, when the officer asked what the appellant was doing in the picture, he stated, "you know", "what [Y.D.] told you right" and "I'm mad it's what happened to Y.D. I'm telling you". When the officer asked K.D. to say it "with your mouth", he replied "I forget" and "I don't know I don't know".

[19] Later in the interview, the officer referred to K.D.'s picture and commented that she noticed he drew the appellant's penis. She asked how K.D. would know what the appellant's penis looked like. He replied, "because I just know," then said "I don't know too good because that's not look like it that doesn't look like it". Eventually, K.D. said that "it" happened six times in the summer in the shed "cause [the appellant] was hiding". He also pointed on the picture to what he said was the appellant's penis and stated, "it made me feel bad," although he could not say why. When the officer said "but something happened", he replied "yup," and then repeated, "I forget what happened".

[20] By the time of trial, K.D. was eight years old. As she did with Y.D., Crown counsel played his videotaped statement when he was on the stand. K.D. testified that he was "scared" when he spoke with the officer and that, while he was feeling "a little better than frightened," he still did not feel comfortable talking about what had happened. However, he said, he would try.

[21] When Crown counsel was playing his statement, K.D. interrupted and said, "there's one more place it happened too. It happened in his room once too". When Crown counsel asked about the portion of the statement where K.D. told the officer "I forget," he said that he had not actually forgotten and was just scared to talk about it. He also said that the appellant made him feel bad "because he did something wrong that wasn't really right to do".

[22] K.D. went on to testify that the appellant did "really bad things" to him and Y.D. in the shed, that "my brother was there watching" and that "[Y.D.] had the same trauma that happened to me too". He said the "really bad things" involved his body and that his "bum" was touched,

but he did not really remember how it felt afterward and he did not want to talk about what had happened. On further questioning, K.D. said that he and the appellant took their pants off and he could see the appellant's penis, which looked "big" and touched him "in a sort of way". He said that he did not really know how many times it happened in the shed, but "it was more than once, I know that".

- [23] As to what happened in the appellant's bedroom, K.D. testified, "[the appellant] turned it into a game" of truth or dare. He said that he did not want to talk about the dare, but "something bad happened". Later in his testimony, K.D. said that he saw the appellant's penis when they were playing truth or dare, that the appellant's penis was big and that the appellant's penis touched his mouth. He also said that he could not remember if the bedroom door was open or closed when this happened or if the appellant's mother was around the house.
- [24] On cross-examination, defence counsel challenged K.D.'s statement that he felt frightened when the officer interviewed him. K.D. responded that, while he was not afraid of the officer, he was afraid to talk to her about what happened with the appellant. He also testified that, during the interview, he felt "embarrassed" and, at one point, "inside [he] felt [he] was going to cry". He testified further that he and Y.D. did not talk with one another about the interviews except "a little" when they watched the videotapes.
- [25] Near the end of the cross-examination, defence counsel put it to K.D. that he did not tell the officer the things he had testified to in court because those things did not happen. K.D. responded to this assertion with seeming bewilderment, stating simply "what?". Defence counsel repeated the assertion, at which point K.D. replied, "no, I remember it happened definitely I just didn't know how to explain it in the right path". Defence counsel also put it to K.D. that he did not tell the officer he and Y.D. were both in the shed watching when the appellant touched each of them sexually. K.D. agreed he did not tell her that and stated this was "because I was still afraid". He went on to state that he was present when Y.D. spoke to their mother and "spilled the juice".

The Appellant

- [26] The appellant, then 16, testified that Y.D. and K.D. played at his house "mostly every day" during the period in question. He said they usually played outside on the trampoline or kicking balls and occasionally they played inside. The appellant denied ever having pulled down Y.D. or K.D.'s pants, but testified that Y.D. did so to K.D. on the trampoline continuously and, as a result, the appellant told Y.D. if he did not stop he would not be allowed to keep bouncing. The appellant also acknowledged that he sometimes urinated outside, but flatly denied all of the allegations of sexual touching.
- [27] On cross-examination, the appellant testified that, as a homeschooler, he sometimes felt isolated from other children and agreed that he "kinda" had to teach himself about what happens in the outside world. He stated that he would not ask a family member about sex because he learned about it through wildlife documentaries on T.V., denied ever being

curious about sex between human beings and claimed he had never experimented with sex, thought about sex or been curious about what sex would feel like. He also testified that he had fun "most of the time" when he played with Y.D. and K.D., but said the friendship ended after their regular presence became "annoying" and denied feeling sad or surprised when they stopped coming over to his house to play.

The Appellant's Mother

- [28] The appellant's mother testified that Y.D. and K.D. played with the appellant at her home "off and on," although the appellant did not enjoy playing with them. She described Y.D. and K.D. as "wild", "rude" and "undisciplined" and stated she would check on them frequently when they came over because she was concerned about their destructiveness. She testified that Y.D. constantly picked on K.D. and tried to pull his pants down on the trampoline, and she described an incident in which she sent Y.D. home to change his wet clothes, which, she said, made him upset, angry and combative. She also testified that Y.D. "was always telling stories", some of which K.D. contradicted, and that K.D. was always "in the shadow of [Y.D.]".

Closing Submissions at Trial

- [29] Both parties focused on credibility in their closing submissions, which they provided to the judge in written form.
- [30] Defence counsel submitted that the videotaped statement showed K.D. was a controlled and relaxed young witness throughout the interview. He also submitted that, in the courtroom, Y.D. and K.D. could "run circles around all the adults" and that Y.D. was "acting," although he "dropped his guard" when he uttered, "who told you" while under cross-examination about yelling "penis penis penis" in the appellant's home. According to defence counsel, "[Y.D.] deviated from his script" when he answered in this manner and "[b]ut for that slip, he would have had us".
- [31] Defence counsel did not identify any specific inconsistencies within or between the testimony of Y.D. and K.D. in his closing submissions. However, he emphasized that both claimed their memories were better at trial than when they were interviewed, which, he argued, "is generally not human experience". He characterized the appellant as "a sheltered young boy" who denied the allegations made against him by the two younger "more worldly" boys and submitted the appellant came across as "shy, scared and believable". As to the appellant's mother, defence counsel acknowledged that she presented as "flippant and arrogant," but argued this could be attributable to nervousness and concern for her son.

- [32] For her part, Crown counsel acknowledged that there were inconsistencies in Y.D. and K.D.'s evidence. However, she argued, those inconsistencies related to peripheral matters or were attributable to their young ages. She reviewed the evidence of Y.D. and K.D. in their videotaped statements and trial testimony in detail and submitted that, despite their obvious reluctance to talk about what had happened, their evidence was clear, credible and reliable on the essential elements of sexual touching.
- [33] In support of her submission, Crown counsel argued there was no indication of fabrication, concoction or coaching in Y.D. or K.D.'s evidence. She noted that both boys described the appellant's penis as "big" or "growing", that both included details in recounting the incidents and that both produced significant drawings during the police interviews. She also submitted the evidence of the appellant's mother neither harmed nor assisted the defence case, but it did confirm aspects of the Crown's case, for example, her acknowledgement that she was not always around the boys when they played outside. In sum, Crown counsel submitted, based on the totality of the evidence, the Crown case was proven beyond a reasonable doubt on both counts.

Reasons for Judgment

- [34] The judge began by addressing the admissibility issues. As I have noted, she ruled that the videotaped statements of Y.D. and K.D. were admissible pursuant to s. 715.1 of the Criminal Code. In outlining the criteria for their admissibility, the judge summarized the sexual touching allegations and the context within which they arose, namely, the neighbourhood-based friendship of the appellant, Y.D. and K.D. She also commented on her observations of Y.D. and K.D.'s in-court demeanour:
- [24] The full videotape was played in the presence of Y.D. and K.D., and I was able to watch not only their demeanour as they listened to and watched the video, but also throughout the course of their examination in chief and cross-examination. Throughout, they answered very carefully questions which were open-ended and not leading, at least with respect to all material aspects of the investigation and the allegations. They were able to say that they did not understand a question and responded accordingly.
- [35] Citing *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183, the judge recognized that, when admitted, the videotaped statements, together with the viva voce evidence at trial, comprised the whole of the evidence in chief of Y.D. and K.D.: at paras. 15, 27. After going on to rule that the hearsay statements of Y.D. and K.D. to their mother were inadmissible, she turned to her assessment of the trial evidence.
- [36] First, the judge identified the key issues for determination, namely, the credibility and reliability of the evidence of the witnesses. She stated the court should apply common sense when assessing the evidence of children and its strengths and weaknesses, citing *R. v. W. (R.)*, [1992] 2 S.C.R. 122. For example, she noted, a child's capacity to observe, recollect, understand and respond to questions in an intelligent and morally responsible way should

be taken into account in the evaluation process. In addition, she stated, aspects such as honesty, memory, suggestibility, and communication ability all form part of the necessary assessment: at paras. 41-42.

- [37] Next, the judge summarized the background evidence. In doing so, she noted the evidence of the appellant's mother, including her description of Y.D. and K.D. as "rude, wild, and undisciplined" and her apparent inability to say anything positive about Y.D. and K.D. However, she stated, the appellant's mother did confirm "the various buildings on the property and that the shed contained tools and equipment": at para. 48.
- [38] Turning to the evidence of Y.D., the judge noted his embarrassment when he talked about the sexual touching incidents. She referred to the specificity of his evidence regarding "where the sexual activity took place, in the shed, sometimes behind the shed, behind the giant water barrel" and the picture that he drew when the officer interviewed him, including his detailed description of the shed's interior: at paras. 49-50. She also mentioned other details such as Y.D.'s description of feeling pain when the appellant "stuck his penis in his butt," the appellant's penis growing and the appellant wiping his penis and his description of a separate incident in the greenhouse when he "sucked [the appellant's] balls": at paras. 51-52. Finally, she referred to Y.D.'s evidence regarding the appellant's threats to stop being his friend and Y.D.'s statement that he responded by agreeing to "do it": at para. 53.
- [39] Then the judge dealt with the evidence of K.D. In doing so, she noted that in his videotaped statement, without prompting, K.D. told the officer "[w]hatever my brother says, it happened. I get it. I had it as well and all that happened to Y.D.": at para. 54. After describing other aspects of the statement, she also noted that K.D. spontaneously added to its content when he was testifying:
- [58] K.D. added to his videotaped statement at trial. It was quite spontaneous. When he was listening to the videotaped statement, without prompting, he interjected and said, "Oh, one more place it happened. It happened in his room once."
- [59] He described how [the appellant] took him to the shed and his brother there, and they were watching. He said, "It was really bad things to us in the shed." Indicated that the incident involved his body, specifically his bum. That [the appellant] took off his pants, he felt like it was wrong, but he really did not know what he should be doing or what to say.
- [60] The incident in the bedroom involved his mouth. He said that [the appellant's] penis touched his mouth and that [the appellant's] penis was big.
- [40] The judge went on to refer to K.D.'s evidence that he was "standing there watching" in the shed when the appellant touched Y.D. sexually. In particular, she said, K.D. testified that "[w]e don't talk to each other about what happened because I already saw what happened to us": at para. 61.

- [41] After reviewing the standard of proof, the burden of proof and some of the leading authorities, including W.(D.), the judge outlined the essential elements of the offence of sexual touching. She emphasized the need to consider the whole of the evidence and stated, "it is not a question of choosing between the Crown's version and that of the defence". She also stated she was mindful that a contradiction in a child's testimony should not be given similar effect to such a flaw in an adult's testimony and that a child may not be able to recount details of an event, but "this does not mean that they have misconceived what happened to them and who did it": at paras. 72-73.
- [42] The judge concluded her reasons with a section entitled "Analysis". Under the heading "Y.D.'s evidence," she stated that Y.D. told the officer and the court what happened in a genuine and articulate manner that showed he understood the questions and was able to answer them despite his embarrassment: at para. 74. She stated further that Y.D.'s evidence was not fanciful or illogical, that he provided "a believable level of detail regarding the specifics of the incidences" and that nothing suggested he was coached, prompted or had anything to gain. On the contrary, she remarked, "I think he was sad that he had lost a friend": at paras. 75-76.
- [43] The judge acknowledged that Y.D. changed his evidence on "the number of occasions," but found this did not detract from his consistency regarding the nature of the unwanted touching. Then she gave specific examples of some of the details Y.D. provided and referred to the manner in which he produced his drawing in the police interview:
- [77] He stood the long and rigorous cross-examination, and he continued to be firm and clear on the essential element of unwanted touching by [the appellant]. There were no inconsistencies that went to the heart of the matter, the nature of the offences, the essential elements remained consistent. Although he changed his evidence about the number of occasions, this did not detract from his consistency in the nature of the unwanted touching.
- [78] In the videotaped statement, he was able to provide specific details about where the incidents occurred; for example, in and behind the shed, behind the water barrel, as he said they were hiding. [The appellant] and his mother both identified these locations and noted that these were hidden locations that were not visible to a person looking out from [the appellant's] house. He also recalled a window in the shed.
- [78] Y.D.'s own drawing was produced in a spontaneous, uncoached manner, corroborating his evidence that [the appellant's] penis was in his mouth.
- [44] Under the heading "K.D.'s evidence", the judge stated that K.D. made "his best effort" to talk about a naturally uncomfortable topic for a young child when he spoke with the officer. She said that he appeared more confident by the time he testified in court and explained that he did not know how to tell the officer about what had happened. She also noted that, while he was unable to articulate what happened during the interview, he was able to draw a picture "that best described it for him". She went on to say, "[t]here was nothing in his court testimony that would suggest he was making up these events" and she emphasized that

testifying was embarrassing for him. Nevertheless, she stated, K.D. "did recall the essential elements that related to the unwanted sexual touching": at paras. 80-82.

- [45] The judge found that, like Y.D., K.D. was an articulate, intelligent witness who gave evidence that did not appear to be coached or prompted. She stated that, although he was unable to provide a lot of detail, he referred to the incident in the shed and said, "the same thing happened to his brother as happened to him. He told the court about [the appellant's] penis and his bum": at paras. 83-84. She also commented that the court cannot expect open-ended questions to elicit the same level of detail from a child witness as that expected of an adult witness. However, "Y.D. and K.D.'s evidence is not generic or vague in nature, but filled with details": at paras. 85-86.
- [46] As to the appellant's evidence, the judge noted that he confirmed many surrounding circumstances, such as when and where the boys played together, and he conceded that, "they were often not in eyeshot of his mother and she did not dispute this, yet he has flatly denied the allegations of sexual touching": at para. 87. Then she said this:
- [88] [The appellant's] evidence is not implausible, nor did he contradict himself during the course of his testimony. It is likely that he would do otherwise in the course of a bare denial. However, in making a credibility assessment with respect to his evidence, the court cannot consider his testimony in isolation of the whole evidence.
- [89] Does the denial, coupled with the whole of the evidence, leave a reasonable doubt? The strength of Y.D. and K.D.'s testimony becomes an important consideration in assessing credibility of [the appellant's] denial.
- [90] I am satisfied, on the whole of the evidence, that the bare denial of [the appellant] simply does not raise a doubt, given the credible evidence presented by Crown. Although it was not clear how many times [the appellant] engaged in sexual touching of Y.D. and K.D., I am satisfied, beyond a reasonable doubt, that there was at least two incidences described by Y.D. and two described by K.D., as detailed in their evidence, that did indeed occur substantially in the manner that they outlined in their testimony.
- [47] Based on the foregoing review and analysis, the judge found the appellant guilty on both counts of the Information.

On Appeal

- [48] The appellant raises four separate grounds of appeal, which grounds, he says, though distinct, are related. The first two concern the manner in which the judge handled the evidence; the second two, the manner in which she reached and explained her conclusions on reasonable doubt.
- [49] According to the appellant, the judge misapprehended the evidence of Y.D., K.D. and the appellant's mother by failing to grapple with some of its key elements when she found Y.D. and K.D. were credible witnesses. For example, he contends, she failed to grapple with both

complainants' admissions to lying in the past, Y.D.'s admission to stealing candy and the testimony of the appellant's mother that Y.D. was "always telling stories" and influencing K.D. She also failed to grapple with the differing number of incidents Y.D. reported in his statement and testimony, with K.D.'s repeated appeals to his brother's account and his inconsistent reports in his statement and testimony, and with the difference between Y.D.'s claim that he did not see what the appellant did to K.D. and K.D.'s claim that Y.D. was present.

- [50] In addition, and relatedly, the appellant contends, contrary to this Court's guidance in *R. v. Untinen*, 2017 BCCA 320, the judge inflated the weight of Y.D.'s evidence by treating the drawing he produced in the police interview as self-corroboration. In other words, he argues, she found that the drawing, which she admitted under s. 715.1 of the Criminal Code, "corroborated" Y.D.'s spoken evidence and, in doing so, added weight to Y.D.'s evidence based on mere consistency.
- [51] The appellant contends further that the judge erred in applying the well-known principles in *W.(D.)* by engaging in a credibility contest between the complainants' evidence, on the one hand, and, on the other, the evidence of the appellant. In his submission, this led her to shift the burden of proof unintentionally and thus to misapply the principle of reasonable doubt.
- [52] Finally, he says, the judge also failed to provide sufficient reasons to explain why she had no reasonable doubt on the whole of the evidence, particularly given her finding that his evidence was "not implausible" and that only two of the three incidents described by Y.D. were proven to the requisite standard. According to the appellant, in light of those findings, as in *R. v. Dick*, 2018 BCCA 343, the logical connection between the guilty verdicts and the basis for the verdicts is not clear.
- [53] The Crown responds that the judge made no factual or legal errors in her handling of the evidence or the manner in which she reached and explained her decision. According to Crown counsel, in reality, the appellant is simply inviting this Court to substitute its own credibility findings for the judge's credibility findings based on a different interpretation of the evidence more favourable to the appellant. However, that is not the role of an appellate court. Crown counsel also says the judge applied the correct burden and standard of proof and that read as a whole, in the context of the record, her reasons demonstrate why she reached the guilty verdicts: she accepted the credible evidence of Y.D. and K.D. and rejected the appellant's bare denial. Accordingly, she submits, this Court should dismiss the appeal.

Discussion

Did the judge misapprehend the evidence when she found Y.D. and K.D. were credible witnesses?

Legal Principles

- [54] Whether a witness is credible is a factual question. In the absence of palpable (obvious) and overriding (material) error, credibility determinations made by a trial judge attract a high degree of appellate deference: *R. v. Vuradin*, 2013 SCC 38 at para. 11; *R. v. Thla Ceu*, 2018 BCCA 480 at para. 34.
- [55] Appellate deference to credibility determinations is appropriate for obvious reasons. Trial judges enjoy the distinct advantage of having seen and heard the witnesses testify firsthand and, therefore, are in the best position to assess the truthfulness of their accounts. Assessing credibility involves a complex process of watching and listening to the witnesses, distilling the impressions that emerge from their testimony and reconciling the various versions of events as recounted: *R. v. Gagnon*, 2006 SCC 17 at para. 20; *R. v. Wright*, 2019 BCCA 327 at paras. 23-25. Accordingly, appellate courts have been repeatedly cautioned against substituting their own assessment of credibility for that of the trial judge when there is a reasonable basis for the trial judge's conclusions on credibility: *Gagnon* at paras. 22-23; *R. v. R.E.M.*, 2008 SCC 51 at para. 48.
- [56] Assessing credibility may be particularly challenging and nuanced when it involves a child witness. Judges evaluate the evidence of young children differently from the evidence of adults: *R. v. Hernandez-Lopez*, 2020 BCCA 12 at para. 8. For example, courts have long recognized that children may experience the world differently than adults and, therefore, details like the time, place and frequency of events may be missing from their recollections because such details may be less important to them. In addition, child witnesses may be more prone to suggestibility and less able to express themselves precisely than adult witnesses: *W.(R.)* at 133; *Hernandez-Lopez* at paras. 9, 18-21. This does not mean that the evidence of children is subject to a different standard of proof than the evidence of adults, but it does mean that when assessing the credibility of child witnesses trial judges should approach their evidence on a "common sense" basis, bearing in mind its strengths and weaknesses in each case. In particular, when the credibility of a child witness is determined "the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which [the witness] is testifying": *W.(R.)* at 134.
- [57] While the credibility determinations of trial judges are entitled to a high degree of deference, appellate courts will intervene to set aside a verdict if it results in a miscarriage of justice. The test for demonstrating a misapprehension of the evidence sufficient to justify such an intervention is stringent and well-established. In *R. v. Lohrer*, 2004 SCC 80, Justice Binnie affirmed the test set out in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.):

- [2] The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".
- [58] In *Morrissey*, Justice Doherty explained that a misapprehension of the evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence": at 538. Where a judge is mistaken as to the substance of material parts of the evidence and those mistakes play an essential part in the reasoning process that results in a conviction, the conviction is not based on the evidence and a miscarriage of justice results because the conviction is not a "true" verdict: at 541. It follows that credibility determinations made by a trial judge must be based on a correct apprehension of the evidence because "[w]rong findings on what the evidence is destroy the basis of findings of credibility": *R. v. Dewar*, 2001 BCCA 561 at para. 23, citing *Whitehouse v. Reimer* (1980), 116 D.L.R. (3d) 594 at 595 (Alta. C.A.).
- [59] However, it is not enough for an appellant merely to suggest a different interpretation of the evidence or point to evidence that arguably weighs against a trial judge's findings on credibility to justify appellate intervention based on a material misapprehension. Mere differences in the interpretation of the evidence do not demonstrate that the evidence was misapprehended. They simply reflect an appellant's disagreement with the trial judge's differing view of the evidence: *R. v. Swales*, 2014 BCCA 350 at para. 49. Nor does the fact that a judge does not discuss all of the evidence on a particular point mean that the judge ignored the evidence. Judges are not obliged to detail every aspect of their factual deliberations or spell out every finding or inference of fact or credibility: *R. v. Walle*, 2012 SCC 41 at para. 46; *Thla Ceu* at para. 47.

Application of Principles

- [60] I see nothing in the judge's reasons or the record to suggest that she misapprehended the evidence or otherwise made a palpable and overriding error in finding Y.D. and K.D. were credible witnesses. On the contrary, in my view, her findings in this regard are well supported and error-free. They are entitled to appellate deference.
- [61] In assessing the credibility of Y.D. and K.D., the judge engaged in a "common sense" consideration of relevant factors, including the detailed nature of their accounts, their embarrassed but genuine demeanour in the police interviews and on the stand and their consistent descriptions of the essential elements of the offences under cross-examination. She also considered the consistency between their evidence and that of the appellant and his mother on the hidden nature of the locations behind the shed and the water barrel where Y.D. and K.D. said the sexual touching occurred. In my view, her discussion of the evidence related to their credibility was reasonably thorough, clear and cogent. It also responded to the submissions made by counsel at trial.

- [62] The judge did not address every point raised by the appellant on appeal in her reasons, but, as noted, she was not obliged to do so. For example, it was not necessary for her to deal specifically with the evidence that Y.D. and K.D. had lied in the past or that Y.D. had stolen candy. That evidence did not relate directly to the events in issue and their candid admissions could support findings that they were truthful witnesses as easily as detract from their credibility. Nor was it necessary for the judge to deal specifically with the conflict in their evidence on the peripheral matter of whether Y.D. was in the shed when the appellant touched K.D. sexually. Although defence counsel touched on that question in cross-examining K.D., he did not pursue it or raise it in cross-examining Y.D., nor did he address it in his closing submissions to the judge.
- [63] The judge did deal expressly with the change in Y.D.'s account of the frequency with which he saw the appellant's penis, and perhaps how often the appellant touched him sexually, (it was unclear if he was referring to the former or the latter at some points in his statement and his testimony). In describing his evidence overall, she stated there were no inconsistencies that went "to the heart of the matter" and that the essential elements of the offences remained consistent. However, she also acknowledged that "[Y.D.] changed his evidence about the number of occasions" but found this did not detract from his consistency with respect to "the nature of the unwanted touching": at para. 77. This approach to evaluating Y.D.'s evidence on the peripheral matter of frequency and assessing his credibility bearing in mind the nature of the inconsistency aligned with the guidance of Supreme Court of Canada in *W.(R.)*. It did not represent a misapprehension of the evidence.
- [64] The judge also dealt expressly with the change in K.D.'s account, or, more accurately, its supplementation on the stand compared to his account in the police interview. She specifically noted the spontaneity of K.D.'s interjection as he watched the videotaped statement and testified that the appellant also touched him sexually once in his room, as well as his increased confidence when he was testifying at trial. She went on to conclude that K.D.'s additional disclosure was explained by his age, which was an available conclusion on the evidence. Further, she referred to K.D.'s statement in the interview that what happened to Y.D. also happened to him and to his testimony at trial that he and Y.D. were in the shed together during the events in question. In my view, nothing in her reasons or the record suggests that the judge misapprehended that evidence, or any other, in assessing K.D.'s credibility. Rather, she interpreted the evidence and its import differently than the appellant would have preferred.
- [65] I am unpersuaded by this ground of appeal.

Did the judge erroneously inflate the weight of Y.D.'s evidence based on self-corroboration?

Legal Principles

- [66] As David M. Paciocco (now Paciocco J.A.) explained in *The Perils and Potential of Prior Consistent Statements: Let's Get It Right*, (2013), 17 Can. Crim. L. Rev. 181, a prior consistent statement is a declaration made by a witness before taking the stand that is consistent with the testimony of the witness on the stand. Subject to certain exceptions, prior consistent statements are presumptively inadmissible because they generally lack probative force and are self-serving. When a prior consistent statement is admitted, its permissible use will be carefully limited. For example, such a statement may be used to rebut an allegation of recent fabrication or as circumstantial evidence to assist the trier of fact in assessing the truth of a witness's in-court testimony: *R. v. Stirling*, 2008 SCC 10 at para. 5; *R. v. C.M.M.*, 2020 BCCA 56 at paras. 145-147.
- [67] Presumptive inadmissibility mitigates the risk of unduly enhanced testimonial credibility based solely on the fact of repetition: *R. v. Ellard*, 2009 SCC 27 at para. 31. Mere consistency between a witness's out-of-court statement and in-court testimony cannot serve to bolster or corroborate the witness's in-court testimony. Applied to evidence, the adjective "corroborative" generally connotes "the adding of strength or reinforcement from an independent source for the truth and accuracy of [a witness's] evidence": *R. v. Aksidan*, 2006 BCCA 258 at para. 44. When a witness repeats an account while testifying in a manner that is consistent with the witness's prior out-of-court account, the mere consistency between the two does not amount to "self-corroboration" or "add weight" to the in-court testimony, thus enhancing the witness's credibility: *Untinen* at paras. 52, 55.
- [68] Pursuant to s. 715.1 of the Criminal Code, a videotaped statement made by a victim or witness under the age of 18 is admissible at trial subject to its adoption by the witness and other specified criteria. In such circumstances, the videotaped statement forms an integral part of the witness's in-court testimony in chief, as explained in *F.(C.C.)*.
- [69] In *Untinen*, this Court rejected the Crown's submission that mere consistency between a videotaped statement admitted under s. 715.1 and a complainant's testimony at trial can add weight to, bolster or corroborate the complainant's account when testifying: at paras. 53, 56. However, speaking for the Court, Justice Fitch also affirmed that both consistencies and inconsistencies between a complainant's videotaped statement and trial testimony may be relevant for the purposes of credibility assessment, depending on the context and the use to which they are put:
- [76] Where inconsistencies are raised to challenge the credibility of the complainant when a video statement is tendered, the truth-seeking function of the trial demands that the entirety of the complainant's account be scrutinized, including internal consistencies as between her video statement and trial testimony, in deciding whether the inconsistencies relied on by the defence so impact on the credibility of reliability of the complainant as to give rise to a reasonable doubt.

Application of Principles

- [70] As noted, the judge ruled that Y.D.'s videotaped statement was admissible pursuant to s. 715.1 of the Criminal Code and, in doing so, recognized that the videotaped statement, together with his viva voce testimony, comprised the whole of Y.D.'s direct evidence. Later in her reasons, when analyzing his evidence, she commented on the drawing that Y.D. produced in the course of the police interview. To repeat, she stated:
- [79] Y.D.'s own drawing was produced in a spontaneous, uncoached manner, corroborating his evidence that [the appellant's] penis was in his mouth.
- [71] Y.D. drew the picture as a means of communicating what the appellant had done to him, namely, put his penis in Y.D.'s mouth. His drawing, together with his contemporaneous explanation of what it depicted, formed part of the statement he made to the officer regarding the sexual touching. When he testified, Y.D. did not add anything to his videotaped statement in direct examination. As noted, he simply adopted the statement, including the drawing, without comment. Nor was he questioned under cross-examination about the nature of the drawing or the event it depicted.
- [72] In my view, the judge's use of the word "corroborating" in the impugned sentence was poorly chosen and ambiguous. To the extent that she appears to have suggested the drawing corroborated Y.D.'s evidence that the appellant put his penis in his mouth, she misspoke. Nevertheless, in my view, it is obvious from the entire sentence, read closely, in the context of her reasons as a whole, that, contrary to the appellant's submission, the judge did not inflate the weight of Y.D.'s evidence by erroneously treating the drawing as a self-corroborating prior consistent statement. In particular, she did not compare Y.D.'s out-of-court account in the interview with his in-court testimony and rely on mere consistency between the two to "add weight" to his in-court testimony and thus enhance his credibility. In the circumstances, no such comparison was possible.
- [73] The drawing was an integral element of the only account Y.D. ever gave of the appellant putting his penis in his mouth. Together with his contemporaneous explanation in the interview, it represented the totality of Y.D.'s evidence regarding that event, admissible at trial by virtue of s. 715.1 of the Criminal Code, and, as such, did not constitute "corroboration". However, the spontaneous and uncoached manner in which he produced the drawing was a relevant consideration in assessing the credibility and reliability of that evidence, particularly given Y.D.'s young age and reluctance to express himself verbally. More specifically, Y.D.'s manner when he produced the drawing suggested that it depicted his genuine and personal recollection of the event thus alleged.

[74] Given the foregoing, in my view, the rule against self-corroboration was not engaged on the evidence. Although the judge expressed herself awkwardly, she did not inflate the weight of Y.D.'s evidence impermissibly by treating the drawing as a self-corroborating prior consistent statement or by considering the spontaneous and uncoached manner in which Y.D. produced the drawing in the interview.

[75] I would not give effect to this ground of appeal.

Did the judge err in applying the principles in W.(D.)?

Legal Principles

[76] The paramount question in every criminal case is whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt as to the guilt of the accused: Vuradin at para. 21. In W.(D.), the Supreme Court of Canada outlined a three-step framework designed to ensure that judges remain focused on the principle of reasonable doubt when an accused testifies: at 758. The purpose of the framework is to prevent judges from unintentionally basing a guilty verdict on a choice between believing the accused's evidence or the Crown's evidence, an error sometimes described as approaching the evidence as a credibility contest: R. v. C.L.Y., 2008 SCC 2 at paras. 6-9; R. v. L.(C.J.), 2004 MBCA 126 at para. 34.

[77] However, judges are not constrained by the form or sequence of the W.(D.) framework. The framework does not establish a sacrosanct formula that must be repeated word for word whenever an accused testifies: C.L.Y. at paras. 7-9. On the contrary, judges are free to undertake the necessary analysis as they see fit provided they give reasons the parties can understand and appellate courts can review. In particular, as Justice Charron stated in R. v. Dinardo, 2008 SCC 24, the reasons must demonstrate that the judge seized the substance of the W.(D.) instruction in the context of a credibility assessment: at para. 23. The key in every case is whether the judge applied the correct burden and standard of proof, not the words used in applying them: C.L.Y. at paras. 6-9.

[78] In some cases, it will be apparent that the judge applied the correct burden and standard of proof even in the absence of an explanation for rejecting the accused's evidence, particularly where the accused's evidence involves a bare denial and the judge accepts credible contradictory evidence: Vuradin at paras. 13, 27. As explained in R.E.M., where the judge finds a complainant's evidence to be truthful on the criminal standard based on its strength and credibility, it necessarily follows that the accused's denial was rejected where it conflicted with the evidence of the complainant. In such circumstances, the convictions themselves raise a reasonable inference that the accused's denial, even if plausible, failed to raise a reasonable doubt: at para. 66. However, depending on the nature of the evidence, a judge may be obliged to explain why the testimony of the accused is disbelieved and why it does not raise a reasonable doubt for the parties to be able to understand the reasons for the guilty verdict and to permit appellate review: Dick at para. 27.

Application of Principles

- [79] In this case, the judge identified the credibility and reliability of the witnesses as the key issue for determination at the outset of her reasons: at para. 41. She also reviewed the governing principles and leading authorities on the applicable onus and standard of proof: at paras. 62-73. After setting out the W.(D.) framework, she specifically stated that a judge must not "fall into the trap of deciding the guilt or innocence of the accused solely on the basis of whether the complainant or the accused was a more credible witness": at para. 68. She also stated that "[i]t is not a question of choosing between the Crown's version and that of the defence, but rather in considering the whole of the evidence, is the judge left with a reasonable doubt as to the guilt of the accused": at para. 72.
- [80] The judge went on to analyze the strength and credibility of Y.D. and K.D.'s evidence. Then she noted that the appellant confirmed many of the surrounding circumstances described by Y.D. and K.D., but flatly denied the sexual touching they alleged: at paras. 74-87. She characterized the appellant's evidence as "not implausible" and commented that he did not contradict himself when he was testifying. However, she stated, "in making a credibility assessment with respect to [the appellant's] evidence, the court cannot consider his testimony in isolation of the whole evidence": at para. 88. To repeat, she said this next:
- [89] Does the denial, coupled with the whole of the evidence, leave a reasonable doubt? The strength of Y.D. and K.D.'s testimony becomes an important consideration in assessing credibility of [the appellant's] denial.
- [90] I am satisfied, on the whole of the evidence, that the bare denial of [the appellant] simply does not raise a doubt, given the credible evidence presented by Crown. Although it was not clear how many times [the appellant] engaged in sexual touching of Y.D. and K.D., I am satisfied, beyond a reasonable doubt, that there was at least two incidences described by Y.D. and two described by K.D., as detailed in their evidence, that did indeed occur substantially in the manner that they outlined in their testimony.
- [81] In my view, the judge's analysis on the reasonable doubt issue was free of error. I do not accept the appellant's submission that she found his plausible denial was uncontradicted and did not reject it, thus indicating that she engaged in a credibility contest and, based on her own findings, should have had a reasonable doubt. The judge conducted an appropriately reasoned and considered assessment of Y.D. and K.D.'s evidence and concluded that, despite some frailties, it was strong and credible. The evidence of Y.D. and K.D. starkly contradicted the appellant's bare denial, from which it necessarily followed that she rejected his denial and that, while "not implausible," it did not raise a reasonable doubt.
- [82] Nor do I accept the appellant's submission that the judge misapplied the burden of proof given that "the number, location, and people involved in the incidents varied wildly" and that she had a doubt as to whether some of the sexual touching occurred, which logically should have extended to all of the allegations as nothing distinguished one from another.

- [83] As the judge recognized, the evidence of Y.D. and K.D. was unclear on the peripheral matter of the frequency of the alleged sexual touching. However, as she also recognized, in cases involving child witnesses a lack of clarity on such matters does not necessarily cast doubt on the credibility of their accounts. Further, the record does not support the submission that Y.D. and K.D.'s evidence "varied wildly", nor do the reasons support the submission that the judge found some of the sexual touching they alleged was not proven beyond a reasonable doubt.
- [84] As noted, Y.D. described three specific incidents of sexual touching: one depicted in the drawing when the appellant put his penis in his mouth; a second the "same summer" when the appellant "sticked his penis [in Y.D.'s] butt"; and a third "one winter ago" when "[Y.D.] sucked [the appellant's] balls". K.D. described the appellant touching his "bum" and his mouth with his "big" penis, which, he said, occurred "more than once", the latter of which he did not report in his police interview but testified to at trial. Taking into account the whole of the evidence, the judge found that at least two of the three incidents described by Y.D. and the two incidents described by K.D. occurred substantially as they outlined in their testimony.
- [85] When read as a whole, in the context of the record, it is apparent from her reasons that, contrary to the appellant's submission, the foregoing was not a finding that the judge had a reasonable doubt that any of the specific incidents of sexual touching alleged by Y.D. or K.D. were unproven to the criminal standard. Rather, it was a positive finding that the judge had no reasonable doubt that any fewer than two of the incidents specifically described by Y.D. and the two described by K.D. crossed that bar. Moreover, even if the judge did have a reasonable doubt regarding some of their allegations (and nothing suggests that she did), she was entitled to accept some, all or none of Y.D. and K.D.'s evidence. While it may have been desirable for her to make more detailed findings, it was unnecessary given the nature of the charges: R.E.M. at paras. 63, 67. The fact that she did not do so does not mean that she misapplied the burden of proof.
- [86] In my view, the appellant's argument is indistinguishable from that rejected by the Supreme Court of Canada in *Vuradin*, where the appellant argued the judge's acceptance of the complainant's evidence and failure to explain his rejection of a bare denial meant the judge misapplied the burden of proof by choosing the Crown's evidence over his evidence in a credibility contest. Like the Court in *Vuradin*, I find this argument unpersuasive in what I see as the substantially similar context in which it is advanced in this case.
- [87] I would not give effect to this ground of appeal.

Did the judge fail to provide sufficient reasons?

Legal Principles

- [88] Judges are obliged to give reasons sufficient to explain their decisions to the public, to explain the result to the parties and to enable meaningful appellate review of the correctness of their decisions. As Justice Binnie explained in *R. v. Sheppard*, 2002 SCC 26, in fulfilling these purposes reasons serve as the mechanism by which judges account to all concerned for their decisions and thus justice is both done and seen to be done: at paras. 15, 24-25. In addition, the task of articulating reasons enhances the quality of decisions by focusing the judge's attention on the salient issues, thus reducing the risk of error, and articulated reasons contribute, in turn, to the proper and uniform development of the law: *R.E.M.* at para. 12.
- [89] Appellate courts adopt a functional approach when assessing the sufficiency of reasons, which they review in the context of the record, the live issues and the arguments of counsel. Appellate intervention will be justified only where the factual and legal basis for a decision is not intelligible in that the logical connection between the verdict and the basis for the verdict is not apparent. Reasons, read as a whole and in context, must show why the judge made the decision challenged on appeal. In cases that turn on determinations of credibility, appellate courts assess the sufficiency of reasons in light of the deference generally afforded to credibility findings. Accordingly, deficiencies in a judge's credibility analysis will rarely merit intervention on the basis that the reasons are insufficient: *R.E.M.* at paras. 35, 37, 49, 54; *Dinardo*, at para. 26; *Vuradin* at paras. 10-13.
- [90] In *Dick*, this Court applied the principles developed in *R.E.M.*, *Dinardo* and *Vuradin* to a decision where the judge convicted the appellant without analyzing key aspects of his testimony in which he denied its commission and provided a starkly different account of the event in question than that of the complainant. As I have explained, depending on the nature of the evidence, in some cases a judge will be obliged to explain why the testimony of the accused is disbelieved and why it does not raise a reasonable doubt for a guilty verdict to be understandable. In overturning the conviction in *Dick*, this Court concluded that the detailed testimony of the accused was not so inherently implausible that it was incapable of raising a reasonable doubt in the context of the evidence and the live issues. That being so, it was unclear if the judge had seized and applied the substance of the *W.(D.)* instruction and, therefore, the reasons did not permit meaningful appellate review.

Application of Principles

- [91] In my view, it is clear from the judge's reasons and the record why she found the appellant guilty of both counts of sexual touching. In other words, her reasons are sufficient to explain her decision to the public and the appellant and to enable meaningful appellate review.
- [92] As previously discussed, the judge conducted a thorough, clear and cogent assessment of *Y.D.* and *K.D.*'s evidence, including its strengths and frailties, and concluded they were credible and reliable witnesses. Given the strength and content of their credible testimony,

which she accepted, she also rejected the appellant's bare denial and found it did not raise a reasonable doubt. As in Vuradin, in the context of the evidence and the live issues, no further explanation was necessary -- the reasons illuminated the logical connection between the verdict and the basis for the verdict. Unlike the reasons at issue in Dick, as also discussed, it was clear that the judge seized the substance of the matter and, in finding the appellant guilty, properly applied the burden of proof and the principles underlying W.(D.).

[93] I would not give effect to this ground of appeal.

Conclusion

[94] For all of the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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