

CANADA / JUDGMENT

R. v. Oloko

2025 ONCA 894

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Oloko

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COA-23-CR-1309

Judges

Paciocco, David M.; George, Jonathon C.; Favreau, Lise G.

Subject

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Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Oloko, 2025 ONCA 894[1]

DATE: 20251224

DOCKET: COA-23-CR-1309

Paciocco, George and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Ridwan Oloko

Appellant

Jassi Vamadevan, for the appellant

Hannah Freeman, for the respondent

Heard: June 26, 2025

On appeal from the conviction entered by Justice Jennifer D. Strasberg of the Ontario Court of Justice, on January 23, 2023.

Favreau J.A.:

A. overview [1] The appellant was convicted of one count of sexual assault. The complainant was a 47-year-old woman with Down syndrome who communicates through words and gestures, but not full sentences. At the time of the alleged sexual assault, the complainant lived in a group home where the appellant worked occasional night shifts.

[2] Rather than calling the complainant as a witness at trial, the Crown brought an application to admit hearsay statements the complainant made to three personal support workers following the alleged sexual assault. The trial judge held a voir dire. The Crown's evidence on the voir dire came from the three personal support workers and from two videos of the complainant speaking to the police. The trial judge ruled that the complainant's hearsay evidence was necessary and reliable. She made this ruling without hearing from the complainant herself and without any expert evidence that compelling the complainant to testify would be traumatic.

[3] After hearing the appellant's evidence and considering the personal support workers' evidence at trial, the trial judge found the appellant guilty.

[4] The appellant raises three issues on appeal. He argues that: (1) the trial judge erred in admitting the hearsay evidence of the personal support workers, (2) the trial judge erred in her application of *R. v. W. (D.)*, [1991] 1 S.C.R. 742 to the evidence at trial, and (3) the verdict was unreasonable.[2]

[5] I would allow the appeal and order a new trial. I agree with the appellant that the trial judge erred in finding that the hearsay evidence was necessary without having the complainant attend on the voir dire and without expert evidence on whether testifying would cause trauma to the complainant.

B. background (1) The alleged sexual assault [6] At the relevant time, the complainant lived in a group home in Toronto. She had her own bedroom. She was able to look after her personal needs but received the assistance of personal support workers to help her with tasks such as her finances, going into the community and preparing meals.

[7] During the day, there were three personal support workers on staff at the group home. At night, there was one personal support worker.

[8] The appellant worked for an agency that supplied personal support workers to the group home when permanent staff members were not available. The appellant covered night shifts at the group home on January 25, 26 and 27, 2021. The night shift on January 27 lasted from 8:30 p.m. to 8:30 a.m.

[9] On the morning of January 28, 2021, the daytime personal support workers noticed that the complainant did not want to shower. At lunch time, the complainant pointed to her vagina and appeared to be frustrated when the staff members did not understand what she meant. At dinner time, she asked if the nighttime personal support worker was going to be a man or a woman. She communicated that she did not want it to be a man. She then communicated to the personal support workers through words and gestures that the appellant had entered her room the previous night and touched her in a sexual way.

[10] The appellant was charged with one count of sexual assault.

(2) The voir dire [11] At trial, the Crown brought an application to adduce the out-of-court statements the complainant made to the three personal support workers about the alleged sexual assault for the truth of their contents. The Crown did not call the complainant as a witness on the voir dire. The Crown called the three personal support workers whose evidence it sought to have admitted. They each testified about their observations of the complainant's ability to communicate, as well as her affect and communications following the alleged sexual assault. Based on this evidence, the trial judge concluded that:

Overall [the complainant] was described by all as being very independent in her personal needs, but her ability to communicate is limited to a few words at a time, broken sentences, and gestures.

The information [the complainant] provided to the three [personal support workers] regarding the allegations was done in a combination of words and actions. In summary, [the complainant] communicated to them that the "overnight" came into her room, was on her bed on all fours, pulled down her underwear, touched her and that her vagina was sore.

[12] Besides hearing from the three personal support workers, the trial judge reviewed two videos of police officers interviewing the complainant. Both videos were recorded two days after the alleged sexual assault, on January 29, 2021.

[13] In the first video, which is approximately 15 minutes long, two female police officers interviewed the complainant in the basement of the group home in the presence of a personal support worker. The trial judge described the complainant as being “largely unresponsive to the questions being asked by the officers”:

[The complainant] can be seen to have a reaction but make no verbal response. The officers try several times in different ways. There are long pauses while they wait for her to answer, but she does not. Even when [the personal support worker] tries to ask the questions, [the complainant] gives no response.

[14] The second video is approximately 30 minutes. This interview took place in the complainant’s bedroom. One police officer sat with the complainant on her bed. The officer first asked the complainant general questions about her bedroom and her likes and dislikes. The officer then asked the complainant questions about the incident. The trial judge described the complainant’s responses as follows:

All her responses are a shaking of the head, or a single word in nothing more than a whisper. When questioned regarding the incident, she has to be asked the same question over and over. On the rare occasion that she provides an answer, it is a single whispered word. As the interview progresses, she is not able to provide answers to simple questions unrelated to the offence. When asked to show what “the man” was doing she makes an action towards her vagina. She is able to say the word vagina, but nothing more. She is asked many times what happened with the man. She is able to act out him getting on all fours on the bed and show herself lying beneath him, but she is unable to provide any verbal response on these points.

[15] Based on the evidence of the three personal support workers and the two videos, the trial judge concluded that the hearsay evidence was necessary. She explained that the videos allowed her to determine that the complainant would be incapable of testifying in a “meaningful way”:

She is unable to communicate what happened to her in the comfort of her own home. It is difficult to see how she would be any better at communicating in an unfamiliar setting with strangers. The video afforded me an ample and realistic opportunity to evaluate [the complainant’s] ability to communicate her evidence about the incident. As stated, this is one of those rare cases where the need to have the complainant come to court to prove necessity is unwarranted. There is nothing to be gained but to cause trauma to [the complainant].

[16] The trial judge also found that the evidence met the requirement of threshold reliability for several reasons, including that (1) the statements were made shortly after the incident, (2) the statements were corroborated by the personal support workers’ observations of changes in the complainant’s behaviour after the incident, (3) the complainant had no motive to fabricate, and (4) the complainant’s evidence that “the ‘overnight’ came into her bedroom and her demonstration of the ‘overnight’ on all fours on the bed above her are details that, apart from occurring, would likely not be within the knowledge of the complainant.

- (3) The trial decision [17] As part of the evidence at trial, the trial judge considered the evidence of the three personal support workers who testified on the voir dire about what the complainant communicated to them following the appellant's night shift at the group home on January 27, 2021. In addition, the Crown called the program supervisor for the group home. The appellant also testified in his own defence.
- [18] The trial judge found that the appellant was not credible because of discrepancies between his evidence in chief and his evidence on cross-examination. In addition, the trial judge found that some of the appellant's evidence was self-serving and an attempt to distance himself from having any dealings with the female residents in the group home, including the complainant.
- [19] The trial judge found the evidence of the three personal support workers credible and reliable, and accepted their evidence regarding what the complainant communicated to them on January 28, 2021. She also found that the complainant's hearsay evidence about what took place the previous night was credible and reliable. In making this finding, she relied on the circumstances surrounding the disclosure, including the complainant's change in affect that day and her lack of motivation for lying.
- [20] The trial judge ultimately concluded:

After considering all the evidence I accept the evidence [of] [the complainant] as provided by the three [personal support workers] as credible and reliable. While I cannot be certain of all what took place in [the complainant's] room and likely no one ever will, I am satisfied beyond a reasonable doubt that [the appellant] was in her room on the night of the 27th or the morning of the 28th and that he touched [the complainant] in a sexual way which caused her vagina to hurt. While [the complainant] was not available for cross-examination on the contents of her statement to the [personal support workers] in the circumstances of the present case, I agree with the Crown that such cross-examination was likely to have added little, if anything, to the process of assessing the reliability of her statements. It is the circumstances surrounding her statement that removes any real concern about whether the statement is true or not.

C. Issues and analysis [21] The appellant raises three issues on appeal:

- a) The trial judge erred in admitting the hearsay evidence;
- b) The trial judge erred in her W.(D.) analysis; and
- c) The verdict was unreasonable.

[22] As discussed below, I agree with the appellant that the trial judge erred in finding that the complainant's hearsay evidence was necessary without first hearing from the complainant directly and without expert evidence on whether her examination would cause trauma. I would dismiss the other grounds of appeal.

Issue 1: Did the trial judge err in admitting the hearsay evidence?

- [23] The appellant argues that the trial judge erred in finding that the hearsay evidence of the three personal support workers was necessary and reliable. The appellant submits that the trial judge should not have found that the hearsay evidence was necessary without the benefit of first hearing directly from the complainant so that she could assess the complainant's ability to testify. The appellant further submits that the trial judge made several errors in finding that the evidence was reliable, including by stating that the alleged sexual conduct would not have been within the complainant's knowledge and suggesting that she therefore could not have been lying.
- [24] I agree with the appellant that the trial judge erred in concluding that the hearsay evidence was necessary without the benefit of the complainant's participation on the voir dire. In other words, the process followed by the trial judge on the voir dire was flawed. Had she followed the proper process, it may ultimately have been open to her to find that the hearsay evidence was necessary. But, in this case, it was not sufficient to rely on the evidence of the three personal support workers and the videos to reach this conclusion.
- [25] My conclusion on the issue of necessity is sufficient to allow the appeal and order a new trial. Had I not reached this conclusion, I would see no reversible error in the trial judge's determination that the hearsay evidence met the requirements for threshold reliability. I agree with the appellant that the trial judge should not have relied on an assumption that sexual activity would have been outside the complainant's knowledge. However, the trial judge relied on multiple other circumstances supporting her finding of threshold reliability, and I am not persuaded that this assumption had any impact on her ultimate conclusion that the hearsay evidence was sufficiently reliable.
- [26] I start with a discussion of the standard of review and the general principles applicable to the admission of hearsay evidence. I then address the issues of necessity and, more briefly, threshold reliability.
- (1) Standard of review [27] The admissibility of hearsay evidence is a question of law, to be reviewed on a standard of correctness. However, an appellate court must accord deference to the findings of fact underlying the admissibility ruling. Further, trial judges are "well placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them". Therefore, absent an error in principle, a trial judge's determination of threshold reliability is entitled to deference: *R. v. Charles*, 2024 SCC 29, at para. 41.
- (2) General principles regarding the admissibility of hearsay evidence [28] Hearsay evidence is presumptively inadmissible: *Charles*, at para. 43. In *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 19, the Supreme Court explained the importance of in-court testimony to the truth-seeking process:

The truth-seeking process of a trial is predicated on the presentation of evidence in court. Litigants make their case by presenting real evidence and viva voce testimony to the trier of fact. In court, witnesses give testimony under oath or solemn affirmation. The trier of fact directly

observes the real evidence and hears the testimony, so there is no concern that the evidence was recorded inaccurately. This process gives the trier of fact robust tools for testing the truthfulness of evidence and assessing its value. To determine whether a witness is telling the truth, the trier of fact can observe the witness's demeanor and assess whether the testimony withstands testing through cross-examination. [Citations omitted.]

- [29] Despite the important role and primacy of in-court testimony, hearsay may exceptionally be admitted into evidence under the principled exception to the hearsay rule. To be admissible, the hearsay evidence must meet the twin requirements of necessity and threshold reliability: *Charles*, at para. 45. In the context of criminal proceedings, the court must conduct a voir dire to determine whether the hearsay evidence meets these requirements: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 47. The party who seeks to adduce hearsay evidence bears the onus of demonstrating both requirements on a balance of probabilities: *Bradshaw*, at para. 23, citing *Khelawon*, at para. 47.
- [30] Necessity arises where relevant direct evidence is not available. In *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 934, the Supreme Court observed that “the categories of necessity are not closed” and identified two circumstances where necessity may arise: (1) where the “person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]”; and (2) the “assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources”.
- [31] Threshold reliability is established if a party demonstrates the statement's procedural or substantive reliability. Procedural reliability depends on the trier of fact's ability “to rationally evaluate the truth and accuracy of the hearsay statement”: *Bradshaw*, at para. 28. There must be “adequate substitutes” for the traditional procedural safeguards around in-court testimony to enable an assessment of the truth and accuracy of the statement to be undertaken: *Charles*, at para. 46. Usually, procedural reliability requires “[s]ome form of cross-examination of the declarant”: *Charles*, at para. 46. Substantive reliability, on the other hand, means the statement is inherently trustworthy given the circumstances it was made in and in light of the other evidence: *Charles*, at para. 47. The standard for substantive reliability is high, as it requires the trial judge to find that the statement is “so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process”: *Bradshaw*, at para. 31, citing *Khelawon*, at para. 49.
- (3) The trial judge's assessment of necessity [32] The appellant's challenge to the trial judge's finding that the hearsay evidence was necessary focuses on the conduct of the voir dire. Specifically, the appellant argues that it was not appropriate for the trial judge to decide that the evidence was necessary without the direct participation of the complainant. As I explain below, I agree with the appellant that the trial judge erred in finding that she could and should decide the issue of necessity without the benefit of hearing from the complainant directly.

- [33] In *R. v. Parrott*, 2001 1 SCC 3, [2001] 1 S.C.R. 178, the Supreme Court considered the admission of hearsay evidence from a complainant who had Down syndrome. In that case, the respondent was alleged to have kidnapped and sexually assaulted the complainant. After the complainant was found, she pointed to her injuries and made various statements to the police and medical practitioners, including that “Man did it, bad man, man in car”. On a voir dire, the Crown simultaneously sought a finding that the complainant did not have the capacity to testify and to have the hearsay statements the complainant made to the police and health care practitioners admitted for the truth of their contents. There was conflicting expert evidence on the issue of whether the complainant was capable of testifying in court. The majority of the Supreme Court held that the trial judge erred in finding that the hearsay evidence was necessary without the benefit of the complainant’s participation in the voir dire. The court based this conclusion on several considerations which are relevant in this case.
- [34] Trial judges should base their voir dire decisions on direct observations of the complainant, absent exceptional circumstances such as evidence that calling the complainant to testify would cause trauma: at paras. 72, 79. The court should not excuse the complainant by inferring a risk of trauma but, instead, receive expert evidence on that point: at para. 79; see e.g., *R. v. R.R.* (2001), 159 C.C.C. (3d) 11 (Ont. C.A.), at paras. 36, 40, *aff’d* 2003 SCC 4, [2003] 1 S.C.R. 37; *R. v. Nicholas* (2004), 70 O.R. (3d) 1 (C.A.), at paras. 86, 94, leave to appeal refused, [2004] S.C.C.A. No. 225.
- [35] The court stated, at para. 73, that “[c]ompassion for the complainant must be balanced against fairness to the [accused].” Therefore, the decision regarding whether it is necessary to receive hearsay evidence should not be driven solely by compassion for the complainant.
- [36] As the court noted at para. 72, judges have various tools at their disposal to help put witnesses at ease and to avoid embarrassing them:

The complainant in this case could have been examined before the trial judge in a format that would have attempted to put her at ease. The trial judge could have ensured that nothing, including questions put to her by opposing counsel, would be used to demean or embarrass her. It is possible that, as anticipated by Dr. Gillespie, the complainant might have been incoherent or otherwise unable to communicate whatever she recalled of the events in question. On the other hand, it is also possible that she might, as suggested by Dr. Morley, have been able to give “some account of what happened to her”. In the absence of any suggestion of potential trauma or other exceptional circumstances, I think the [accused] was entitled to have this issue determined on the basis of the evidence of the complainant rather than on the conflicting opinions, however learned, of her various doctors.

- [37] Only in exceptional cases would it be appropriate for a judge not to hear from a witness directly before deciding that hearsay evidence is necessary. As the court explained, at para. 77:

In my view, if the witness is physically available and there is no suggestion that he or she would suffer trauma by attempting to give evidence, that evidence should generally not be pre-empted by hearsay unless the trial judge has first had an opportunity to hear the potential witness and form his or her own opinion as to testimonial competence. I say generally because there may arise exceptional circumstances where a witness is available and not called and the out-of-court statements may be nevertheless admitted ... The point is that there are no circumstances put in evidence here that would justify such an exceptional procedure. [Emphasis in original.]

[38] Finally, at para. 80, the Supreme Court emphasized that there should be no presumption that adults with cognitive disabilities are not capable of testifying and that their hearsay evidence is thereby presumptively necessary:

[T]he Court should not be quick to leap to the assumption that a person with mental disabilities is not competent to give useful testimony. Trauma should not be presumed, not only because such a presumption would deprive the accused of the ability to observe and cross-examine the witness, but also because stereotypical assumptions about persons with disabilities should be avoided... Persons with disabilities should not be underestimated. [Emphasis added.]

[39] In this case, the trial judge referred to Parrott and purported to apply it. She concluded that, based on the evidence from the three personal support workers and her review of the videos, this was one of those exceptional cases where she could decide necessity without the benefit of the complainant's attendance. In reaching this conclusion, as reviewed above, the trial judge was satisfied, based on the videos, that the complainant would be unable to testify "in a meaningful way". She concluded that "this is one of those rare cases where the need to have the complainant come to court to prove necessity is unwarranted. There is nothing to be gained but to cause trauma to [the complainant]" (emphasis added).

[40] In my view, the trial judge made two errors in reaching this conclusion.

[41] First, the trial judge assumed that the experience of testifying would be traumatic for the complainant. She made this assumption without the benefit of any evidence, including expert evidence. As reviewed above, this is contrary to the Supreme Court's direction in Parrott, at para. 79; see also R. v. Wills, 2016 ONCA 965, at para. 21.

[42] Second, the evidence the trial judge relied on does not support her conclusion that the complainant would not be able to communicate what happened to her in the context of a court proceeding. The trial judge relied on the evidence of the three personal support workers and the videos of interviews with the police. Although this evidence supports a finding that the appellants' ability to communicate is limited, it does not lead to the inevitable conclusion that it would be unreasonable to expect to obtain evidence from the complainant "of the same value" if she was required to testify in the court proceedings. It is important to remember that, at this stage, the issue is whether the trial judge erred in finding that this was one of those exceptional circumstances where it was not necessary for the complainant to be made available on the voir dire.[3]

- [43] The personal support workers' evidence does not suggest that the complainant is unable to understand questions. They also gave no evidence regarding her ability to remember or her cognitive abilities. Rather, they testified that she does not speak often, that she prefers interacting with people with whom she is comfortable and that she is able to communicate with a few words and gestures. Their evidence about what occurred on the morning after the alleged sexual assault is that the complainant's affect changed and that she eventually demonstrated with words and gestures what the appellant allegedly did to her.
- [44] In the first video, the complainant was interviewed by two female police officers in the presence of a personal support worker. The complainant mostly sat with her head averted away from the police officers and said very little. She did not respond to most of the questions she was asked. She did respond "no" when she was asked twice if she was scared or nervous. She also responded by shaking her head "no" when asked if she had been hurt.
- [45] In the second video, the complainant was interviewed by one of the female police officers in her own bedroom, while sitting on her bed. The police officer started by asking the complainant questions about her room and what she likes to do. The complainant responded to most, but not all, questions with single words in a very low voice or head gestures. When the police officer started asking the complainant questions about the alleged sexual assault, she answered fewer questions, but answered some of them with single words and gestures. For example, when asked whether anyone else had ever slept in her room with her, she responded "the guy". When asked about lower pain on her abdomen, she gestured to her bed. She also communicated that the man was in her bed while she was sleeping. When asked what the man did while he was in her bed, she pointed to the area between her legs. When asked what part of her body she was touching, the complainant said "vagina". When asked whether the man was nice or he hurt her, she pointed to her vagina again. At one point, the police officer asked the complainant to show her what the man was doing when he was on her bed, and she got onto the bed on all fours. She was then asked what she was doing while the man was on the bed. After she was asked a few times, she lay down on her back on her bed.
- [46] While these videos show that the complainant has limitations in her ability to communicate, they do not necessarily lead to the conclusion that the complainant would be unable to testify in a court proceeding. Notably, what she communicated to the police officer in the second video, a stranger, was very similar to what she communicated to the personal support workers. There was also no evidence that the complainant was unable to remember the incident.

- [47] As the Supreme Court explained in Parrott, at para. 73, in the context of that case, the appellant faces a serious charge with serious consequences. He was confronted with out-of-court statements from the complainant taken in his absence and on which he did not have an opportunity to cross-examine. The court must be very cautious before truncating the appellant's right to confront the evidence in court through direct observation and cross-examination.
- [48] In Parrott, at para. 77, the Supreme Court recognized that there may be exceptional circumstances aside from a risk of trauma where a trial judge could decide the issue of necessity without the benefit of the complainant's participation on a voir dire. The Supreme Court was not prepared to "close the door to this possibility", but it did not elaborate on what those other exceptional circumstances could be. Necessarily, each case must be decided on its own facts. However, at the very least, a trial judge who decides the issue of necessity without hearing directly from the complainant should provide a compelling rationale to "justify such an exceptional procedure": Parrott, at para. 77. For example, it may be evident in some cases that the complainant is unable to understand questions or communicate at all.
- [49] In this case, the trial judge did not explain what she meant when she found that there were exceptional circumstances, other than referring to the videos and stating that nothing would be gained from the complainant's direct participation other than imposing trauma on her. Given the evidence on the voir dire, neither the videos nor the issue of trauma was sufficient to constitute exceptional circumstances. First, the videos were evidence that the complainant was able to communicate what happened to her to a police officer by using words and gestures. As noted previously, what she communicated to the police officer was similar to what she communicated to the three personal support workers. Second, a risk of trauma could not be inferred in the absence of expert evidence. The trial judge's concerns about "the unfamiliar setting of a courtroom" should have led her to consider an adapted format for the complainant's examination. However, these concerns were not a sufficient basis to proceed without hearing directly from the complainant at all before determining that her hearsay evidence was necessary.
- [50] I am satisfied that it was an error for the trial judge to decide that the hearsay evidence was necessary without the benefit of the complainant's participation on the voir dire. On a voir dire conducted with the complainant, it may turn out that a trial judge can properly decide that the complainant's hearsay evidence is necessary. However, in the absence of evidence of trauma or other exceptional circumstances, it was an error to admit the hearsay evidence without the complainant's direct participation on the voir dire.
- (4) The trial judge's assessment of threshold reliability [51] Given that I would allow the appeal based on the error on the issue of necessity, my analysis on the issue of threshold reliability is relatively brief. If I had found that the trial judge did not err in her assessment of necessity, I would find that she did not err in her assessment of threshold reliability.

- [52] The trial judge found that the hearsay evidence met the requirements of substantive reliability, which “is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to reject alternative explanations for the statement, other than the declarant’s truthfulness or accuracy” (emphasis in original): Bradshaw, at para. 40. She found that the circumstances under which the complainant made her statements to the personal support workers were such that the statements were trustworthy. In reaching this conclusion, the trial judge relied on (1) the timing of the disclosure, which occurred shortly after the alleged incident, and (2) the fact that the disclosure “emerged naturally and without any prompting”.
- [53] The trial judge also found that the complainant’s statements were corroborated by the personal support workers’ observations of the changes in the complainant’s behaviour immediately after the alleged incident: (1) her demeanour changed and she was agitated; (2) her routine was off, including not showering; (3) she was showing frustration in trying to communicate with the personal support workers; (4) her room was uncharacteristically disorganized; and (5) she was rubbing her hands and had teary eyes.
- [54] The trial judge further observed that the complainant had no motive to lie and that one would expect her to tell the truth to the personal support workers given her relationship with them.
- [55] Finally, towards the end of her analysis on the issue of reliability, the trial judge stated that the complainant’s description and demonstration of the alleged sexual assault “are details that apart from occurring would likely not be within the knowledge” of the complainant.
- [56] The appellant submits that the trial judge erred in her analysis of the circumstances of the disclosure and in concluding that these were guarantees of trustworthiness. Specifically, he argues that it was an error for the trial judge to rely on factors such as the timing of the disclosure, that the complainant made the disclosure naturally and without prompting, that the complainant had no apparent motive to lie and the complainant’s behaviour and demeanour throughout that day. However, as the respondent points out, when assessing substantive reliability to establish threshold reliability, the case law allows for consideration of factors such as timing, demeanour, personality, the absence of any reason to fabricate and the likelihood of the declarant’s knowledge of the event apart from its occurrence: *R. v. Khan*, [1990] 2 S.C.R. 531, at p. 547; *R. v. J.M.*, 2010 ONCA 117, 251 C.C.C. (3d) 325, at para. 54.
- [57] Unlike in *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 571, at paras. 100-101, which the appellant relies on, the trial judge in this case did not only rely on the absence of factors that, if present, might taint the complainant’s statements. While the trial judge observed that the statements were made without prompting or a motive to lie, she also considered well-recognized factors that sufficiently support the trustworthiness of the complainant’s statement.

- [58] The appellant further submits that it was an error for the trial judge to assume that sexual conduct would be outside the complainant's knowledge or understanding, and to rely on this as an additional factor in support of the trustworthiness of her statements. I agree with this submission. As indicated above, as a general principle, the likelihood of the declarant's knowledge of the event apart from its occurrence can be a circumstance that adds to its trustworthiness. However, this comes from the decision in *Khan*, where the Supreme Court was dealing with the evidence of a child. When dealing with sexual offences against children, it will often be appropriate to consider that sexual conduct or specific forms of conduct would not fall within the child's knowledge, especially when dealing with younger children: *R. v. S.S.*, 2022 ONCA 305, 161 O.R. (3d) 641, at para. 99, per MacPherson J.A. (dissenting), rev'd 2023 SCC 1 ("substantially for the reasons of the dissenting judge"); *R. v. C.S.*, 2020 ONCA 752, at para. 76. However, the same reasoning should not apply when the complainant is an adult with cognitive disabilities. The knowledge and life experiences of adults with cognitive disabilities should not be equated with those of a child. This amounts to impermissible stereotypical reasoning. In this case, the complainant was 47 years old. Prior to living in the group home, she had lived independently with roommates for a few years. There was no basis in the evidence for the trial judge to assume that the complainant had no familiarity with sexual contact or interactions.
- [59] Nevertheless, I am not concerned that this should affect the outcome, given the multiple circumstances that supported the trial judge's conclusion that the hearsay evidence met the threshold for substantive reliability. All the other circumstances are sufficient to support the trial judge's conclusion on the issue of threshold reliability.
- (5) Conclusion on the issue of the hearsay evidence [60] It was an error for the trial judge to find that the hearsay evidence was necessary without the benefit of hearing directly from the complainant. While I agree with the trial judge's conclusion on the issue of threshold reliability, a new trial is nevertheless required.
- [61] This is an unfortunate outcome. It may well turn out that a trial judge decides that the hearsay evidence is necessary after hearing directly from the complainant. However, in balancing compassion for the complainant against fairness to the appellant, I am not persuaded that this was one of those exceptional cases where it was appropriate for the trial judge to find that the hearsay evidence was necessary without the complainant's participation on the voir dire.

Issue 2: Did the trial judge err in her W.(D.) analysis?

- [62] The appellant alleges that the trial judge erred in her W.(D.) analysis. When properly considered, the appellant's complaint is not with the W.(D.) analysis. Rather, the appellant submits that the trial judge misapprehended some of his evidence. He also suggests that the trial judge applied uneven scrutiny to his evidence and the complainant's evidence.

- [63] Given my conclusion that the trial judge erred in finding that the hearsay evidence was necessary, there is no need to address this ground of appeal in any depth. I simply note that, had the trial judge not erred in admitting the hearsay evidence without first hearing directly from the complainant, I would find no basis for overturning the conviction in the trial judge's assessment of the evidence and the appellant's credibility.
- [64] The appellant claims that, in assessing his credibility, the trial judge misapprehended his evidence about whether he saw the complainant at breakfast the morning following the alleged incident. The record from his evidence supports the finding that the appellant gave inconsistent evidence on this point. It was open to the trial judge to rely on these inconsistencies as part of her assessment of the appellant's credibility.
- [65] The appellant also asserts that the trial judge misapprehended his evidence when she found that it was "concerning that the only conversation that he recalled, and then recalled in detail, was the one that would distance him from the women in the home." As the respondent points out, there was plenty of support for this conclusion in the appellant's testimony.
- [66] The appellant further contends that the trial judge misapprehended his evidence regarding opportunities the complainant would have had to see him wearing gloves. One of the personal support workers had testified that the complainant used the word "gloves" when talking about the man in her room. Again, based on the evidence the appellant gave at trial, it was open to the trial judge to find that this evidence was inconsistent, and to prefer the evidence to the contrary.
- [67] I also do not accept the appellant's argument that the trial judge applied uneven scrutiny to the appellant and complainant's evidence. Specifically, the appellant submits that the trial judge failed to mention that there was no cross-examination of the complainant. There is a live issue as to whether uneven scrutiny is a valid ground of appeal: *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 99-101. In any event, the appellant's complaint on this issue is related to his ground of appeal regarding the admissibility of the complainant's hearsay evidence. If that evidence was properly admitted, there would be no basis to contend as a separate ground of appeal that there was no opportunity to cross-examine the complainant.
- [68] Ultimately, this court owes significant deference to the trial judge's assessment of the appellant's credibility. I see no reversible error in how she approached his evidence or her ultimate conclusion that she did not find him to be a credible witness.

Issue 3: Was the verdict unreasonable?

- [69] The appellant's argument that the verdict was unreasonable is tied to his position that the trial judge erred in admitting the hearsay evidence. He submits that, in the absence of the complainant's hearsay evidence, the verdict is unreasonable. I agree that, without the hearsay evidence, there is no basis for the appellant's conviction. However, it is unhelpful to apply an unreasonable verdict analysis that is predicated on the exclusion of inadmissible

evidence. The unreasonable verdict test inquires whether “the verdict is one that a properly instructed jury could not reasonably have rendered,” an inquiry that is conducted based on all of the evidence before them: *R. v. W.H.*, [2013] 2 S.C.R. 180, at para. 25. In this case, if the trial judge had not committed the procedural error that she did, the hearsay evidence may well have been admissible and the verdict entirely reasonable. When an argument that a verdict is unreasonable depends upon a legal error in admitting evidence, the better approach is to avoid inquiring into the reasonableness of the verdict on the assumption that the evidence had not been admitted and to find the error and order a new trial: see *R. v. Calnen*, [2019] 1 S.C.R. 301, at para. 170.

D. disposition [70] I would allow the appeal and order a new trial.

[71] I would dismiss the sentence appeal as abandoned.

Released: December 24, 2025 “D.M.P.”

“L. Favreau J.A.”

“I agree. David M. Paciocco J.A.”

“I agree. J. George J.A.”

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The appellant also sought to appeal his sentence, but abandoned his sentence appeal prior to the hearing.
- [3] There is an important distinction between the complainant’s competence to testify and the admissibility of her hearsay evidence. That distinction is relevant here because the trial judge begins her analysis of necessity in the hearsay voir dire by reviewing the standard for competence in s. 16 of the Canada Evidence Act, R.S.C. 1985, c. C-5. In this case, no one challenged the complainant’s testimonial competence. Had there been such a challenge, it would not have been appropriate to combine the inquiry into the complainant’s competence with the voir dire on the admissibility of her hearsay statements: *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 76. Given the issues on this appeal, I observe that a voir dire on the testimonial competence of an adult with mental disabilities should also involve the witness’s participation: *D.A.I.*, at para. 78.

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Prepared on 29 October 2026 · Esheria