

CANADA / JUDGMENT

R. v. S.S.S.

2020 BCCA 180

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 180 R. v. S.S.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. S.S.S.,

2020 BCCA 180

Date: 20200626

Docket: CA45839

Between:

Regina

Respondent

And

S.S.S.

Appellant

Restriction on publication: A publication ban has been imposed under

s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant and witnesses, referred to in the trial judgment by the initials M.S., J.B., R.S. and S.S.

This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

On appeal from: An order of the Provincial Court of British Columbia, dated

March 21, 2017 (R. v. S.S.S., Port Coquitlam Registry docket 91851-2C).

Counsel for the Appellant:

G.N.A. Botting

Counsel for the Respondent:

J.A. Dyck

Place and Date of Hearing:

Vancouver, British Columbia

February 4, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 26, 2020

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Willcock

Summary:

The appellant was convicted of sexual interference and invitation to sexual touching in respect of his granddaughter. He denied the allegations, suggesting they were fabricated by the complainant to allow her to move out of her father's home. The judge found the complainant to be credible, and rejected the evidence of the appellant. Among her reasons for finding the appellant not to be credible, the judge cited a portion of the appellant's evidence that was inconsistent with the testimony of another witness. The accused appealed, alleging various errors in the assessment of credibility. Held: Appeal allowed, new trial ordered. The judge's reliance on "external inconsistency" as a basis for rejecting the appellant's testimony was erroneous, as she had found that, to the extent of the inconsistency, it was the appellant who was telling the truth. There was a very limited basis for assessing the credibility of the complainant and of the appellant, so it cannot be said that the judge's error was peripheral to her determination. It is unnecessary, in the circumstances, to reach any conclusion on the broader

issue of whether the judge applied an uneven standard in assessing the evidence of the Crown and of the appellant.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] Mr. S. appeals from convictions on one count of sexual interference (Criminal Code, R.S.C. 1985 c. C-46, s. 151) and one count of invitation to sexual touching (Criminal Code, s. 152). The Crown alleged that he engaged in sexual touching of his granddaughter on multiple occasions between June 2005 and June 2013. The appellant was also found guilty of sexual assault (Criminal Code, s. 271), but a conditional stay was entered on that count on the basis of the principle in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729.
- [2] The complainant, M.S. was born June 26, 1997. Her parents divorced when she was a year old. Her primary residence was initially with her father, a situation that subsisted in 2005. Her paternal grandparents resided in her father's home at that time.
- [3] The complainant testified that in late June 2005, sometime after her eighth birthday, she was alone in her father's family home with the appellant. The appellant took her into his bedroom and told her to remove her clothes and lie on the bed. While on the bed, she felt something being inserted into her "bum"; she believes that the appellant inserted his penis into her anus, but she did not see what was inserted, nor was she able to say (at least in her initial testimony) whether there was penetration.
- [4] The complainant was unable to provide any further details of that initial incident, other than to say that it occurred at a time when her grandmother was in hospital recovering from an emergency appendectomy, and other family members were away from the home.
- [5] The complainant testified that in the years following that event, the appellant engaged in less aggravated sexual assaults and in sexual harassment against her. In particular, she testified that he frequently ordered her to remove her shirt or pants when the two were alone in the house. She also said that he groped her, and that that occurred even when others were around. She said that it was done in such a way that others did not see it happen. She told the court that the appellant also requested that she engage in unspecified sexual acts with him, though it can be inferred from her evidence that she did not accede to those requests. Finally, she alleged that he masturbated in front of her on a daily basis.
- [6] During the years when these events are said to have occurred, the complainant sometimes lived primarily with her mother, sometimes primarily with her father, and sometimes split her time between the two homes. The events giving rise to the charges generally took place at her father's residence, and happened when the appellant was also living there. They ended only when the complainant revealed them to her mother and maternal grandmother, just before her sixteenth birthday. She then ceased to reside in her father's home.

- [7] The only issue at trial was credibility. The appellant denied all of the allegations, and suggested that the complainant fabricated her story in order to be allowed to leave her father's residence and live with her mother. He contended that the complainant was resistant to the discipline that was demanded of her at her father's residence. The complainant denied any such motive, and maintained that her evidence was accurate.
- [8] The assessment of credibility in this case was quite challenging. The complainant gave her evidence in a straightforward manner, but her testimony respecting the offences was lacking in detail. There was little, if any, evidence corroborating her testimony.
- [9] The appellant gave evidence, but simply denied the allegations. There were a number of issues making it difficult to assess his credibility. He was eighty years old at the time of trial, and in poor health. His cross-examination took place over four days spread over a period of seven months. His evidence was given through an interpreter. It appears, both from the transcript and from the trial judge's assessment, that he could be an irascible and combative witness.

The "Ground" of Appeal

- [10] The appellant's ground of appeal is stated broadly in his factum:

The trial judge misapplied *R. v. W.(D.)* in assessing credibility and reasonable doubt, and in particular misapprehended significant parts of the evidence, including contradictions and exaggerations in the evidence of the complainant, and disregard for the infirmity, advanced age and ill health of the appellant at the time of trial. The verdict should be set aside on the ground that it is unreasonable and cannot be supported by the evidence, pursuant to s. 686(1)(a)(i) of the Criminal Code.

- [11] As the argument has unfolded, it appears that this "ground" was meant to cover several different bases for appeal. While the appellant contends that the judge failed to apply *W.D.*, misapprehended evidence, and reached an unreasonable verdict, he also says that the judge made various errors in evaluating credibility, which caused her to assess the complainant's credibility too generously, and the appellant's credibility too severely.

Analysis

- [12] Most of the bases for appeal can be dealt with briefly. As I will indicate, the only bases that require deeper analysis are the arguments to the effect that the judge made errors of principle in assessing credibility.

Assessment of Reasonable Doubt

- [13] I will begin with the appellant's assertion that the judge failed to properly apply the concept of reasonable doubt to the evidence. The judge was very familiar with the law governing the assessment of reasonable doubt when an accused testifies. She cited *R. v. Riley* (1972), 42 C.C.C.(2d) 437 (Ont. C.A.); *R. v. W.(D).*, [1991] 1 S.C.R. 742; and *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.), among other cases.
- [14] The appellant does not take issue with the judge's statement of the law governing the assessment of reasonable doubt. He contends, however, that she failed to apply the principles that she articulated. I am unable to accept that assertion. The judge indicated that she was satisfied of the appellant's guilt beyond a reasonable doubt, specifically stating that she found the complainant's evidence to be credible, and that neither the appellant's evidence nor any other circumstance left her with a reasonable doubt. Her reasoning was in keeping with the law as stated in *W.D.* and *C.W.H.*

Misapprehension of Evidence

- [15] The appellant contends that the judge's credibility assessments were tainted by misapprehensions of evidence. A misapprehension of evidence that results in an adverse finding of credibility can constitute a reversible error: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.); *R. v. C.B.*, 2017 ONCA 862 at paras. 42-47. In order to succeed, however, the appellant must demonstrate both that the judge misapprehended evidence, and that the misapprehension was central to the judge's credibility findings.
- [16] The appellant points to three instances in which the judge interpreted evidence in a manner that led her to findings consistent with the complainant's credibility or adverse to that of the appellant. I will, later in these reasons, refer to each of these instances in greater detail. For the moment, however, I will simply list them:
- a) the judge found that the complainant's grandmother was in hospital, (though not, as the complainant alleged, for an appendectomy) when the most aggravated offence is alleged to have occurred;
 - b) the judge found that the appellant gave inconsistent evidence on the question of whether he was ever left alone with the complainant; and
 - c) the judge found that the appellant gave inconsistent evidence on the question of whether he ever entered a bathroom in the home that was used by the complainant and her father.
- [17] All of these matters were tangential to the substance of the case, but in each instance, the judge's findings arguably went to credibility issues. The judge could have interpreted the evidence differently. The finding that the complainant's grandmother was in hospital for a procedure other than an emergency appendectomy at the time of the alleged incident was a matter of speculation. The two instances where the appellant is said to have given inconsistent evidence occurred during extensive and somewhat confusing cross-

examination, and a more charitable interpretation of the appellant's answers was available.

- [18] The appellant argues that the judge ought to have adopted interpretations of the evidence that were more favourable to him, contending that those interpretations were more in keeping with the tenor of the evidence.
- [19] An appeal based on an alleged misapprehension of evidence by the trial judge can only succeed if it meets stringent criteria. In the recent case of *R. v. Razavi Zadeh*, 2020 BCCA 93, Fitch J.A. provided a concise summary of the requirements:
- [38] The standard an appellant must meet to obtain relief on misapprehension of evidence grounds is high: *R. v. Lohrer*, 2004 SCC 80 at para. 2; *R. v. Webber*, 2019 BCCA 208 at para. 27. The error must be plainly identified. As Justice Lebel explained in *R. v. Sinclair*, 2011 SCC 40 at para. 53, "[t]he plain language or the thrust of the reasons must disclose an actual mistake." In addition, the misapprehension must go to a question of substance, must be material, and must play an essential role in the reasoning process that led to the conviction: *R. v. Swales*, 2014 BCCA 350 at para. 48. One way of determining whether the misapprehension played an essential role in the reasoning process is to consider whether striking it from the judgment would leave the reasoning on which the conviction is based on unsteady ground: *Lohrer* at paras. 6-9; *Sinclair* at paras. 53, 56.
- [39] It is not enough for the appellant to merely suggest a different interpretation of the evidence. Mere differences of interpretation on factual matters are not misapprehensions of evidence but simple disagreement with the factual findings made below: *Swales* at para. 49 .
- [20] I am not persuaded that the arguments advanced by the appellant satisfy these criteria. The fact that the judge could have reached other findings on the evidence is not sufficient to sustain an argument that the judge misapprehended the evidence. In each instance, the evidence relied on by the trial judge was capable of sustaining her findings. That is sufficient to dispose of the argument that the judge misapprehended evidence.

Unreasonable Verdict

- [21] The contention that the verdict was unreasonable is also not sustainable and can be dealt with briefly. It is well established that a verdict is unreasonable only where it is one that could not have been rendered by a properly instructed jury acting judicially: *Corbett v. The Queen*, [1975] 2 S.C.R. 275 at 282; *R. v. Yebe*, [1987] 2 S.C.R. 168 at 185.
- [22] In the case before us, the evidence of the complainant directly implicated the appellant in the crimes charged. It cannot be said that a properly instructed jury, acting judicially, would have inevitably rejected her evidence, nor that the evidence of the appellant would inevitably have raised a reasonable doubt in the minds of jurors. There was, in short, a reasonable basis for the verdict.

Error With Respect to Findings of Credibility

- [23] The appellant also raises a number of other concerns in respect of the judge's credibility assessments, though he does not analyse them in a systematic fashion. In my view, however, there is substance to the issues raised by the appellant, and they require some consideration.
- [24] It is important to emphasize that while an appellate court is tasked with scrutinizing the reasons given by the trial judge, considerable deference is owed to the trial judge on issues of fact-finding and credibility assessment. In *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.) Doherty J.A. outlined the rationale for the limited role of an appellate court:
- [46] Careful scrutiny of the trial judge's reasoning process is not to be equated with re-trying the case. An appellate court must always bear in mind the significant advantage enjoyed by the trial judge when it comes to assessing credibility. A lifeless transcript of the testimony cannot possibly replicate the unfolding of the narrative at trial. Nor can oral argument and a selective review of the trial record possibly put an appellate court in as good a position as the trial judge when it comes to credibility determinations: see *R. v. Francois* (1994), 91 C.C.C. (3d) 289 at 296 (S.C.C.).
- [25] In *R. v. Gagnon*, 2006 SCC 17 at para. 20, the Court recognized that the bases for credibility assessments are not always easy to express, and re-emphasized the need for appellate courts to give deference to the findings of trial judges:

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *[H.L. v. Canada (Attorney General)]*, [2005] 1 S.C.R. 401, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.

- [26] The need for deference, however, does not mean that appellate review is abandoned altogether. Where a judge's reasons demonstrate an error of principle in the assessment of credibility, or show that credibility has been assessed arbitrarily or using irrelevant criteria, appellate intervention may be required.

The Judge's Characterization of the Appellant's Evidence as "Externally Inconsistent"

- [27] At para. 77 of her reasons, the judge introduced her discussion of the appellant's credibility by saying "I found the evidence of the accused was evasive and internally and externally inconsistent, and I did not believe his evidence." She reiterated her conclusions at the end of the judgment:
- [89] I do not believe the evidence of the accused because of the internal and external inconsistencies and I am not left with a reasonable doubt by it.

- [28] The only "external" inconsistency referred to in the judgment was a difference between the evidence of the appellant and that of his daughter. Both were asked about the frequency of the appellant's wife's hospitalizations. The appellant said that, over the years, his wife had been in poor health, and that she had been hospitalized on several occasions. This evidence contrasted with the evidence of the appellant's daughter, who said that while her mother had attended hospital emergency departments on a number of occasions, she had few admissions to hospital. The judge accepted the appellant's testimony on this point.
- [29] Oddly, having found the appellant to be credible on this issue, the judge used it as a basis for finding that he should not be believed, generally:
- [81] The evidence of the accused was externally inconsistent with his [daughter's] evidence, in that he said that his wife had numerous long-standing health problems which was consistent with the medical records but inconsistent with [the daughter's] evidence that there were only a few medical admissions although there were many trips to the emergency.
- [30] Apart from the discussion at para. 81, the judge refers to no "external inconsistencies" in the appellant's evidence. The Crown has not suggested any, nor have I been able to identify any in the transcript.
- [31] It is obviously an error to discount a witness's credibility on the basis that his own evidence, while truthful, conflicts with that of another witness, whose evidence is found to be false. The judge's view that the appellant's credibility was diminished because of its "external inconsistency" cannot stand.
- [32] The Crown, in oral argument, suggested that if the judge's finding of "external inconsistency" was an error, it was a harmless one, as it did not play any central role in her ultimate assessment of credibility. I will return to that question after analysing other aspects of the judge's credibility findings.

The Judge's Assessment of the Complainant's Credibility

- [33] The trial judge made assessments of credibility at a few places in the judgment. With respect to the complainant's credibility, the judge's reasons were brief:
- [82] Generally, I found the complainant gave her evidence in a straightforward manner and she was not shaken in cross-examination. She did not exaggerate or embellish her evidence .
- [34] In saying that the complainant gave her evidence in a "straightforward manner", the judge appears to be referring primarily to her demeanour. From the record, it can be said that the complainant's evidence was largely internally consistent, although there was some inconsistency in her description of the nature, extent, and duration of the most serious assault. The complainant's evidence was remarkably devoid of detail.
- [35] With respect to the assertion that the complainant was not shaken in cross-examination, it is true that she did not resile from her evidence in cross-examination.

- [36] The appellant takes issue with the statement that the complainant did not exaggerate or embellish her evidence, and suggests that the statement constitutes an error. He notes that she described sexual touching on a daily basis over a period of many years, which touching was witnessed by no household members, despite the fact that there were several people around. He also says that the evidence that he masturbated in front of her every day defies belief.
- [37] The question of whether the complainant exaggerated or embellished her evidence was one to be determined by the trial judge. It is not for this Court to embark on a determination of whether an account of events was exaggerated or embellished.
- [38] It is important, however, to differentiate between two possible functions that might be attributed to the judge's statement that the complainant "did not exaggerate or embellish evidence". In some circumstances, a statement to that effect might be interpreted as representing a step in the credibility assessment. Where a witness's evidence can be compared with that of other witnesses (particularly independent witnesses), it may be obvious that the witness has exercised restraint in her description of events. Even in the absence of independent evidence, it will, occasionally, be obvious that a witness has chosen to minimize the nature or effects of particular events. A witness's restraint in describing events may well show that the witness is being cautious in her testimony, and may give a trial judge increased confidence in the credibility of the witness.
- [39] In this case, nothing in the evidence of other witnesses or in the witness's own account demonstrated that the complainant exercised restraint in giving her evidence. Instead, it would appear that the judge's statement that the complainant did not exaggerate or embellish her evidence was conclusory. The judge did not infer that the complainant was credible because her evidence was not embellished or exaggerated. Rather, the inference went in the other direction: the judge found that the witness's evidence was not exaggerated or embellished because she had concluded the witness was credible.
- [40] That inference was one that was available to the trial judge. I would therefore reject the appellant's contention that the judge made a reviewable error in finding that the complainant did not exaggerate or embellish her evidence. On the other hand, the judge's statement was not of assistance in explaining the basis for finding the complainant to be credible; rather, it was a consequence of that finding.
- [41] A similar analysis applies in respect of two instances in which the judge resolved contentious issues in favour of the complainant: the issue of whether the complainant's grandmother was in hospital at the time of the most serious offence, and the issue of whether the complainant returned to live at her father's house of her own accord, or as a result of a decision made by her parents. I will discuss each of these issues in turn.

- [42] As I have indicated, the complainant's evidence was lacking in detail. The only particular that she provided that could be independently tested was her assertion that the initial and most serious incident occurred in June of 2005, after her birthday, and after the school year ended. Taken at face value, this testimony meant that the event had to have happened between June 27 and 30, 2005.
- [43] The complainant said her grandmother was in hospital for an emergency appendectomy at that time, and that her stepmother and stepbrother were visiting her stepmother's mother at the time of the offence, while her father was at work. Though nothing turns on the error, the judge appears to have misapprehended this evidence, finding that "the rest of the family was at the hospital with her grandmother".
- [44] Medical records introduced at the trial showed that the grandmother's appendectomy was not in June 2005, but rather in December 2006. The judge recognized that the evidence of the complainant was not consistent with medical records, and that the complainant was either wrong about the date of the sexual assault or in her recollection that her grandmother was in hospital for an appendectomy at the time. The trial judge resolved the issue by finding that the complainant was mistaken only as to the cause of her grandmother's hospitalization:
- [83] I am mindful that the complainant was eight years old and it is understandable that she may not remember exact dates or particulars. The medical records state that the grandmother was in and out of hospital and I find that at the time of the offence, the grandmother was in hospital for a medical issue and the fact that the complainant got the particular medical issue wrong is a minor detail.
- [45] The judge's apparent finding that the grandmother was in hospital in June 2005 was not supported by any evidence, apart from the complainant's statement about the emergency appendectomy. There were no medical records introduced stating that the grandmother was hospitalized in June 2005. The inference that the grandmother was "in and out of hospital" appears to be based primarily on what was said in a pre-operative consultation report at the time of the appendectomy:

[The grandmother] has a well-documented past cardiac history of atrial fibrillation and tachybrady syndrome. She had a VVI pacemaker put in around 1995. She has had several admissions to Burnaby Hospital because of tachyarrhythmia. She had a MIBI scan in 2003 which showed no reversible ischemia, but there is an area of fixed deficit. The patient herself does not recall ever having had a heart attack. Echocardiograms done last month showed normal left ventricular ejection fraction, but there is increased LA size and mild to moderate mitral regurgitation. From a cardiac stand point, she can walk about 15-20 minutes on a flat surface before getting short of breath. She is not otherwise particularly active. No recent reports of chest pain or palpitations otherwise.

- [46] It is highly doubtful that the report's statement that "she had several admissions to Burnaby Hospital" was admissible as evidence of its truth. Although the report is a business record, the author of the report was not recording his own observations in referring to previous admissions. More importantly, nothing in the document is capable of founding an inference that the grandmother was in hospital around the end of June 2005. Rather, the document merely refers to "several admissions" between 1995 and 2006.
- [47] The consultation report was put to the appellant to confirm that his wife had been admitted to hospital on several occasions. He agreed that she had been in hospital a number of times over the years. He was asked whether she had been hospitalized in 2005, and he indicated that he had no recollection of a hospitalization, though he agreed that he could not rule it out. The Crown continued to aggressively cross-examine him on this issue, but in the end, he was still unable to provide any assistance with respect to a hospitalization in 2005.
- [48] The complainant was not recalled to clarify her evidence about the appendectomy, and never suggested that her grandmother was in hospital for another reason in June 2005.
- [49] The appellant argues that the judge's finding was a misapprehension of evidence. I do not agree with that assertion. The complainant's statement that her grandmother was in hospital in June 2005 constituted some evidence of that fact, even though the complainant was wrong about her grandmother undergoing an appendectomy at that time. It was open to the judge to accept that part of the complainant's statement as true.
- [50] It is important to recognize, however, that, once again, the judge's finding of fact with respect to the hospitalization is not a reason for finding the complainant to be credible, but rather a result of that assessment. There was no independent evidence supporting the complainant's version of the facts, and, indeed, at least a part of her testimony was demonstrated to be false.
- [51] Apart from the discussion of the grandmother's hospitalization, the only specific issue the judge referred to in respect of the complainant's credibility was her account of the reasons for her move to her father's residence in 2011.
- [52] Both the appellant and the complainant's mother gave evidence to the effect that the complainant's mother and father decided she should live at her father's residence, because her scholastic achievements were declining, and she would be in a more disciplined environment at the father's residence. The complainant resisted the idea that the environment at her father's residence was more disciplined, and contended that the move to her father's residence was exclusively her choice, and was made despite the continual sexual harassment by the appellant at her father's residence. The judge accepted the complainant's account:

- [85] The complainant stated that the actual abuse regarding touching her breasts and her bum was ongoing throughout the years. The complainant stated that it was her choice to move from her mother's residence to live with her father. Her mother stated that it was her and the complainant's father's decision that [the complainant] reside with her father, and not the complainant's decision .
- [86] I accept that [complainants] behave in different ways and that that behaviour, while different from how another complainant may act, is not a bar to conviction. In this case I find the complainant wanted to be close to her grandmother before she passed away and to her father after his mother died.
- [53] The judge's finding is somewhat curious, given that it was contrary to the testimony of the complainant's mother, who had no stake in the trial, and who gave evidence on behalf of the Crown. The mother's evidence was very supportive, generally, of the complainant, and it is not clear why the judge rejected it in this instance. The determination was for the trial judge to make, however.
- [54] Again, it is important to note that the finding that the complainant's version of the facts was true was a function of the judge's assessment that she was credible, and not a basis for that assessment. Again, there was no objective or independent evidence supporting the complainant's account. Indeed, there was a considerable body of evidence suggesting that it was not a fair assessment of the situation.
- [55] To summarize, I am unable to conclude that the judge made any findings in favour of the complainant's account of events that were not open to her on the evidence. That said, the basis for the judge's conclusion that the complainant was credible appears to be limited. The judge was impressed with the complainant's demeanour and by the fact that her evidence was, for the most part, internally consistent.

The Judge's Assessment of the Appellant's Credibility

- [56] The judge's assessment of the appellant's credibility immediately preceded her assessment of the complainant's credibility. She said:
- [77] . I found the evidence of the accused was evasive and internally and externally inconsistent, and I did not believe his evidence. [O]n cross-examination he was evasive regarding his time alone with the complainant. He would make reference to additional bad behaviour of the complainant and not answer the question.
- [80] The accused's evidence was internally inconsistent in that he said that there were times when he was alone with her and also stated that he was never alone with her. He was her grandfather and clearly one of his roles was to babysit the complainant and there would have been times when he would have been alone with her. Similarly, the accused said he was never alone with the complainant at [a particular] house despite his evidence that the complainant had moved back to her father's house because her grades were slipping and her parents thought she needed more supervision and his son asked him to make sure that

she did her homework and help around the house.

- [57] The appellant takes issue with a number of the trial judge's findings. He says that the judge misapprehended his evidence about being alone with the complainant.
- [58] The appellant's evidence on that issue was convoluted. Arguably, a large part of the confusion was a result of the manner in which the Crown questioned him. The time period covered by the Crown's questions was often unclear and frequently shifted. Similarly, in many instances it was unclear what was meant by "alone", both in terms of the proximity of other persons, and in terms of activities being undertaken.
- [59] There were also difficulties with translation. The accused did not speak English, and it is obvious from the transcript that the interpreter was encountering difficulties throughout the hearing.
- [60] These various problems mean that it is not clear from the transcript that there was inconsistency in the appellant's testimony regarding if and when he was alone with the complainant. The judge, however, was in the best position to assess the meaning of the appellant's testimony, and it cannot be said that her finding that the appellant's testimony was inconsistent amounted to a palpable and overriding error.
- [61] The appellant also contends that the judge erred in finding his evidence to have been inconsistent in respect of the bathrooms in the house. The judge said:
- [51] The accused testified that at [a particular house] he never went into any other bathroom except his but later, when confronted with his evidence that he cleaned M.S.'s menstrual pads, he changed his evidence to say that he did go into her bathroom to clean it.
- [62] The issue of whether the appellant ever entered the bathroom that the complainant used was explored at length by the Crown in cross-examination, though it had no bearing on any substantive issue in this case. I reproduce a limited excerpt of that cross-examination:

Q Okay, so you -- you don't think it's correct that [the complainant] had her own bathroom?

A So all -- all my life that long, you know I lived, I never used their bathroom, I didn't go to my wife's bathroom, I didn't go to my son's bathroom as long as he stayed there I never use those bathrooms.

Q Okay. So at the house you only use your own bathroom, is that what you're saying?

A Yes.

Q Okay. You never went into anybody else's bathroom?

A No.

Q Okay. So there's two bedrooms in the house, right? Sorry, two bathrooms in the house, right? One of them is accessed, you get to it by going through your son's bedroom, is that right?

A I did not go there.

Q I know you didn't go there. But if you wanted to go there, you would go in through your son's room, right?

A Why would I go if I have my own bathroom?

Q Okay. If you wanted to go -- if somebody wanted to go -- say your son wanted to go to his bathroom, the only way he could do that is by going into his bedroom first, right?

A Yes.

Q But you [have] to go into the bedroom first in order to get into that bathroom?

A Yeah, I didn't have the door to that bathroom and why would I go to that bathroom?

Q I'm not asking you about that right now, Mr. [S.] I'm just confirming that the only way to get into the bathroom from your -- that your son used was through your son's bedroom. That's the only way.

A Yes.

Q Okay. Now, I understand that you had -- one of the things that you would tell [the complainant] to do was to clean up after herself, is that right?

A Yes.

Q And one of the things that you would do would be to tell her to clean up her tampons, correct?

A Yeah, she throwed at that bathroom. Dad's bathroom.

Q Oh, the bathroom that you just testified that you never went into?

A I -- but I go there to clean up. Because I was the one who was cleaning the house and nobody was home so I have to clean the house.

Q I see. So when you testified earlier numerous times that you never went into that bathroom, that -- you were asking me, "Why would I ever go into that bathroom?" You -- that wasn't the truth then? You did go into the bathroom?

A No, I did not go there. But I went there when nobody's home and I have to clean the house.

Q I see, okay. So you never went there but you did went there. That's your answer?

A Yeah, when no one is home, you know, then you have to collect the garbage from there and you have to throw the garbage out, you know.

[63] There is much to be said for the appellant's contention that both the Crown and the judge misconstrued his evidence. He was originally asked which bathroom different occupants of the house used. The discussion that followed concerned use of bathrooms, though the Crown began to use the words "went into" instead of "use" in its questioning. On the face of it, there was no contradiction in the appellant's statement that he did not use a particular

bathroom (or "go into" it in the sense of going into it to use it) and his statement that he was responsible for cleaning it. Regrettably, the Crown appears to have made too much of this matter.

- [64] That said, I do not see that the judge's interpretation of the evidence can clearly be said to be in error.
- [65] To summarize, apart from the judge's erroneous conclusion with respect to "external inconsistency", her expressed reasons for finding the appellant not to be credible were very limited. They appear to be concerned with confusion in answering certain questions on peripheral issues. While it is arguable that his answers showed some inconsistency, the basis for an adverse finding of credibility appears to be very limited.

Was the Finding of External Inconsistency Harmless?

- [66] I have reviewed the basis for the judge's findings in some detail for three purposes:
- a) to assess the appellant's assertion that specific findings made by the judge constituted errors;
 - b) to assess the importance of the judge's error in respect of "external inconsistency"; and
 - c) to consider the appellant's (rather vaguely expressed) contention that the judge was uneven in her evaluation of Crown and defence evidence.
- [67] In terms of the first purpose, as I have indicated, I am not persuaded that the judge made specific findings of fact that were not open to her.
- [68] With respect to the second purpose, a review of the specific findings that impinged on the credibility assessment discloses that the judge's bases for finding the complainant to be credible and for finding the appellant not to be credible were quite narrow. I cannot say, in the circumstances, that the judge's erroneous determination that the appellant's evidence should be discounted because it was "externally inconsistent" was a harmless one. It appears that the finding of external inconsistency was, indeed, central to the judge's credibility assessment. In the circumstances, the conviction must be set aside, and a new trial ordered.
- [69] Given that the appeal must be allowed on that basis, I do not intend to discuss the third purpose -- the issue of uneven evaluation of evidence -- at any great length. As this case does raise some concerns in respect of the evaluation, however, a few words are in order.

Uneven Evaluation of Evidence

- [70] A judge is required, in a criminal case, to apply the same standards in assessing the credibility of a complainant and the credibility of an accused person. An allegation that a trial judge applied differing standards is a difficult basis on which to appeal a conviction, but it is possible to succeed on such a ground. As Doherty J.A. observed in *Howe*:

- [59] This argument or some variation on it is common on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial judge's credibility assessments. This is a difficult argument to make successfully. It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.
- [71] Arguments that a trial judge has applied different standards to the evidence of the complainant and that of the appellant are usually rejected by appeal courts: see, for example the judgments of this Court in *R. v. Lopez*, 2015 BCCA 294 at paras. 47-48 and in *R. v. Rohani*, 2012 BCCA 198 at paras. 69-71. Where there are clear indications that different standards have been applied, however, appellate courts will intervene to overturn a conviction: see *Howe*; *R. v. T.T.*, 2009 ONCA 613; *R. v. Rhayel*, 2015 ONCA 377; *R. v. Gravesande*, 2015 ONCA 774; *R. v. Mehari*, 2020 SKCA 37.
- [72] I am left with significant concerns on this score in the case before us. The trial judge swept aside, without analysis, inconsistencies in the complainant's evidence. On the other hand, she appears to have applied a very harsh standard to the evidence of the appellant (as, for example, in respect of the bathroom issue). She considered an inconsistency between the appellant's evidence and that of another witness to be a ground for labelling the appellant as being not credible, even though she found, in that instance, that the appellant was being truthful. In contrast, she made no such finding in respect of the discrepancy between the evidence of the complainant and that of her mother on why the complainant moved to her father's home. Indeed, in that instance, without explanation, she simply preferred the complainant's evidence. While the judge was mindful of the specific difficulties in assessing the evidence of a child, she does not appear to have considered the difficulties that an elderly witness who is in poor health faces, both in terms of recollection of events and in terms of expressing themselves.
- [73] The trial judge's unforgiving approach to the evidence of the appellant in this case contrasted sharply with her more tolerant approach to problems with the evidence of the complainant. It is not necessary, however, to make any determination as to whether the conviction should be overturned on the basis of uneven treatment of evidence. In this case, the judge's error of principle in respect of "external inconsistencies" in the evidence of the appellant is sufficient to require a new trial.

Conclusion

[74] Only four witnesses gave evidence at the trial, and only two (the complainant and the appellant) were able to speak directly about the offences that were alleged. The credibility of those two witnesses was the only real issue at trial, and it was a difficult one. The judge erred in discounting the appellant's credibility on the basis that his evidence with respect to his wife's hospitalizations, while truthful, differed from the recollections of his daughter (who was not believed). This error in assessing the appellant's truthfulness cannot be said to have been inconsequential. The matter must be returned for a new trial.

[75] In the result, I would overturn the convictions, lift the conditional stay and vacate the finding of guilt on the third charge, and send the matter back to the Provincial Court for a new trial.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

The Honourable Mr. Justice Willcock

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