

CANADA / JUDGMENT

R. v. Sandhu

2012 BCCA 500

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 500 R. v. Sandhu

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Sandhu,

2012 BCCA 500

Date: 20121210

Docket: CA039422

Between:

Regina

Respondent

And

Kulvinder Singh Sandhu

Appellant

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Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Garson

The Honourable Madam Justice A. MacKenzie

On appeal from: Supreme Court of British Columbia, August 18, 2011

(R. v. Sandhu, Prince Rupert Docket No. 26627-2)

Counsel for the Appellant:

M.J. Ford

Counsel for the Respondent:

W.J. Scott Bell

Place and Date of Hearing:

Vancouver, British Columbia

October 12, 2012

Place and Date of Judgment:

Vancouver, British Columbia

December 10, 2012

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice A. MacKenzie

Reasons for Judgment of the Honourable Madam Justice Garson:

[1] Kulvinder Singh Sandhu appeals his conviction for sexual interference and invitation to sexual touching contrary to ss. 151 and 152 of the Criminal Code, R.S.C. 1985, c. C-47. The complainant is the daughter of the woman with whom Mr. Sandhu lived for about seven years, between about 1993 and 2000. The complainant reported her allegations to the police in 2003; Mr. Sandhu was charged in 2009; tried on August 15-18, 2011; and convicted on August 18, 2011.

[2] Mr. Sandhu appeals his conviction on the following grounds:

(i) He did not receive adequate representation at trial because trial counsel failed to apply for a stay of proceedings based on pre-charge delay, resulting in a miscarriage of justice;

(ii) He did not receive adequate representation at trial because trial counsel failed to call witnesses to corroborate that the appellant lacked opportunity to commit the alleged offences resulting in a miscarriage of justice;

- (iii) The trial judge erred in law by relying on Mr. Sandhu's silence following the alleged offence to determine that Mr. Sandhu was not credible, and to convict Mr. Sandhu, resulting in a miscarriage of justice;
 - (iv) The judge erred in finding that the complainant was credible which led to an unreasonable verdict;
 - (v) The judge erred in his apprehension of the evidence which led to an unreasonable verdict.
- [3] Both Mr. Sandhu and the Crown seek to introduce fresh evidence on appeal.
- [4] Mr. Sandhu's fresh evidence concerns the date the complainant and her mother moved out of the family home he had shared with them - where the alleged offences occurred. Mr. Sandhu says that if the correct dates had been in evidence, the judge may not have found the complainant credible.
- [5] The Crown's fresh evidence is evidence of trial counsel, addressing the pre-charge delay ground of appeal.
- [6] I would allow the appeal and order a new trial on the third, fourth, and fifth grounds of appeal on the basis that the trial judge's verdict was unreasonable. This conclusion makes it unnecessary to consider the new evidence applications and the first two grounds of appeal.

Background Facts

- [7] In 1989, Mr. Sandhu met the complainant's mother T.Z. They began a romantic relationship. In the fall of 1993, T.Z. and her children, a son then aged eight and a daughter, the complainant, then aged six, began living with Mr. Sandhu in a duplex that he owned. The son moved out to live with his father in about 1999. In about December 2000, the relationship between T.Z. and Mr. Sandhu ended and Mr. Sandhu moved into the other side of the duplex in which he had been living with T.Z. Later, the complainant and her mother moved away from the duplex and into another residence. Part of the appellant's new evidence application is clarification of the date the complainant moved. As I have said, it is unnecessary to further consider this point.
- [8] The indictment charges Mr. Sandhu with sexual touching between September 25, 1997, and September 24, 2001, and with inviting sexual touching between September 25, 1999, and September 25, 2000.
- [9] The trial judge found the following with respect to Count 1:
- [13] At the time of the events alleged in Count 1 of this indictment, the complainant was some nine or ten years of age. In that time period this accused entered the bedroom occupied by the complainant while the complainant was in bed. The accused removed the bedding and pulled down the complainant's underwear and digitally penetrated her vagina. That conduct continued at a rate of some eight or nine times a month over the period of the assaults. On one or more of those transactions the accused told the complainant not to tell her mother.

On another occasion, when the complainant was approximately 11 years of age, the accused approached her while she was seated at a computer terminal. On that occasion he digitally penetrated her vagina. There was a second occasion when the complainant was at a computer, and once again the accused digitally penetrated the complainant's vagina.

[10] The trial judge found the following with respect to Count 2:

[14] On Count 2, on an undefined date but during the period covered by the Indictment, this accused invited the complainant to suck his penis. The complainant did so, briefly, and then wept and ran from the room. And as it appears to relate to both Counts 1 and 2, there is another transaction on an undefined date, but again during the period covered by the indictment. The accused was on a couch, masturbating while watching a pornographic movie. The scene depicted on the screen at the time was a man performing oral sex on a woman. The accused asked the complainant if she wanted him to do that to her. The complainant said, "No", and the accused proceeded to digitally penetrate her vagina.

[15] The last transaction occurred when the complainant was about 13 years of age. This was some three or four months before the accused left the premises, upon the breakup of the relationship between the accused and the complainant's mother.

[11] On or about August 31, 2003, the complainant disclosed the allegations of inappropriate touching to her mother. T.Z. immediately took the complainant to the police to report the allegations.

[12] In June 2004, Mr. Sandhu's biological daughter told him about the complainant's allegations. This was the first occasion on which he was informed of the complaint.

[13] There is no evidence of further steps taken by the RCMP in their investigation of the complaint between November 2003 and November 2007.

[14] In November 2007, the RCMP asked Mr. Sandhu to provide a statement. He did so on December 4, 2007. He denied all the allegations. He was served with a summons on February 15, 2009.

Analysis

[15] In the analysis that follows, I consider first Mr. Sandhu's argument that the judge erred in relying on his silence between the date his daughter told him about the allegation and the date he provided a statement to the police - December 4, 2007. Then I turn to a consideration of the credibility findings. Mr. Sandhu frames his appeal on the basis that the credibility findings were so flawed as to result in an unreasonable verdict. As discussed below, my view is that the issue underlying the credibility findings is the inadequacy of the reasons given by the trial judge.

Silence during investigation

[16] In her closing submission the Crown argued that Mr. Sandhu's failure to promptly address the allegations of a sexual assault reported to him by his daughter was corroborative of his guilt:

Now, with respect to the accused's evidence, My Lord, it was certainly put to him in cross-examination that he knew about these allegations in 2004. And in the Crown's submission, there was nothing from his evidence other than he had moved on, to say that there wouldn't have been a reason for him to go and talk to [T.Z.]. If he was -- he acknowledged that these were serious allegations, that he was concerned about them. Whether or not it was right or wrong, in the Crown's submission, that would be the natural thing to do, to go and talk to the mother. Not to confront the young person himself, that would indeed be wrong, but to go and talk, if he could, to [T.Z.] and say, hey, what's going on?

In the Crown's submission, Mr. Sandhu knew exactly what he had done, and was hoping to get away with this. And certainly takes no steps to talk to the RCMP, to phone them up and say, hey, I'm here, let's talk about these allegations. He's hoping that Christmas comes early and that this young girl, for whatever reason, the police are not going to go ahead and complete the investigation.

But he's wrong. It takes some time. Mr. Sandhu knew that there was an active investigation in 2004. He certainly at that point in time had options, he agreed. He didn't want to spend his money, is what he said, but one of those options was to perhaps have a lawyer phone the RCMP and find out if indeed there was a live investigation, and to ask what's going on. In the Crown's submission, to say that -- to do nothing and simply say, well, they'll find me if they need me, if a person is truly, in the Crown's submission, outraged at these allegations, they would want to put them to rest. And what the situation that we have here is not only is the accused's daughter, on his version, coming to him, but another individual is coming to him. So it's not a contained situation. At that point in time his daughter is in high school. Certainly the other friend of his daughter knows about this. Who knows how many other rumours are out there. And the accused agreed that these were serious allegations, and in the Crown's submission, he would want to put them to rest, particularly if he had nothing to do with molesting [the complainant, J.Z.].

[17] In his reasons for judgment the trial judge implicitly accepted the premise of the Crown's submission (about Mr. Sandhu's failure to confront his accuser's mother or speak to the police). In stating that he did not believe Mr. Sandhu, the trial judge placed heavy emphasis on the inconsistency between his passionate indignation at trial and his somewhat passive response when he first learned of the allegations in 2004. The judge said at paras 3-5:

- [3] I do not believe Mr. Sandhu. I found him in his testimony to be unnecessarily and unduly evasive in responding to questions from Crown counsel. He was very indignant, passionately indignant, about the fact that these allegations have been made against him. He took that position from the time he entered his pleas of not guilty throughout his testimony and his appearance before this court.
- [4] His explanation of the complainant's allegations is that they are all "bullshit and lies". He learned that these accusations were being made against him as a result of a conversation with his daughter in June of 2004. His reaction to learning about these accusations, which he acknowledges were very serious, was to simply say, "Well, if there is an investigation, I am here. Come and investigate me." He did get a request from members of the RCM Police Detachment in Prince Rupert to attend for an interview in November of 2007.
- [5] I find the laissez-faire reaction of this accused to receiving intelligence that somebody had made accusations that he had sexually assaulted a child to be wholly inconsistent with the passionate indignation he displayed throughout this trial, and that inconsistency adversely affected my assessment of this accused's credibility. There is nothing in the accused's testimony which raises a reasonable doubt in my mind that he did commit the acts described by the complainant in her testimony.

[Emphasis added.]

- [18] It was this contrast in demeanour, "passionate indignation at trial" as opposed to a "laissez-faire attitude" when first informed of the complaints, that the trial judge found so troubling and ultimately, as emphasized in the excerpt above, it formed an important basis of his complete rejection of Mr. Sandhu's evidence.
- [19] Mr. Sandhu argues that the judge erred by using his "silence" against him. In support of this argument, Mr. Sandhu relies on *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519, a case in which silence was considered as a form of "post-offence conduct". Post-offence conduct is a term used to describe conduct after the offence which is probative of guilt. Abella J. for the Court, held that evidence of silence should not generally be used as evidence of guilt at paras. 44-45:

44 It would be an illusory right if the decision not to speak to the police could be used by the Crown as evidence of guilt. As Cory J. explained in *Chambers*, where the trial judge failed to instruct the jury that the accused's silence could not be used as evidence of guilt:

It has as well been recognized that since there is a right to silence, it would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt. [p. 1316]

45 Although Chambers dealt specifically with silence after the accused had been cautioned, it would equally be "a snare and a delusion" to allow evidence of any valid exercise of the right to be used as evidence of guilt.

[20] While it is true the appellant argued on the basis of Turcotte that the judge erred by considering his "silence following the alleged offence," as the Crown points out, the judge's reasons for rejecting the appellant's evidence was not a comment on the appellant's right to silence. Rather, the adverse finding of credibility was based on the inconsistency between the appellant's "laissez-faire" reaction on learning from his daughter in June 2004, that someone had made accusations that he sexually assaulted a child, and his reaction of "passionate indignation" throughout the trial (in August 2011). The trial judge used a comparison between the appellant's reactions in 2004 to his reaction seven years later in 2011 in different circumstances involving extremely different and incomparable threats to his legal jeopardy and liberty, as a major basis to reject his credibility. Although I would not conclude that the trial judge ran afoul of Turcotte, his use of this demeanor comparison is not logical and cannot be said to be grounded in any common-sense inference.

[21] Before drawing any firm conclusions as to the effect of this error, I shall review the trial judge's remaining findings as to the credibility of the parties and consider the trial judge's overall analysis of the issue of credibility.

Mr. Sandhu's general credibility

[22] The reasons for judgment indicate that the trial judge entirely rejected Mr. Sandhu's testimony on the basis of two factors. First, he found Mr. Sandhu to be "unduly evasive", which I take as a comment on the accused's demeanor. Second, as already discussed, he found Mr. Sandhu's "silence" to adversely affect the assessment of his credibility.

[23] A review of Mr. Sandhu's testimony discloses that his evidence was not impeached in the sense that his evidence was shown to be internally inconsistent or contradictory with other evidence. He simply denied all of the allegations. Nevertheless, a judge's perception of a witness should be respected: *R. v. Dinardo*, 2008 SCC 24 at para. 26, [2008] 1 S.C.R. 788. In this case, the trial judge perceived Mr. Sandhu as not truthful. Later I will return to the question of whether the trial judge's reasons were adequate to inform Mr. Sandhu why the judge was left with no doubt of his guilt.

Complainant's credibility

[24] The trial judge accepted the complainant's evidence. In finding her evidence entirely credible he said at paras. 6, and 8-11:

[6] Proof of the allegations in this testimony must be found solely in the testimony of this complainant, and I found her to be a creditable and credible witness.

...

- [8] The accused challenges the credibility of this complainant on a number of grounds. One of those grounds is that throughout her testimony, in this trial, her testimony at the preliminary inquiry, and in a video-recorded interview she had with a member of the RCM Police Detachment in Prince Rupert, her answers were inconsistent. I will not deal with each of the items said to be inconsistent in their substance. I agree with the accused that some of her answers were indeed inconsistent. I do not agree that some of the others were, but that does not matter, because the inconsistencies are now immaterial, because I find that I believe this complainant.
- [9] The second ground is that one of the reasons that this complainant has given for not disclosing the attacks upon her in a more timely fashion is that she was scared. Well, scared and fear are abstract notions. Although there was some quibbling about whether or not the accused had a temper or was simply opinionated, I am satisfied on all of the evidence, from the people who were there, namely the accused, the complainant, and the mother of the complainant, that this was an eventful relationship. The complainant told us that she did not raise the issue with her mother until she was satisfied that the relationship between her mother and this accused had come to an end. She concluded it was at an end when the family, being then herself and her mother, moved out of the residence they were then occupying, which residence was owned by the accused. The complainant's mother was a tenant of the accused.
- [10] The complainant said that this was an up-and-down relationship, that the accused would leave, and then he would return. It must be remembered that for this complainant, it seems to me she has already been the victim of one failed relationship. One of the fears that I infer that this child felt was that if she disclosed what this accused was doing to her, it would destroy the relationship between her mother and this accused. And if it was she who made the disclosure, then she would regard herself as at fault for that phenomenon.
- [11] Although it was unconventional, this was a family, residing together. It does not surprise me, and I find it entirely plausible, that the child would keep her counsel as long as there was some hope that the family would remain intact, notwithstanding what she was undergoing.
- [Italics in original, underlined emphasis added.]
- [25] As the trial judge noted there were many inconsistencies in the complainant's evidence. In his factum Mr. Sandhu identifies many. The most significant is the difference between testimony in the complainant's examination in chief in which she said that the assaults occurred four times in total. Later she said the bedroom assaults occurred 8-9 times in total. She then altered her testimony in cross-examination and said that the assaults occurred 8-9 times per month from age 10 to age 13.
- [26] Given the age at which she testified she was when the assaults began and ended, and her account in cross-examination of the total number of assaults, (the one the judge accepted) this means the complainant was assaulted about 433 times.

- [27] Other examples of inconsistencies in the complainant's evidence include testimony that she was only assaulted once while sitting at the computer, but later she said an assault at the computer occurred twice. Her account of the assaults that occurred when she was lying on the couch is inconsistent, as is the testimony about the location of some assaults. Counsel for Mr. Sandhu identifies numerous inconsistencies concerning the complainant's age, the presence of her brother in the house at the time of the assaults, what she said to Mr. Sandhu, and the physical position of Mr. Sandhu when he assaulted her.
- [28] In the trial judge's reasons he did acknowledge that her testimony was inconsistent. But he concluded that the inconsistencies in the complainant's evidence did not matter because he believed her. The basis for this belief could only have been supported by his assessment of the complainant's demeanour. That is, the trial judge found that the complainant was a "credible and credible" witness, one who appeared to be telling the truth. In the result, and apart from the reasons for her delayed complaint, the trial judge did not think it necessary to explain how he resolved the inconsistencies in the complainant's testimony on the evidence before him, and instead came to a conclusion about Mr. Sandhu's guilt based on his opinion of the complainant's demeanour

The use of demeanor evidence as the basis for assessing credibility

- [29] In the seminal case on appellate standard of review, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the Court expressed the undisputed proposition that trial judges are in the best position to assess credibility, at para. 24:

... We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. ...

This proposition is equally applicable in a criminal context.

- [30] *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 was a case concerning a complainant who gave inconsistent accounts of a sexual assault. The plaintiff had been a student at a residential school, and claimed he had been sexually assaulted by a school supervisor. Despite inconsistencies in the plaintiff's evidence, the trial judge concluded that the plaintiff was a credible witness. The Court of Appeal allowed an appeal on the basis that the trial judge had failed to consider the inconsistencies. The Supreme Court of Canada allowed the plaintiff's appeal on the issue of the trial judge's finding based on credibility. Justice Rothstein, for the Court, stated, at para. 72:

... Assessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility. As explained by Bastarache and Abella JJ. in *R. c. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17 (S.C.C.), at para. 20:

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

(See also *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, and *R. v. Burke*, [1996] 1 S.C.R. 474, 105 C.C.C. (3d) 205.)

[31] However, it is equally clear that reasons relating to credibility cannot be based on demeanour alone. In the oft-cited case of *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354, 4 W.W.R. 171 (B.C.C.A.), O'Halloran, J.A. of this Court stated at 356:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be

satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[32] In *R. v. Dinardo*, Charron J. noted that trial judges must not only consider the evidence using the steps suggested in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397, as the trial judge did here, but must go further and explain how credibility concerns were resolved, which the trial judge did not do here. At paras. 26 and 27 of *Dinardo*, she explained:

[26] At the trial level, reasons "justify and explain the result" (Sheppard, at para. 24). Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error (see *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 23). As this Court noted in *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, the accused is entitled to know "why the trial judge is left with no reasonable doubt" ...

...

[27] Reasons "acquire particular importance" where the trial judge must "resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record" (Sheppard, at para. 55). Here, the complainant's evidence was not only confused, but contradicted as well by the accused. As I will now explain, it is my view that the trial judge fell into error by failing to explain how he reconciled the inconsistencies in the complainant's testimony on the issue of whether she invented the allegations. I also conclude that the trial judge's failure to provide such an explanation prejudiced the accused's legal right to an appeal.

[Emphasis added.]

See also *R. v. M. (R.E.)*, 2008 SCC 51, [2008] 3 S.C.R. 3.

[33] *R. v. Jeng*, 2004 BCCA 464, is an example of a case in which the trial judge, as here, clearly believed the complainant and not the accused. On appeal to this Court, it was held that a case cannot be decided purely on a comparison of the demeanor of the accused and the complainant. At para. 54, in reference to *Faryna*, Ryan J.A. stated:

For the reasons given by O'Halloran J.A., it would be dangerous for a trial judge to rely wholly on demeanour in determining credibility. Not only does the better actor have the advantage, but cultural differences and differences in attitudes towards, for example, persons in authority may undermine a truthful witness's credibility in the eyes of the trier of fact. Demeanour is nevertheless one factor, in combination with others, that a trier of fact may look to in determining credibility, and in the case at bar in particular, it would have been odd not to mention demeanour since counsel devoted a large part of their submissions to the topic.

However, this case did not turn on demeanour alone; the trial judge took some care in her reasons for judgment to examine the stories of the witnesses for their internal consistencies, for their consistency with the physical injuries and the state of the apartment when examined by the police. Accordingly, I am not persuaded that the trial judge erred in her approach to credibility. I would dismiss this ground of appeal.

[34] There is no doubt that it can be difficult for a judge to articulate why a witness seems honest and believable. But that difficulty does not relieve the trial judge from the obligation of resolving significant evidentiary conflicts of the type that confronted the judge here. (*R. v. Sanichar*, 2012 ONCA 117, 280 C.C.C. (3d) 500; *R. v. G.E.H.*, 2012 NSCA 69; and *R. v. Norman* (1993), 16 O.R. (3d) 295, 87 C.C.C. (3d) 153 (C.A.).)

[35] In summary, on appellate review where the credibility of a witness/complainant is in issue, an appellate court must recognize that a trial judge is in the best position to assess credibility. There is no doubt that on appeal the view of the trial judge should be respected. However, the assessment of credibility cannot stand on an assessment of demeanour alone. Rather, where there are serious concerns about credibility (as here) a trial judge should explain at least minimally how he or she resolved those concerns. There are many ways in which such concerns may be resolved depending upon the facts of the case. In so doing the trial judge should in some manner address the conflicts within the impugned evidence. Reasons for judgment risk being assessed as inadequate if they fail to explain at all how the credibility concerns were resolved, in a manner that makes plain to an accused, the reason his evidence was rejected, or failed to raise a reasonable doubt, thus leading to his conviction.

[36] Applying these principles to this appeal, it is my view that the trial judge erred in holding that the inconsistencies were immaterial because he believed the complainant. The question is not whether belief in the evidence of a witness disposes of concerns about her inconsistencies. Rather, the question is whether the evidence is believed despite those inconsistencies.

[37] In casting aside the import of the inconsistent evidence the trial judge relied on *R. v. W.(R.)*, [1992] 2 S.C.R. 122, 74 C.C.C. (3d) 134. He cited this judgment at para. 7 of his reasons:

In dealing with the testimony of this complainant, I must direct myself in the terms set out by the Supreme Court of Canada in *R. v. W.*, [1992] 2 S.C.R. 122. The direction must be in these words:

... where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, 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 she is testifying.

[38] *R. v. W.(R.)* does not, with respect, relieve a trial judge from the necessity to analyze the complainant's evidence in order to determine its reliability.

- [39] The trial judge did consider explanations for the complainant's delay in complaining. The trial judge inferred that she had been afraid to make the complaint earlier because it might have jeopardized her mother's relationship with Mr. Sandhu. Leaving aside any questions of whether there was some confusion about the dates the complainant and her mother moved away from the duplex, the trial judge's error was in treating the reasons for the delayed complaint as a means to strengthen her evidence rather than as an explanation for an apparent weakness in her evidence.
- [40] In the end, the trial judge was left with a comparison of the demeanor of the two main witnesses. As in Dinardo, the complainant's evidence was confused and contradictory. The trial judge's reason for accepting the complainant's testimony and rejecting Mr. Sandhu's testimony, when examined carefully, was based solely on demeanor. The trial judge gave no explanation at all for his acceptance of the complainant's account despite her confused, and at times, contradictory testimony. He made no effort to resolve the significant conflicts in her testimony as a means of addressing the reliability of the complainant's evidence. In the result, the reasons do not adequately inform the accused why he was convicted despite the inconsistent evidence of the complainant.
- [41] The assessment of Mr. Sandhu's credibility thus rests on two shaky foundations. First, the trial judge's reasoning was illogical in that he rejected the appellant's credibility based largely on a comparison of his demeanor at two points in time that were seven years apart and under different circumstances. Second, apart from the dubious common sense inference of this proposition, his ultimate rejection of Mr. Sandhu's testimony is not explained in the reasons for judgment other than to say that the complainant was credible and therefore believed. In my view, the reasons are inadequate and therefore the verdict is unreasonable.

Disposition

[42] I would allow the appeal and direct a new trial.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice A. MacKenzie"

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