

CANADA / JUDGMENT

R. v. Sanhueza

2020 BCCA 279

COURT

British Columbia Court of Appeal

DECIDED

13 October 2020

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2020 BCCA 279 R. v. Sanhueza

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Sanhueza,

2020 BCCA 279

Date: 20201013

Docket: CA46133

Between:

Regina

Respondent

And

Ruth Marisol Sanhueza

Appellant

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Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated April 4, 2018 (R. v. Sanhueza, Surrey Docket 221915-2C).

Counsel for the Appellant:

B.R. Anderson

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Counsel for the Respondent:

J.A. Dyck

Place and Date of Hearing:

Vancouver, British Columbia

September 18, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 13, 2020

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

Summary:

Following a trial, the appellant was found guilty of sexual interference and sexual assault. She did not testify. However, as part of its case, the Crown led an out-of-court denial by the appellant when confronted with the complainant's allegations. On appeal, the appellant contends that the trial judge erred in her treatment of the denial, failing to consider its exculpatory value in accordance with the principles underlying R. v. W.(D.), [1991] 1 S.C.R. 742. Held: Appeal allowed and new trial ordered. The trial judge committed a reversible error by not asking whether the out-of-court statement raised a reasonable doubt once considered in the context of the evidence as a whole, even if not believed.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] After a Provincial Court trial, the appellant was found guilty of sexual interference and sexual assault involving a 15-year-old male complainant (s. 151 and 271, Criminal Code, R.S.C. 1985, c. C-46). The trial judge dismissed a charge of inviting that same complainant to touch the appellant's body for a sexual purpose (s. 152).
- [2] The appellant challenges the convictions on two grounds. First, she says the trial judge erred in her approach to an out-of-court denial made by the appellant when confronted with the allegations. Second, the appellant contends that the judge did not adequately explain why she rejected the denial.
- [3] For the reasons that follow, I would allow the appeal from conviction on the first ground of appeal and order a new trial.

Background

- [4] The complainant's family immigrated to Canada from Mexico in spring 2016. They met the appellant through a local church and became friends. The complainant was 15 years old and has a twin brother, who dated the appellant's daughter. The appellant would take all three teenagers on outings. The complainant testified that after one of these outings, he had a discussion with the appellant about sexual matters, including whether she had ever had an affair and whether the complainant was a virgin.
- [5] In summer 2016, the complainant's mother returned to Mexico to deal with a property issue. The appellant also arranged for travel to Mexico. The complainant testified that on the day before the appellant left for Mexico, he was alone with her while running errands. The appellant drove to a parking lot in a forested area near the Guildford Mall in Surrey. She parked and the two of them began talking. The appellant asked the complainant to look for something in the back seat. When he could not find it, she joined him there, and the conversation continued.
- [6] The complainant testified that the appellant produced a bag from which she removed a dildo and lingerie. She talked to him about how she used the dildo. She opened her shirt, removed her bra and asked him if he liked her breasts. He said she twice touched his penis over his pants, and, at one point, she moved her head down close to his penis. He was uncomfortable and got out of the car. The appellant apologized. The complainant got back into the car and they left the parking lot, continuing with the errands.
- [7] The complainant testified that after the appellant went to Mexico, she contacted him and told him not to say anything about the incident. Approximately two weeks later, he told his mother and stepfather. The complainant and his mother subsequently met with the bishop of their church. The appellant also attended that meeting. In his evidence, the complainant explained what happened:

Q So did you describe what happened to Mrs. Sanhueza? Did you talk about the incident with Mrs. Sanhueza at that meeting?

A Oh, I think my mom and her did. But then the -- the person in the church, he was just like --

Q All right. Now --

A He wanted me to tell her and her what happened, right? In front of everyone. Like just the people who was in -- in the room. And that happened. I did.

Q And you did say that to Mrs. Sanhueza?

A Yeah.

Q Okay. And did she say anything in response?

A She showed me a picture of -- that we take on Canada Day, and she was like -- I looking like down and smiling, and then she was just like looking in front of the camera, and she's like what are you doing in this picture, like tell me what you were doing in this picture, and I say I was like -- we were just taking a picture, and she's like look at -- look at the way he look at -- he looks at me. So she show the picture again, and I was just like -- it's just like I'm smiling at the camera. Like I was -- someone took the picture, but it was like a lot of pictures, so I was just trying to get ready to take the picture --

Q All right.

A -- and I was just smiling.

Q Okay. And so she -- what happens after that then? So she shows you the photo in the meeting --

A Oh. So the person at the church couldn't solve anything, and after we were -- it was Friday, I think, or Thursday. Because it was like actually the day in church, and there was like a lot of people in the church that day, but not to like pray or something like that. It was just to like [indiscernible] with each other, and I wanted to go and I think that they stayed, and we were leaving, and then that's when Ms. Sanhueza tell that to my mom, that she was gonna charge me with sexual harassment.

Q Okay. And how -- at that meeting, how was your demeanour? Like how were you -- how was your emotional level or your tone of voice when you were speaking with Mrs. Sanhueza?

A I was -- oh, at the meeting or after?

Q At the meeting.

A I was trying to like calm down, 'cause I didn't want to like get in a fight or argue with nobody, so I was just like trying to talk. And -- but then Mrs. -- Ms. Sanhueza got like really aggressive about it. That's why we couldn't solve anything there, 'cause she was like screaming and yelling there.

Q And what about your mom? How was she?

A My mom was just like trying to tell her to like face what happened and that's it. But Mrs. Sanhueza say no. She was like I'm gonna charge your kid and I'm gonna kick you guys out of the country.

[8] The complainant's mother testified. She confirmed the meeting with the bishop. At first, only she and the appellant were present. The bishop asked her to listen to the appellant's side of the story. The appellant:

said many things, but she was also upset. Well, she threatened me and she also told me that she would -- if I would go to the police to file anything that I would -- that she would go to jail, of course, but -- but that I would also be deported from Canada. Well, you see, also she told me that she had a lawyer and she also had spoken to this lawyer and he also had said that perhaps my son would be subject of a criminal proceedings in a sexual harassment charge.

[9] The complainant subsequently entered the room and provided his version of events. His mother testified that in response, the appellant:

started to yell at my son and become very aggressive towards him, to the point that I had to come between the two of them, and I said that -- that she will stop doing that, and that I would -- the only thing that I wanted her to do is to accept the truth, and I didn't want to have anything else to do with her.

you see, she said -- she told him -- she said many things. The -- the thing that I remember the most that she said to him that she would -- that -- that he would be going to jail because of sexual harassment. Sexual harassment, yes.

she said that she -- it was my son, the one who had tried to have a sexual relation with her. Well, you see, I had -- then I ask her back why haven't you told me. I mean we have been many days alone, you could have told me something about it. But she never told me anything.

she said that one day she had gone to my place and she had asked to go to the bathroom, and then she said that that's when my son had gone and sexual harass her.

[10] In cross-examination, the complainant's mother agreed that during the meeting with the bishop, the appellant said the complainant had grabbed her buttock and asked for kisses. She also said she had not wanted to tell the complainant's mother about his behaviour because she knew the complainant's mother "punishes" her children and the complainant was afraid of her. The appellant "denied everything [the complainant] said".

[11] The appellant did not testify.

Closing Submissions

- [12] In closing submissions, Crown counsel encouraged the trial judge to accept the evidence of the complainant as credible and reliable. Any inconsistencies in his testimony were minor and did not affect his "actual memory" of the incident. He had no motive to lie, and, in fact, he was a reluctant witness. His mother's testimony was corroborative. With reference to the denial before the bishop, the Crown asked the judge to assign that evidence little or no weight, given that the appellant was confronted with the allegation in front of a church leader, the complainant's mother, and the complainant. These were not circumstances lending themselves to truthfulness. The Crown also took the position that the appellant's statements about the complainant having sexually harassed her were not true.
- [13] Defence counsel argued that the complainant's version of events was false. He did have a motive to lie, namely, to make up a story to avoid being punished by his mother for "sexually harassing" the appellant. The defence said the testimony of both the complainant and his mother lacked credibility. Among other things, there were significant inconsistencies in the complainant's evidence. With respect to the appellant's out-of-court denial, defence counsel submitted that the appellant's reaction was "exactly what you would expect someone to do if falsely accused of something like this". He suggested that the judge give the denial "enhanced weight" because it was "concurrent with the presentation of [the] allegations and they result[ed] in a fast, repeated, firm, and angry denial".
- [14] Neither counsel referenced *R. v. W.(D.)*, [1991] 1 S.C.R. 742, in their closing submissions or advanced an argument on how those principles apply to a denial adduced by the Crown.

Reasons of the Trial Judge

- [15] The trial judge delivered oral reasons for judgment ("RFJ"). She began with a recitation of the evidence. This included reference to the out-of-court denial:
- [19] Both [the complainant] and his mother testified that Mrs. Sanhueza accused [him] during that meeting, of sexually harassing her and said she would have him charged with sexual harassment. She threatened that they would be deported. Both [the complainant] and his mother said that they were not believed in that meeting, and that Mrs. Sanhueza kept giving her version of events.
- [20] When asked in cross-examination whether Mrs. Sanhueza had denied doing what [the complainant] had said, they acknowledged that she had denied it.
- [16] The judge noted the positions of the parties, including the defence submission that the "Crown evidence was not sufficiently credible or reliable to substantiate the charges" (RFJ at para. 23). She acknowledged the inconsistencies in the complainant's evidence said to exist by the defence (at paras. 24-40). Ultimately, the judge found that the complainant gave his evidence in a "clear and forthright manner" (at para. 32). He readily acknowledged frailties in his memory, but was "clear on the main points of the allegation, that the accused put her

hand on his penis twice, albeit over his pants" (at para. 32).

[17] The judge accepted that the complainant's mother was "not a perfect witness" (RFJ at para. 46). In particular, her "dates and timelines were not always clear" and it was "clear she was trying to assist her son" (at para. 46).

[18] However, "after reviewing all of the evidence, after hearing all of the submissions," the judge accepted that "during the beginning of July [2016], the accused touched [the complainant's] penis over his pants" (RFJ at para. 55). Moreover, the touching was "done in a sexual context where there had been previous conversations of a sexual nature, where [the appellant] unbuttoned her blouse" (at para. 56).

[19] Specific to the out-of-court denial, the judge said this:

[47] The accused did not testify. I am asked to consider her comments, her behaviour and her denial at the meeting that she had with [the complainant], his mother and the bishop. It is clear that she did not accept the allegations. She said they were not true. She, in [the complainant's] words, blamed him and tried to turn the story around.

[48] She said that he grabbed her by the buttock and asked her for kisses but she did not want to tell the mother, even when she spent time with her in Mexico, because she did not want [the complainant] to be punished.

[49] The defence also says that her anger at that meeting shows that she was angry at being falsely accused. I cannot assume that. It is just as consistent with being, perhaps, outed in front of the bishop and her friend.

[50] In all, I cannot place great weight on what happened at that meeting. Mrs. Sanhueza did not testify, as is her right, but what happened at that meeting is capable of different interpretations. I accept that she denied the allegations but that did not happen in court where it could be tested by cross-examination, nor was I able to examine her demeanour.

[Emphasis added.]

[20] The appellant was found guilty of sexual interference and sexual assault. Post-verdict, the appellant sought a stay of proceedings under s. 24(1) of the Canadian Charter of Rights and Freedoms based on an alleged abuse of process. That application was dismissed. The appellant has not appealed the abuse of process ruling.

Issues on Appeal and Standard of Review

[21] The appellant contends that the trial judge erred in law by not assessing her out-of-court denial in accordance with W.(D.) principles. Alternatively, the appellant says the trial judge erred in law by failing to explain why she did not believe the denial or find that it did not raise a reasonable doubt.

[22] The standard of review for both alleged errors is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

Discussion

Did the judge err in her approach to the out-of-court denial?

[23] The Crown led the evidence of the meeting with the bishop as part of its case. The appellant says that once the Crown made that choice, the appellant was entitled to the whole of the meeting's exculpatory potential. On this point, the appellant cites *R. v. Graham*, [1974] S.C.R. 206 at 213, for the principle that when the Crown elects to adduce an out-of-court declaration made by the accused:

the declaration then becomes evidence for the prisoner as well as against him . If in such a case the declaration is capable of being construed as an explanation which might reasonably be true, the accused is, of course, entitled to all the advantages of it.

[Internal citations omitted.]

[24] In *R. v. Rojas*, 2008 SCC 56, the Supreme Court affirmed the principle, explaining it this way:

[37] Of course, the general rule that excludes out-of-court exculpatory statements is not without exceptions. One such exception is relevant here -- the mixed statement exception. Just as in England, it has long been established that where the Crown seeks to tender an accused's out-of-court statement which contains both inculpatory and exculpatory parts, it must tender the entire statement, and the exculpatory portions are substantively admissible in favour of the accused: *R. v. Hughes*, [1942] S.C.R. 517, at p. 521. Fairness to the accused is the obvious rationale for the mixed statement exception. The exception is also based on the more pragmatic consideration that it is often difficult to determine which parts of a statement are inculpatory and which parts are exculpatory.

[Emphasis added.]

See also *R. v. Sunshine*, 2013 BCCA 102 at para. 47 and *R. v. Evans*, 2012 BCCA 209 at para. 48.

[25] The appellant submits that to give meaningful effect to *Graham*, *Rojas* and like authorities, a trial judge must apply the W.(D.) analytical framework to the out-of-court statement. In other words, they must approach the statement as they would testimony from the accused and ask themselves whether they believe any exculpatory parts. If so, the accused is entitled to an acquittal. If the judge does not believe the exculpatory parts, but those portions of the statement raise a reasonable doubt, the accused is also entitled to an acquittal. Finally, even if the exculpatory parts do not raise a reasonable doubt, but leave the judge unable to decide whom to believe in assessing the Crown's burden of proof, the judge must acquit: *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146 (B.C. C.A.).

- [26] Here, no one disputed that the appellant made the out-of-court denial adduced by the Crown. The appellant says the trial judge did not explicitly reject the statement. Instead, she found that what happened in the presence of the bishop, including the appellant's display of anger and her denial of initiating sexual contact with the complainant, was "capable of different interpretations" (RFJ at para. 50). Crucially, she found that the evidence was equally consistent with innocence as guilt (at para. 49).
- [27] The denial may have been a truthful reaction to the complainant's allegations. On this point, the appellant emphasizes that a spontaneous statement made in the face of an accusation, when properly admitted, can "yield persuasive evidence of innocence": *R. v. Edgar*, 2010 ONCA 529 at para. 67, leave to appeal to the SCC ref'd, 33984 (31 March 2011). At the same time, the appellant's denial may have been an untruthful reaction, motivated by a desire to avoid admitting culpability in the presence of a church leader and the complainant's mother. The judge could not be sure. As a result, she found the evidence equivocal.
- [28] The appellant says that in acknowledging the evidence was open to competing interpretations, the judge tacitly accepted that the denial, the assertion it was the complainant who initiated sexual touching, and the reason the appellant offered for not bringing that conduct to the attention of his mother, could reasonably be true. Applying W.(D.) principles, the judge should have asked herself whether the evidence thereby left her with a reasonable doubt, or, even if such was not the case, whether it left her unable to decide whom to believe. There is no indication that the judge made these enquiries. Her reasons are silent on that point. The appellant says the silence engenders a realistic possibility that the judge failed to respect the W.(D.) framework and that it constitutes reversible error.
- [29] The Crown does not dispute the applicability of W.(D.) to cases where the accused does not testify and elects to rely, instead, on exculpatory evidence adduced through the Crown's case or as otherwise called by the defence.
- [30] However, the Crown says that in a judge-alone trial, the judge is presumed to know the law and the absence of an overt reference to W.(D.), or its underlying principles, does not mean that the judge erred in her approach to assessing credibility or the Crown's burden of proof. As acknowledged in *R. v. Dick*, 2018 BCCA 343 at para. 27, "there is nothing sacrosanct about the W.(D.) formula and it need not be [cited or] followed slavishly" (referencing *R. v. Dinardo*, 2008 SCC 24 at para. 23). Instead, what is critical is that the judge's assessment of the evidence and their reasoning process respect the principle of reasonable doubt and that there be no shift in the burden of proof, even unintentionally: *Dick* at para. 27.
- [31] The Crown contends that in this case, the judge did respect the principle of reasonable doubt, including as it applies to credibility. Adherence to the W.(D.) framework is implicit in her reasons. Once the reasons are read as a whole, it is obvious that the judge rejected the appellant's out-of-court denial and found that it did not raise a reasonable doubt:

While [the judge] did not explain specifically why she disbelieved and was not left in doubt by the denial evidence, her reasoning was clear from the record as a whole. She accepted credible evidence from [the complainant], and did not accept nor was left in doubt by the un-tested, out-of-court denial of the appellant. Her lack of comprehensive explanation should not be equated with a failure to properly apply the principle of reasonable doubt or the burden of proof.

(Respondent's factum at para. 43).

[32] Consistent with the approach accepted in other jurisdictions, I agree with the appellant that the application of W.(D.) is not restricted to cases in which the accused testifies. In *R. v. Smits*, 2012 ONCA 524, for example, the Crown introduced out-of-court statements from the accused that contained exculpatory evidence relevant to an element of the offence. On appeal, it was argued that the judge committed reversible error by failing to consider those statements in accordance with W.(D.) (at para. 36). The Court of Appeal for Ontario found no error, but accepted that the W.(D.) framework applies even where an accused does not give evidence:

[37] where there are credibility findings on a vital issue to be made between conflicting evidence arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear that it is not necessary for the trier of fact to believe the evidence favourable to the defence on that trial issue. Rather, it is sufficient if, viewed in the context of all the evidence, the conflicting evidence leaves the trier of fact in a state of reasonable doubt as to the accused's guilt. In that event, the trier of fact must acquit.

...

[39] Trial judges in a judge alone trial do not need to adhere slavishly to the W.(D.) formula. It should, however, be clear from an examination of the reasons that at the end of the day the trial judge has had regard for the basic principles underlying the W.(D.) instruction .

[Emphasis added; internal citation omitted.]

[33] This same approach was endorsed in *R. v. B.D.*, 2011 ONCA 51 at para. 114. There, the principles underlying W.(D.) were described as having:

[114] a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if - viewed in the context of all of the evidence - the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt . In that event, they must acquit.

[Emphasis added; internal citation omitted.]

See also *R. v. Cuthill*, 2018 ABCA 321 at paras. 93-104 (and the cases cited therein), leave to appeal to the SCC ref'd, 38504 (23 May 2019); *R. v. Baksza*, 2019 ABCA 237 at para. 12; *R. v. R.S.L.*, 2006 NBCA 64 at para. 100.

[34] Specific to jury trials, I note that the application of W.(D.) principles to out-of-court statements by the accused has been specifically incorporated into the template instruction for "Out-of-Court Statements of Accused (General Instruction)", as found in Watt's Manual of Criminal Jury Instructions, 2nd ed (Toronto: Carswell, 2015), at 308-09:

[5] Some or all of the statement(s) may help [(name of accused)] in his/her defence. You must consider those remarks that may help (NOA), along with all of the other evidence, even if you do not believe them, unless you are satisfied that s/he did not make them. In other words, you must consider all the remarks that might help (NOA) even if you cannot decide whether s/he said them, or whether you believe them.

[Emphasis added.]

[35] I also agree with the appellant that in the circumstances of this case, it is not clear from a review of the judge's reasons that she appreciated the need to consider the evidence of the meeting with the bishop in accordance with the W.(D.) framework. Three aspects of the reasons give me particular concern.

[36] First, after addressing the various defence challenges to the complainant's credibility, the trial judge states at para. 39 of her reasons that she "accept[s] that sometime shortly after Canada Day, [the complainant] was in Mrs. Sanhueza's car and she touched his penis with her hand over top of his pants". The judge reaches this conclusion on the actus reus for the charged offences without any apparent substantive consideration of the appellant's out-of-court statement. Instead, she moves directly from a finding that inconsistencies in the complainant's evidence did not "go to the heart of the allegations [or] affect his credibility" (at para. 38) to conclusive proof of indirect touching of the complainant's penis. The appellant's statement in the presence of the bishop denied the complainant's version of events in its entirety, and, if accepted, it would render his evidence of intentional touching untrue. Even if not accepted, the denial could have raised a reasonable doubt about the complainant's narrative, or left the judge unable to decide whom to believe.

[37] Second, at para. 47 of her reasons, the judge comments on the fact that the appellant did not testify and then turns her attention to the out-of-court denial, noting that she had been "asked to consider" that evidence in assessing the case. Casting the issue in this way, as a request for consideration, raises a serious question about whether the judge understood that the out-of-court denial, once tendered by the Crown, functioned as exculpatory evidence in the same way as evidence provided directly by an accused. As a result, the judge was obliged to consider and assess that evidence in her credibility determinations, applying W.(D.) principles. If the evidence was accepted, it raised a reasonable doubt about the appellant's guilt, or the judge did not know whom to believe because of the evidence, the appellant was entitled to an acquittal.

- [38] Finally, at paras. 49-50 of her reasons, the judge addresses the circumstances surrounding the meeting with the bishop and concludes that the appellant's display of anger at that meeting and what she said are "capable of different interpretations" (RFJ at para. 50). Critically, she found that one of those interpretations is "consistent" with the appellant having been "falsely accused" (at para. 49). The judge indicates that because of the equivocal nature of the evidence, she cannot "place great weight" on it (at para. 50). However, she does not take the logical (and required) next step and ask herself whether the possibility that the appellant was responding truthfully to a false accusation, viewed in the context of the evidence as a whole, raises a reasonable doubt. As Rojas makes clear, the appellant was entitled to the benefit of any reasonable doubt, including a reasonable doubt about the truth of the out-of-court statement or any part of it (at para. 45). The judge did not have to believe the appellant's denial to find a reasonable doubt. Her reasons are devoid of any such analysis.
- [39] These aspects of the reasons for conviction, in their cumulative effect, leave me unsure whether the trial judge properly related the concept of reasonable doubt to conflicting evidence on a vital issue arising from an out-of-court statement favourable to the defence: Smits at para. 37.
- [40] Relying on *R. v. Vuradin*, 2013 SCC 38, the Crown says that although the judge did not make explicit reference to *W.(D.)* in her analysis, the reasons for the conviction make clear that she properly understood and applied the criminal burden of proof and that is sufficient to withstand this first ground of appeal.
- [41] The judge was alive to the evidence of the denial and accepted that it took place (RFJ at paras. 20, 44, 45, 47, 50). As such, this is not a case in which she failed to advert to one or more material portions of the evidence, raising questions about whether she directed her mind to a central issue: *R. v. R.E.M.*, 2008 SCC 51 at para. 33.
- [42] The Crown says it is also apparent the judge understood that the denial came with an assertion it was the complainant, rather than the appellant, who initiated sexual contact (RFJ at para. 48). The judge appreciated the appellant's position that she should consider this evidence in her analysis (at para. 47). She explicitly acknowledged the defence submission that the manner in which the appellant reacted when confronted was consistent with having been falsely accused (at para. 49). The reasons demonstrate an awareness of the substance of the contested issues and the need to grapple with them.
- [43] The Crown contends the judge understood that before convicting the appellant, she had to be satisfied the Crown had proved its case beyond a reasonable doubt (RFJ at paras. 58, 59). She understood that she was obliged to consider the entirety of the evidence in reaching that conclusion (at para. 55). When she had a doubt about a particular piece of evidence, she gave the benefit of that doubt to the appellant. For example, the complainant's mother testified that while in Mexico, the appellant told her of a sexual experience with a young man similar to the one described by the complainant. The judge assigned that evidence "no

weight" because the mother only disclosed the conversation on the eve of trial (at para. 42). The judge also agreed with the defence that there was "no evidence" in support of the second count on the indictment (invitation to sexual touching), and she acquitted the appellant of that charge (at para. 60). It is obvious that she engaged with the evidence.

- [44] The Crown says the judge spent considerable time addressing the frailties that the defence said existed in the complainant's evidence. This was directly responsive to defence counsel's submission, in closing, that the sexual interference and sexual assault counts turned "primarily upon the credibility of the complainant". On appeal, the appellant does not allege that the trial judge erred in her approach to the complainant's evidence or in her conclusion on his credibility.
- [45] Finally, the trial judge accepted the testimony of the complainant, which contradicted the appellant's denial, after finding him a credible witness and determining that his evidence was "clear on the main points of the allegation" (RFJ at para. 32). The Crown says the appellant's denial amounted to little more than a bare denial and was not subject to cross-examination and the judge was appropriately concerned that she had no meaningful opportunity to assess its veracity (at para. 50).
- [46] The Crown emphasizes that a trial judge is not obliged to "spell out" why she was not left in doubt by exculpatory evidence, as long as the reasons for conviction permit meaningful appellate review. In this case, the basis for the conviction is said to be "straightforward":

the trial judge, alive to the strengths and weaknesses of the complainant's evidence, as well as to the appellant's denial, believed [the complainant]. She did not believe, nor was she left in doubt by, the out-of-court denial of the appellant.

(Respondent's factum at para. 65.)

- [47] I have considered the points raised by the Crown. I appreciate that the "functional approach" to analyzing reasons for judgment allows for a finding that W.(D.) principles have been respected, even where those reasons are sparse and the judge neither references W.(D.), nor explains in any detail why exculpatory evidence does not raise a reasonable doubt: Vuradin at paras. 12-13; R.E.M. at para. 66; Dick at paras. 23-25. I also appreciate that in some circumstances, an out-of-court denial by the accused, limited in detail and untested through cross-examination, may attract considerably less weight than testimony. This is an individualized assessment, necessarily informed by the evidential foundation of each case.
- [48] However, this is a circumstance where the reasons reveal an acceptance of the complainant's testimony on a material element of the charged offences without any apparent substantive consideration of the out-of-court statement and its exculpatory value. There is also a realistic possibility, gleaned from language used in the reasons, that the judge did not appreciate she was obliged to give the appellant the whole of the exculpatory advantages arising from the out-of-court denial, consistent with W.(D.) principles. Most importantly, she found that the appellant's conduct and denial in the presence of the bishop

was equally consistent with innocence, as guilt. That finding should have caused her to ask whether the denial raised a reasonable doubt, viewed in the context of the totality of the evidence, even if she did not believe it was true.

- [49] In light of these features, I agree with the appellant that Vuradin is a qualitatively different case and not dispositive of the first ground of appeal. In that case, the accused was charged with sexual assault. The trial judge explained in some detail why he accepted the Crown's evidence; however, he did not directly address the accused's evidence. Nonetheless, he was explicit in his reasons that the accused's testimony did not raise a reasonable doubt, stating that he did not find it "truthful" (at para. 18). His reasons also adverted to W.(D.) principles, with explicit recognition that he was required to "attend to the evidence of the accused in a particular way" (at para. 22; emphasis added). That was the context in which the Supreme Court found that the judge "properly applied the burden of proof" (at para. 26).
- [50] In this case, the trial judge did not make it clear that the appellant's denial did not raise a reasonable doubt for her. Nor do her reasons for judgment reflect an appreciation of the need to "attend to the evidence of the [out-of-court denial] in a particular way", as mandated by W.(D.).
- [51] On balance, I am persuaded that the trial judge did not assess the out-of-court denial in accordance with the principles underlying W.(D.). I cannot say, in the particular circumstances of this case, that there is no risk the burden of proof unintentionally shifted: Dick at para. 27. Accordingly, I would accede to the appellant's first ground of appeal.

Were the reasons for conviction insufficient?

- [52] In light of my conclusion on the first ground, it is not necessary to decide the alternative basis for judicial intervention advanced by the appellant, namely, that the trial judge did not adequately explain why the denial did not raise a reasonable doubt.

Disposition

- [53] For the reasons provided, I would allow the appeal from conviction, set aside the conditional stay on the conviction for sexual assault (entered pursuant to R. v. Kienapple, [1975] 1 S.C.R. 729), and order a new trial on counts one and three of the indictment.
- [54] Appropriately, given the nature of the errors alleged by the appellant, the Crown did not seek to invoke the curative proviso under s. 686(1)(b)(iii) of the Code.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Bennett"

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Prepared on 28 October 2026 · Esheria