Citation: R v CAM, 2017 MBCA 70 Date: 20170721
Docket: AR16-30-08620

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

	)	***R. J. Wolson, Q.C.*** *and*
HER MAJESTY THE QUEEN	)	***L. C. Robinson***
	)	*for the Appellant*
Respondent	)	
	)	***C. T. St. Croix***
- and -	)	*for the Respondent*
	)	
C. A. M.	)	*Appeal heard:*
	)	***May 2, 2017***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***July 21, 2017***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the complainant(s) or witness(es) (see section 486.4 of the *Criminal Code*).

On appeal from 2015 MBQB 108

MAINELLA JA

Introduction and Issues

[1] This conviction appeal arises from allegations of sexual assault and domestic violence by the accused against his ex-wife (the complainant). The accused was tried by a judge sitting without a jury on a 14-count indictment in relation to five incidents (December 24, 2005; April 15, 2012;

July 23, 2012; October 9, 2012; and November 13, 2012).

[2] During the trial, the judge heard evidence from several witnesses, including the complainant and the accused. Other evidence included agreed facts, business records, a photograph, a recording of a 911 call and text messages. The Crown's case, however, rested almost entirely on the complainant's evidence. In his evidence, the accused denied all of the allegations. Not surprisingly, the case turned on the judge's assessment of the credibility and reliability of the witnesses.

[3] The judge acquitted the accused of sexual assault and choking to overcome resistance to commit an offence in relation to the 2005 incident. She convicted him of the offences relating to the four incidents in 2012, namely: sexual assault with a weapon, two counts of sexual assault, assault with a weapon and eight counts of uttering threats.

[4] The principal issue on appeal is whether the judge erred by subjecting the accused's testimony to a different and stricter level of scrutiny than that of the complainant. The other ground of appeal is that the verdicts for the 2012 incidents are unreasonable in light of the acquittal for the 2005 incident. The accused's sentence of four and one-half years has not been appealed.

[5] For the following reasons, I would dismiss the appeal.

Background

[6] The accused and the complainant began their relationship in 1998 during the early stages of his career as a professional hockey player. By the time his career ended in 2002, the couple had settled in Manitoba at a

cottage in the Interlake.

Incident One—December 24, 2005

[7] On December 24, 2005, the couple returned to the cottage after a Christmas party. They were both drunk and arguing. The complainant testified that the argument escalated into the accused raping her. She said that, during the rape, the accused punched her, leaving marks on her eye and cheek which later had to be covered with make-up. He also choked her. On cross-examination she conceded that, while she believed he vaginally penetrated her, she could not be certain. In addition to the accused's denial of the incident, his mother testified that, the next morning, the complainant had no visible injuries which was confirmed by a photograph.

Incident Two—April 15, 2012

[8] The complainant did not disclose the 2005 incident and continued the relationship. In 2007, the couple married, purchased a home in a small town near Winnipeg and had their first child. A second child followed in 2010. The accused took the role of caring for the children as the complainant pursued a business career. By 2012, she was the sole breadwinner for the family.

[9] Over time, the marriage broke down. On April 15, 2012, an argument occurred regarding the complainant's participation in marriage counselling. The complainant testified that, after she said that she was having a hard time getting over being raped in 2005, the accused reacted by saying, "How did I do it? Like this?" He then grabbed her, threw her towards the sectional and pulled her pants down. When the complainant reached for a phone, the accused grabbed a knife, pointed it at her and said,

"Do you want to die?" In cross-examination, the complainant conceded that she was unsure if the accused punched her in the face during this incident despite a prior inconsistent statement to that effect. When the incident ended, the accused apologised and they agreed to separate.

[10] In his evidence, the accused said that, while they agreed to separate after a heated argument during which the complainant had said he raped her, he denies that any assault occurred. A short time later, he moved to the cottage, but continued to commute to the family home each weekday to care for the children. Shortly after the incident, the complainant disclosed what happened to a female co-worker who testified to the disclosure.

Incident Three—July 23, 2012

[11] On July 23, 2012, the accused was staying at the family home because he was taking a course in Winnipeg. An argument broke out over a personal relationship the complainant had developed with another man. During the argument, the accused learned that the complainant had performed fellatio on the other man. She testified that the argument escalated to her being raped on multiple occasions that evening by the accused. During the evening, he punched her in the jaw, but there was no resulting visible injury. While holding a knife, the accused told her they were not getting divorced. At one point during the prolonged sexual assault, he uttered threats to kill her and the children.

[12] The accused's behaviour led the complainant to be concerned that he may commit suicide. She told him he needed help and a call was placed to 911 when he had calmed down. In the recording of the 911 call, filed as an exhibit, the accused told the operator that he needed to be taken to the

hospital as he was "having some bad thoughts" and didn't want to do anything he would regret towards "anybody." The accused was taken to the hospital by police and spent the night there. The complainant did not disclose being raped to police. Again, shortly after the incident, she disclosed what happened to a female co-worker who testified to the disclosure.

[13] In contrast, the accused testified that the evening was one of entirely consensual "make-up sex". After having sexual intercourse with the complainant twice, he raised the possibility of the relationship going somewhere. The complainant dismissed the idea and said that all he wanted to do was "fuck" her. She then made some sexually provocative comments to the accused, put her hands on the kitchen table and said, "fuck me again" from behind. He testified that, when he attempted to penetrate her vaginally, he accidentally touched her anus with his penis, which caused her to become upset and reiterate that all he wanted to do was "fuck" her. She also uttered the word "rape". It was agreed that he left the house and she followed him outside, convincing him to go back inside with her. In his evidence, he said that the emotional toll of the evening overwhelmed him and he agreed, at the suggestion of the complainant, to make the 911 call to get away from her.

Incident Four—October 9, 2012

[14] After his release from an overnight stay in hospital, the accused continued to live at the cottage and care for the children. The complainant testified that, on a date in October 2012, the accused called her at work and harassed her by playing a song from their wedding. Later that evening, at the family home, the couple had an argument where the accused said they were not getting a divorce and that he would kill her and the children.

Eventually the argument subsided, the accused apologised and he left as he had a hockey game. The complainant testified that she was "Not exactly" sure of the date this occurred, but she had made a note that it was October 9, 2012.

[15] As part of his denial of the incident, the accused testified to an undisputed alibi for his whereabouts on October 9, 2012, supported by various business records, that he never was at the family home on that date and did not have a hockey game that night.

Incident Five—November 13, 2012

[16] The complainant's female co-worker testified that, on October 29, 2012, the complainant gave her a sealed envelope in case something happened to her. While the contents were not read into the record, it was agreed that the envelope contained the complainant's notes with a description of incidents between her and the accused. The female co-worker also testified that, in November 2012, the complainant was very emotional at work and displayed nervousness if there was a telephone call or someone knocked on her office door.

[17] The complainant gave evidence that, on November 13, 2012, she received a telephone call at work from the accused. He said he was in the family home and had discovered she had new lingerie. He asked with whom she was sleeping. He told her they were all better off dead than not being a family.

[18] The accused denied making the threat in his evidence. He testified that, at this time in the marriage breakdown, they were having arguments about how their finances would be settled in the divorce. He said that the

discussion about the complaint's lingerie arose because, on reviewing their finances, he discovered that she had made a significant expenditure on the lingerie.

Arrest and Disclosure of Allegations to Police

[19] On November 15, 2012, the couple had a heated argument in a telephone conversation. The complainant testified that the accused eventually said "bye bye" and then there was a loud noise which she believed was a gunshot. She feared he may have committed suicide in the same way as his brother had done. She telephoned 911. Text messages entered into evidence confirm that, when she was reporting the gunshot incident to police, the accused was attempting to contact her. In the text messages, he told her to answer his calls or he would "[come] there right now". She testified that, when she saw the text messages, meaning he was alive, she was afraid of what he might do if he found out she had called the police. Because of her fear of him, she made the decision to disclose the incidents of domestic violence to police. The accused was later arrested by police at the cottage.

[20] The complainant's father testified that he received a telephone call from the complainant on the evening of November 15, 2012, where she sounded "terrified" and "completely hysterical". He contacted his brother in Portage la Prairie and asked him to check on his daughter. He then decided to get into his car with his wife in the middle of the night and drive from Saskatoon to see his daughter.

[21] In his evidence, the accused acknowledged that there was a heated argument over the telephone. The loud noise was him slamming the phone

down. He said he called the complainant back to apologise but had no intention of coming to see her.

The Judge's Decision

[22] The judge reviewed the evidence in accordance with the approach discussed in *R v W(D)*, [1991] 1 SCR 742 at 758.

[23] The judge identified various problematic aspects of the accused's evidence which led her to reject it, such as his desire to dominate the complainant; his conflicting views of the state of the marriage and the reasons for its breakdown; his nonsensical explanation regarding the April 15, 2012 separation; his implausible account of the sexual incidents on July 23, 2012, in light of such independent evidence as the 911 call; and his unbelievable claim on the date of arrest that he had no intention of coming to the family home which was contradicted by his text messages.

[24] The judge then reviewed the complainant's evidence based on concerns raised by counsel, which included uncertainty as to details of each of the incidents; the lack of visible injuries from the assaults; the accused's alibi for the October 9, 2012 incident; and inconsistencies in details between her trial evidence and prior evidence at the preliminary inquiry or during the family proceedings.

[25] At trial and on appeal, the accused made the submission that it was implausible that, if the complainant had been the victim of a brutal rape on July 23, 2012, she would have talked him into returning to the house before calling 911, as she testified to, or that she would let him care for their children thereafter in the face of threats from him to kill her and the children. Taking into account the circumstances of this case, the submission amounts

to an attempt to discredit the complainant on the basis of myths and stereotypes as to what her reaction should have been (see *R v Osolin*, [1993] 4 SCR 595 at 625; *R v D(D)*, 2000 SCC 43 at para 63; *R v Find*, 2001 SCC 32 at para 101; and *R v RGB*, 2012 MBCA 5 at paras 51-59). I will comment further on this point later in my reasons.

[26] The judge determined that, while the complainant "may" have been raped during the 2005 incident, because of her intoxication, lack of visible injuries the next day and uncertainty as to what exactly occurred, there was insufficient reliable evidence to prove the allegation beyond a reasonable doubt.

[27] The judge addressed some of the concerns raised with the complainant's evidence by stating that a number of them were inconsequential. She found the complainant's version of the April 2012 incident to be consistent with the separation occurring on that date. The judge also concluded that the complainant's evidence as to the details of the October and November 2012 incidents was "clear and specific" (at para 67) despite some uncertainty as to the date of the October 2012 incident.

[28] The judge accepted the complainant's evidence as to the sexual assaults and death threats on July 23, 2012; particularly in light of the content of the 911 call. She discounted the lack of visible injuries after the assault on the basis that there was no evidence that the punch was of "such force that visible physical injury would necessarily have resulted" (at para 66).

[29] The judge took into consideration demeanour evidence of the complainant being distressed while describing the incidents during her

testimony and also while disclosing the abuse to her female co-worker and father as supportive of her credibility.

[30] The judge answered the accused's submission about the credibility implications for the complainant having not severed all contact with him after July 23, 2012, this way (at para 68):

> During her testimony, the complainant explained that she did not report the abuse because she wanted to help the accused and follow through with their plan–and did not want to end up in court, as has in fact happened. This is consistent with matters upon which she and the accused agree, namely their four-year plan, and her encouraging him following the July incident to call 911 due to concern for his well-being. I also accept that she did not believe he would actually harm the children, and I expect that her approach was influenced by practical considerations regarding childcare arrangements. In all, I accept her explanation.

[31] Overall, the judge found the complainant to be "consistent, convincing, and credible" (at para 70). She accepted her evidence and concluded that the Crown had proven all of the 2012 offences beyond a reasonable doubt.

Issue One—Uneven Scrutiny of the Evidence

The Law

[32] Trial judges are commonly required to resolve conflicting versions of events by making an assessment of the credibility of witnesses. Given the advantage of hearing and seeing the witnesses first hand and the reality that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization" (*R v REM*, 2008 SCC 51

at para 49), the standard of review of a trial judge's credibility assessment is demonstration of palpable and overriding error. See also *Schwartz v Canada*, [1996] 1 SCR 254 at para 32; and *R v Gagnon*, 2006 SCC 17 at para 10.

[33] Applying a stricter standard of scrutiny to the evidence of an accused than used to assess the evidence of a Crown witness is an error of law that undermines the fairness of a trial and can give rise to a miscarriage of justice (see *R v Owen*, 2001 CarswellOnt 3852 at para 3 (CA); *R v HC*, 2009 ONCA 56 at para 62; and *R v Glays*, 2015 MBCA 76 at paras 13-14).

[34] In order to succeed on a claim of uneven scrutiny, an appellant must meet the threshold of demonstrating "something sufficiently significant" (*R v Phan*, 2013 ONCA 787 at para 34) in the reasons or the record that establishes that the trial judge employed faulty methodology in deciding credibility. See also *R v Radcliffe*, 2017 ONCA 176 at para 25.

[35] The mere fact that a trial judge believes the evidence of a Crown witness over that of a witness for the defence does not establish or even suggest, by itself, that there has been an uneven scrutiny of the evidence (see *R v Karas*, 2006 CarswellOnt 3475 at para 9 (CA); and *Radcliffe* at para 28). Much more is required. An appellant's burden to demonstrate the uneven scrutiny error is a heavy one, as Laskin JA explained in *R v Aird*, 2013 ONCA 447 (at para 39):

> The "different standards of scrutiny" argument is a difficult argument to succeed on in an appellate court. It is difficult for two related reasons: credibility findings are the province of the trial judge and attract a very high degree of deference on appeal; and appellate courts invariably view this argument with skepticism, seeing it as a veiled invitation to reassess the trial

> judge's credibility determinations. Thus, as Doherty J.A. said in *R. v. [Howe]* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.), at para. 59: "[t]o 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."

[36] In deciding whether the threshold has been met, an appellate court must take care to not overstep its role and retry the case. As the Ontario Court of Appeal explained in *R v Chanmany*, 2016 ONCA 576 (at para 27):

> An appellant who advances an "uneven scrutiny" argument must do more than show that a different trial judge could have assessed credibility differently. Nor is it sufficient to demonstrate that the trial judge failed to say something he or she could have said in assessing the credibility of the witnesses who gave different accounts of various events. Equally inadequate is the submission that the trial judge failed to expressly articulate legal principles relevant to the credibility assessment: *Howe*, at para. 59.

See also *Radcliffe* at paras 23-26.

[37] The fundamental rule, for purposes of appellate review, is that, if a trial judge's credibility assessment can be reasonably supported by the record, it cannot be interfered with on appeal (see *R v RP*, 2012 SCC 22 at para 10; and *Gagnon* at paras 10, 20).

Analysis

[38] With reference to particular aspects of the record, the accused raised several points in support of the submission that the judge committed the uneven scrutiny error. All but two of the arguments can be summarily dismissed because they amount to nothing more than an invitation to this

Court to reassess credibility without something evident in the judge's reasons or the record that she used different measuring sticks as to the evidence of the accused versus that of the complainant (see *Aird* at para 39).

Lack of Visible Injuries Submission

[39] The accused says that how the judge dealt with the lack of visible injuries on the complainant clearly demonstrates that there was an uneven scrutiny of the evidence. It is an undisputed fact that, soon after each of the three instances where it is alleged that an assault occurred (December 24, 2005; April 15, 2012; and July 23, 2012), either the accused's mother or the complainant's female co-worker gave evidence that they did not see any visible injuries on the complainant. In his evidence, the accused also denied ever punching or otherwise assaulting the complainant. The accused points out that he is a large man who outweighs the complainant by more than 100 pounds. Given his experience with fighting in professional hockey, he submits that, if he had in fact used force in the heat of the moment while trying to rape her, common sense would dictate that she would have had visible injuries at a minimum and likely needed medical attention.

[40] The difficulty with this submission is that it invites this Court to re-assess and re-weigh the evidence. An appellate court is not entitled to do so absent palpable and overriding error (see *Gagnon* at para 20).

[41] The judge did give effect to the absence of visible injuries as a "factor" (at para 59) in her decision in relation to the December 24, 2005 incident.

[42] She made no reference to the lack of visible injuries in her reasons in relation to the April 15, 2012 incident, but that fact alone is

inconsequential (see *Chanmany* at para 27). Given the record, I am not satisfied that it was a palpable and overriding error for the judge not to have found that there would have been visible injuries for the April 2012 incident. While the complainant was certain she was thrown onto a sectional and her clothes were forcibly removed, she was uncertain she was punched.

[43] Finally, in terms of the July 23, 2012 incident, the judge made a finding based on the complainant's description of the punch that it was not "of such force that visible physical injury would necessarily have resulted" (at para 66). It would be pure speculation to overturn that finding of fact.

[44] It is trite, but important, to recall that issues of credibility are not determined by a "set of rules" that "have the force of law" (*White v The King*, [1947] SCR 268 at 272). Contrary to the submission of the accused, the mere fact that the lack of visible injuries affected the verdict for the 2005 incident does not mean that the lack of visible injuries necessarily also had to affect the verdicts as to the 2012 incidents. In summary, I have not been convinced of a palpable and overriding error as to how the judge dealt with the issue of a lack of visible injuries on the complainant after the alleged assaults.

Myth and Stereotyping Submission

[45] The accused's factum states as follows:

> On the July 2012 incident the Learned Trial Judge was highly critical of the [Accused's] explanation for the reason for calling 911, namely that he wanted to get out of the house and away from the Complainant. However on the basis of the Complainant's evidence she had followed him throughout the residence, when he went outside to leave, she begged him to return to the residence. The Learned Trial Judge appeared to

> have found fault with the fact that the [Accused] didn't use his size and weight advantage to leave the residence. In contrast, the Complainant's actions encouraging the [Accused] to remain in the residence with her and physically comforting him after he had, as she described, violently sexually assaulted her multiple times and threatened her with a knife, was not at all considered in the analysis of the Complainant's credibility and the plausibility of her version of events. Further her continued contact with the [Accused] in the days and months that followed and his continued time spent alone with the children, was not considered by the Learned Trial Judge as a factor to consider when assessing the version of events set forth by the Complainant. It is respectfully submitted that a close critical look at the Complainant's evidence, as was applied to the [Accused's], would have caused these factors to be of significant concern on the issue of credibility. While there may not be a standard way to react to a situation, the Learned Trial Judge was called upon to evaluate the [Accused's] conduct and found it to be implausible and non sensical. In doing so she was required to also closely examine the Complainant's conduct to determine if it was plausible in the context of the situation.
>
> [emphasis added]

[46] The strategy of using myths and stereotypes to discredit the credibility of a complainant in an allegation of sexual violence is "invidious" because such a submission is subtlety persuasive by its appeal to common sense (*Find* at para 103). While the argument in the accused's factum focusses on the circumstances of this case and the issue of different levels of scrutiny, any doubt as to what was meant by the statement in the accused's factum that the complainant's version of the events was not "plausible in the context of the situation" was made crystal clear at the hearing of the appeal. Counsel for the accused invited the Court to interfere with the judge's credibility assessment based on a submission relying on myths and stereotypes regarding a complainant of a sexual assault and domestic violence.

[47] During oral submissions, counsel for the accused argued that it wasn't usual for rape victims to invite perpetrators back into the house and console them (which was the complainant's evidence). He further argued that the complainant's credibility should have been questioned by, as counsel put it, her reckless decision after the July 2012 incident to leave the children with the accused who had apparently threatened to kill them. At the core, these submissions go beyond the determination of credibility based on the facts of the case and place an impermissible reliance on myths and stereotyping to discredit the complainant. As Cory J explained in *Osolin*, "inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper" (at p 670).

[48] One of the unfortunate realities of the Canadian criminal justice system historically is the prevalence of the use by lawyers, judges and juries of myths and stereotyping to discredit female and child witnesses. McLachlin CJC explained this reality in the following manner in *Find* (at paras 101-3):

> The appellant also contends that myths and stereotypes attached to the crime of sexual assault may unfairly inform the deliberation of some jurors. However, strong, sometimes biased, assumptions about sexual behaviour are not new to sexual assault trials. Traditional myths and stereotypes have long tainted the assessment of the conduct and veracity of complainants in sexual assault cases—the belief that women of "unchaste" character are more likely to have consented or are less worthy of belief; that passivity or even resistance may in fact constitute consent; and that some women invite sexual assault by reason of their dress or behaviour, to name only a few. Based on overwhelming evidence from relevant social science literature, this Court has been willing to accept the prevailing existence of such myths and stereotypes: see, for example, *Seaboyer*, [[1991] 2 SCR 577];

> *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 669-71; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 94-97.
>
> Child complainants may similarly be subject to stereotypical assumptions, such as the belief that stories of abuse are probably fabricated if not reported immediately, or that the testimony of children is inherently unreliable: *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *R. v. D.D.*, [2000] 2 S.C.R. 275, 2000 SCC 43; N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., *Discrimination in the Law and the Administration of Justice* (1993), 231.
>
> These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

[49] Similarly, Schulman J, in his report in the Lavoie Inquiry (Commission of Inquiry into the Deaths of Rhonda Lavoie and Roy Lavoie, *A Study of Domestic Violence and the Justice System in Manitoba* (Manitoba: Department of Justice, 1997)), which examined domestic violence and the justice system in Manitoba, warned of the danger of evaluating the credibility of victims of domestic violence based on uninformed and pre-conceived notions of human behaviour (at p 43):

> Judges and the court system can play a crucial role in interrupting the cycle of violence and preventing further violence. To do so, judges must understand the issues associated with domestic violence. The behaviour of a victim may confuse or mislead someone who does not appreciate the dynamics of an abusive relationship. Victims frequently return to an abusive relationship or ask that criminal charges against an offender be dropped. They often fail to enforce a no-contact no-communication condition or a recognizance or probation order or refuse to tell anyone, including police officers, about the abuse. While this behaviour is typical of victims of domestic violence, it may lead

> an uninformed person to conclude that the abuse did not really occur or was not very significant.
>
> To ensure that judges do not formulate incorrect and inappropriate assumptions about victims of domestic violence, they must be aware that domestic violence occurs within every socioeconomic and demographic group. Victims do not necessarily fit into specific categories or possess specific characteristics.

See also *R v Lavallee*, [1990] 1 SCR 852 at 870-73.

[50] The law is now well settled that the use of myths and stereotypes has no place in the determination of credibility because such reasoning corrupts and distorts the trial process and may result in an unfair trial. As this Court explained in *RGB* (at para 59):

> [T]he credibility of a witness should be judged on the evidence before the judge, not on stereotypical assumptions. A judge would err in law if there is a sound basis to conclude, on appellate review, that a credibility finding was not based on a proper evidentiary foundation, but rather on inappropriate judicial stereotyping.

[51] Trial judges have a heavy responsibility to ensure that counsel do not introduce the spectre of such forbidden reasoning into a trial. If that occurs in a jury trial, it should be answered by a timely and appropriate instruction to the jury (see *R v Barton*, 2017 ABCA 216 at paras 1, 159-61). In judge-alone trials, judges must not succumb to drinking from such a poisoned chalice in their assessment of credibility.

[52] The accused's submission that the complainant's credibility as to her version of events was undermined because it did not conform to some "idealized standard of conduct" (*R v CMG*, 2016 ABQB 368 at para 60) is

unsound. I reject it unequivocally. Credibility determinations must be based on the totality of the evidence, not untested assumptions of a victim's likely behaviour based on myths and stereotypes.

[53] The judge properly looked at the evidence, as opposed to myth and stereotypes, and accepted that the complainant's motivation for staying with the accused after being raped on July 23, 2012, and not telling the police, was to help him and to not further disrupt their family situation. The fact that the complainant did not tell the police that night about being raped was irrelevant to assessing her credibility (see *DD* at para 63). The judge also accepted the complainant's evidence that she sincerely believed that her children were not in danger and that, regardless of the conflict between her and the accused, he could continue to care for the children after the July 23, 2012 incident. There is nothing in the record to suggest other than the accused was a good caregiver for the children; particularly when the complainant was not around. I see no palpable and overriding errors in the judge's conclusions as to the complainant's credibility given the fact that she did not sever all contact with the accused after the July 23, 2012 incident.

Decision

[54] After a careful review of the judge's reasons as a whole in light of the record and the arguments advanced by the parties, in my view, the accused has not met the stringent standard of establishing that the fairness of his trial was undermined because the judge's credibility assessment was the product of an uneven scrutiny of the evidence. In her credibility assessment, the judge did not refer to every piece of evidence pointed to by the accused, nor was she required to do so. She appropriately gave no credence to myth and stereotyping in her assessment of the credibility of the complainant.

Finally, she made no palpable and overriding errors. In my view, the judge's assessment of the credibility of the complainant and the accused's evidence was fair and balanced. She resolved conflicting testimony on the key events with thorough and careful reasons. Additionally, this is not a situation where it can be said that her credibility findings cannot be supported on any reasonable review of the evidence.

Issue Two—Unreasonable Verdict

[55] The alternative ground of appeal, that the verdicts for offences occurring in 2012 are unreasonable because they are inconsistent with the acquittal for the 2005 allegation, is also unpersuasive.

[56] In light of the record and the judge's findings of credibility, the verdicts for the 2012 incidents are ones that a properly instructed trier of fact could reasonably have rendered. Moreover, there is nothing illogical or irrational about the judge's reasoning that makes her verdicts irreconcilable. A trier of fact has "a very wide latitude in its assessment of the evidence" (*R v Pittiman*, 2006 SCC 9 at para 7). The judge drew a distinction between the 2005 and 2012 incidents based on concerns she described in her reasons about the reliability of the complainant's evidence as to what occurred in 2005. I see no basis to say that the distinction she drew makes her verdicts in relation to the 2012 incidents illogical or irrational. The quality of the evidence for the 2005 incident was different than the other incidents based on the complainant's own evidence. She was quite candid that she was not sure what happened and her ability to recall events was affected by being drunk at the time and the passage of time between the incident and her testimony (see *RP* at paras 9-10; and *Pittiman* at para 8).

Disposition

[57] In the result, I would dismiss the appeal.

Mainella JA

I agree: Beard JA

I agree: Pfuetzner JA