Citation: R v Ramos, 2020 MBCA 111 Date: 20201119
Docket: AR19-30-09245

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella

B E T W E E N:

	)	***R. J. Wolson, Q.C. and***
	)	***L. C. Robinson***
	)	*for the Appellant*
	)	*(via videoconference)*
	)	
HER MAJESTY THE QUEEN	)	***C. R. Savage***
	)	*for the Respondent*
Respondent	)	*(via videoconference)*
	)	
- and -	)	***J. A. Weinstein***
	)	*on a watching brief*
ERIK OSWALDO RAMOS	)	*for Gary Stern*
	)	*(via teleconference)*
(Accused) Appellant	)	
	)	*Appeal heard:*
	)	***April 20, 2020***
	)	
	)	*Judgment delivered:*
	)	***November 19, 2020***

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On appeal from 2018 MBQB 35; and 2018 MBQB 89

MAINELLA JA

Introduction

[1] While several issues have been raised in this conviction appeal, the main controversy is whether the trial judge gave adequate reasons in his assessment of the credibility of the witnesses.

[2] The accused was tried by a judge sitting without a jury on a two-count indictment charging him with sexual assault and sexual interference of his girlfriend's daughter (the complainant) when she was between six and 10 years of age.

[3] The case for the Crown consisted of the evidence of the complainant and her mother.

[4] Two video statements of the complainant were admitted by consent pursuant to section 715.1 of the *Criminal Code* (the *Code*). The first video statement was taken in November 2013 when she was 10 years of age. The second video statement was taken in February 2016 when she was 12. She was 13 when she testified at the trial in February 2017.

[5] In her narrative of events, the complainant said that the accused repeatedly sexually touched her over a three-year period at three residences in Winnipeg. The sexual touching included him touching her vagina with his penis, fingers and tongue, and ejaculating on her body.

[6] The complainant's mother testified about the living arrangements of the accused with her family from 2010 until 2013 and the complainant's disclosures to her in October 2013 and December 2015.

[7] After the Crown closed its case, the accused discharged his lawyer, Gary Stern, due to a lack of confidence. The trial was adjourned and present counsel was retained. The accused then moved for a mistrial or, alternatively, recalling the complainant and her mother for cross-examination on the basis of the ineffective assistance of counsel. After his motion was dismissed, the accused testified and denied sexually touching the complainant.

[8] The live issue in the case was whether it had been proven beyond a reasonable doubt that the accused sexually touched the complainant. As is often the situation in allegations of child sexual abuse, the case turned on the trial judge's assessment of the credibility of the complainant and the accused. The key arguments raised by counsel were the plausibility of the accused's denials and the frailties with the complainant's evidence.

[9] After deliberating for two months, the trial judge delivered a 19-page written decision setting out his reasons for convicting the accused of both offences; the conviction for sexual assault was then conditionally stayed (see *Kienapple v The Queen*, [1975] 1 SCR 729).

[10] The accused appeals against his convictions on three grounds: (1) the trial judge erred in law in his application of *R v W(D)*, [1991] 1 SCR 742, in his credibility analysis; (2) there was a miscarriage of justice due to the ineffective assistance of previous counsel; and (3) the trial judge erred in law in not ordering the remedies of a mistrial or the recalling of the complainant and her mother for cross-examination

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

The Facts

[12] The three locations where the alleged sexual touching occurred were a home on Redwood Avenue (the Redwood residence); an apartment on Donald Street (the Donald residence); and a home on Spence Street (the Spence residence).

[13] In 2010, the complainant and her family lived at the Redwood residence. The accused lived in the basement with his friend, Hector Lemos. In or around December 2010, the accused began a romantic relationship with the complainant's mother.

[14] In or around November 2011, the complainant, her mother, the complainant's older teenage brother and the accused moved into the Donald residence. While living there, the accused and the complainant's mother separated for between two to four months. During the separation, the accused lived at the Spence residence which was then the home of Hector Lemos.

[15] The complainant's evidence was that the accused began to sexually touch her soon after he began dating her mother in 2010. The complainant said that there were probably four incidents of sexual touching at the Redwood residence, more than five incidents at the Donald residence and two incidents at the Spence residence.

[16] At the Redwood and Donald residences, the accused would come into the complainant's bedroom while the other residents were away. He would touch her vagina with his fingers and penis and try to insert his fingers and penis into her vagina. He also would perform oral sex on her.

[17] During the time the accused lived at the Spence residence, he took the complainant there when her mother was away. In his bedroom, he would touch her vagina with his fingers and penis and try to insert his fingers and penis into her vagina. He also would perform oral sex on her. She said Hector Lemos was elsewhere in the house when the accused was touching her and, on one occasion, Hector Lemos's girlfriend was outside the house on the deck.

[18] The complainant said that, during the sexual touching, sometimes "sperm" would come out of the accused's penis and would go "on" her body but "not in" her body.

[19] According to the complainant, the accused gave her candy when he sexually touched her so that she didn't tell anybody. He also gave her four pet hamsters. He told her not to tell her mother because her mother would go to "jail" and the complainant would then end up "alone". He said that he had done the "same thing" to his daughters in Guatemala and "their mother never found out, so don't worry, your mom will never find out".

[20] While on holiday in Colombia in October 2013, the complainant first disclosed that the accused had sexually touched her. Immediately on her return to Canada, a complaint was made to police which resulted in the first video statement and the arrest of the accused.

[21] One of the suggested difficulties with the complainant's evidence is that she disclosed the nature of the sexual touching incrementally. In her first video statement, she made no mention of the sexual touching at the Spence residence. That came to light only in her December 2015 disclosure to her mother and the second video statement. In the second video statement, she

also first disclosed that the accused showed her child pornography on his laptop computer of what she described as “little girls” between the ages of five and 10 having intercourse with “old men” and that he gave her gifts of candy and hamsters. Also, in the second disclosure to her mother and the second video statement, she revealed that the accused encouraged sexual touching between her and her brother.

[22] A further incremental disclosure was that, during cross-examination at trial, the complainant mentioned that the accused had taken one nude photograph of her while she was standing in the closet of her bedroom. The complainant never told the police about that incident. Her mother, however, testified that, in the October 2013 disclosure, the complainant told her that the accused had put her “in the closet” and took a “picture” of her. The complainant’s testimony at trial was that she had never previously told her mother about the nude photograph.

[23] Another alleged frailty with the complainant’s evidence was that, leaving aside the complete denial by the accused of any sexual touching occurring, there were contradictions in her evidence relating to sexual touching between her and her brother.

[24] The complainant said that the accused asked her to touch her brother’s penis so that he could “videotape or take pictures” of the two of them. She said she went into her brother’s room at the Donald residence and touched his penis two to five times. She did not see the accused take any pictures of her touching her brother. In her testimony, she said that her brother had touched her vagina with his finger but she later changed her evidence to him not having touched her vagina.

[25] The complainant's mother told a different version of who the accused counselled to do the sexual touching. She said that the complainant told her in the December 2015 disclosure that the accused had "push[ed] [her brother]" to "touch" the complainant but her brother had done "nothing".

[26] In his testimony, the accused denied sexually touching the complainant. He also denied showing the complainant child pornography, directing her to sexually touch her brother, taking a nude picture of her or threatening her that her mother would go to jail.

[27] The accused said that, while he does have two children in Guatemala, he denied ever sexually touching them or telling the complainant he had.

[28] In direct examination, the accused said that he did not "recall" ever being alone with the complainant at the Redwood residence. He said it was "possible" there may have been a time when he and the complainant were together somewhere in the house. In cross-examination, his evidence was that it was "possible" that just he and the complainant were alone together at the Redwood residence. He admitted he was alone with the complainant at the Donald residence. He denied that he was ever alone with the complainant at the Spence residence. He said the complainant came to the Spence residence to visit "[t]hree times, maybe" with her mother and her brother.

[29] The accused admitted to owning a laptop computer but without any child pornography on it. He denied ever giving the complainant candy but said he did give her pet hamsters for her birthday.

[30] The accused said his relationship with the complainant was a good one. They were "friends"; she treated him like "a father". He said she never manifested any anger or hostility towards him and actually intervened on his behalf when her mother was emotionally or physically abusive towards him.

[31] In his closing argument, counsel for the accused said that the accused's evidence denying he ever sexually touched the complainant was "clear, straightforward . . . sincere . . . [and] was unassailed in cross-examination." He underlined to the trial judge that, in contrast, there were problems with the complainant's evidence, including incremental disclosure with additional details coming after some time; lack of corroborative evidence; a suggested "false allegation" against her brother; and a new disclosure on the witness stand that the accused took a "nude photograph of her."

[32] Also, counsel for the accused questioned the degree to which the accused actually had the opportunity to be alone with the complainant at all three residences. While conceding the accused was alone with the complainant at the Donald residence, he said the evidence was not as clear at the other two residences.

[33] Counsel for the accused argued that there was "no reason" why the trial judge should disbelieve the accused's evidence that he "couldn't recall a time" he was alone with the complainant at the Redwood residence although he "can't deny that either". Counsel also brought up the fact that, while the complainant's mother testified that the accused had been alone with the complainant at the Redwood residence when she was working, she had given

a prior inconsistent statement to police that the accused was never alone with the complainant at the Redwood residence.

[34] In terms of the accused having the opportunity to be alone with the complainant at the Spence residence, counsel pointed to the failure of the Crown to call witnesses, such as Hector Lemos and his girlfriend, to corroborate the complainant's evidence.

[35] In his closing submission, Crown counsel attacked the accused's testimony on some oddities that were peripheral to the live issue but concentrated his argument on the fact that the complainant was a vulnerable young child, with no motive to falsify such a serious allegation, and she had provided a detailed account of the sexual touching that occurred at the three residences. He said she "held up very well" during a lengthy cross-examination. He submitted that there was nothing "particularly contradictory" in her evidence; he argued she was "pretty clear." He stated that corroborative evidence was not legally required for a conviction and some of the missing evidence counsel for the accused mentioned was speculative and would have had a "negligible at best" effect on the case.

[36] Crown counsel described the accused's evidence about his opportunity to be alone with the complainant as "a little strange, a little weird" because of it changing by location. In particular, he called the accused's evidence on opportunity at the Redwood residence a "little dance". He said the accused's inconsistent evidence about the opportunity to be alone with the complainant at the Redwood residence was "important" to assessing the accused's credibility. Ultimately, Crown counsel argued that the trial judge

should not conduct his *W(D)* analysis in a "vacuum" and should assess the accused's evidence in the "context" of the other evidence.

Ground One—Trial Judge's Credibility Analysis

Background

Trial Judge's Reasons (2018 MBQB 89)

[37] The trial judge devoted over six pages of his reasons to summarising the evidence. He then self-instructed himself on the framework discussed in *W(D)*, mentioned that "the task of the trial judge is not simply to choose one version of events over another" (at para 33) and later said that "the order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration" (at para 36). He also self-instructed himself on a trial judge's duty to give reasons in assessing credibility (citing *R v REM*, 2008 SCC 51) and the use which could be made of the complainant's prior consistent statements to her mother (citing *R v Cain*, 2018 SCC 20).

[38] The trial judge's credibility analysis encompassed approximately six pages of his reasons. During this part of his reasons, he identified that the "central [allegation]" was whether the accused sexually touched the complainant at the three residences (at para 43). He described the complainant as a polite, honest, intelligent but relatively unsophisticated child without any motivation to lie who was "consistent and clear" that the accused sexually touched her at each of the three residences (at para 43). He noted that there were some inconsistencies in her evidence but he attributed them to either the passage of time (see para 44) or involving "insignificant peripheral matters"

(at para 46). He said these shortcomings with her evidence did "not detract from [her] overall credibility" (at para 46). He disbelieved the accused's bare denials of sexually touching the complainant. In reference to the first step of the *W(D)* analysis, he said, "I find that the very credible evidence of the complainant, while admittedly containing some peripheral inconsistencies, is believable and provides a context which leads me to the conclusion that the accused's denial of these allegations is not believable" (at para 53).

[39] The trial judge then referred to the second step of *W(D)* and concluded that the accused's evidence did not raise a reasonable doubt "on its own, or even when considered in the context of all of the evidence provided at trial" (at para 54). He repeated his view that the discrepancies in the complainant's evidence did not compromise the "central integrity" of her evidence that the accused repeatedly sexually touched her (at para 54).

[40] Referring to the third step of *W(D)*, the trial judge explained that he was satisfied beyond a reasonable doubt "on the basis of the evidence which [he] heard" that the accused touched the complainant with his fingers, his penis and his tongue for a sexual purpose at the three residences when the complainant was between six and 10 years of age (at para 55).

The Submissions

[41] The accused accepts that the trial judge understood the requirements of *W(D)* but says: (1) his reasons were insufficient because he gave no express explanation for why the accused's evidence was rejected and did not properly consider the significant differences in the complainant's evidence arising from her incremental disclosure; (2) he decided the case simply on the basis of a credibility contest; and (3) he misapprehended the evidence.

[42] The Crown responds by arguing that, when the trial judge's reasons are read as a whole and in context, they meet the standard of adequacy. It says the reasons respond to the evidence and the positions of the parties, and explain why the accused was convicted. The Crown also submits that the trial judge did not simply prefer one narrative over another and did not misapprehend the evidence. It makes the point that the accused's submissions are nothing more than a thinly disguised attempt to invite this Court to re-try the case.

[43] I have had the advantage of reading my colleague, Steel JA's, reasons for decision in draft. I have considered her reasons for concluding that the trial judge erred in his credibility assessment for the reasons raised by the accused and also for an additional reason that she has raised, namely, that the trial judge improperly relied on demeanour evidence. Despite the cogency of her reasons, I respectfully disagree with her conclusions.

Discussion

Claim of Insufficient Reasons

The Law

[44] The law as to the sufficiency of reasons can be divided into the nature of the duty to give reasons and the standard of review on a claim of insufficient reasons.

(i) Nature of the Duty to Give Reasons

[45] What Sharpe JA has called the "discipline of reasons" is important to ensure the necessary transparency and accountability for the proper

administration of justice (Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 134; see also *R v Sheppard*, 2002 SCC 26 at paras 15-23).

[46] Adequate reasons explain *why* a decision was reached as opposed to *how* it was reached. The expectation is that the trial judge's reasons provide a "logical connection between the 'what' — the verdict — and the 'why' — the basis for the verdict" (*REM* at para 17). This duty should be given a "functional and purposeful interpretation" (*Sheppard* at para 53) considering the given context. This means that the exigencies of each case dictate the necessary content of reasons (*ibid* at para 24; and *R v Dinardo*, 2008 SCC 24 at para 24); no one size fits all. The duty to give reasons is met where the basis for a decision, whether it be stated explicitly or is apparent from the circumstances, satisfies the purposes for the reasons—to explain the decision to the parties, to provide public accountability and to permit meaningful appellate review (see *Sheppard* at para 55; and *REM* at para 11).

[47] With the benefit of hindsight, it is often not difficult to say that reasons could have been more detailed and clearer. However, the duty to give reasons does not require a trial judge to meet "some abstract standard of perfection" (*Sheppard* at para 55). Rather, the trial judge must articulate an intelligible pathway to the result reached given the context of the specific case (*ibid* at para 52; *R v Braich*, 2002 SCC 27 at para 42; and *REM* at paras 17, 35). There is no obligation to discuss every fact, issue or thought the trial judge has provided that the reasons respond to the substance of the live issues and the parties' key arguments (see *Dinardo* at paras 30-31; *R v Walker*, 2008 SCC 34 at para 20; *REM* at para 64; *R v Vuradin*, 2013 SCC 38 at para 21; and *R v Gulliver*, 2017 ABCA 223 at para 15, aff'd 2018 SCC 24). As was

explained in *REM,* a clear "path" must be discernable from the reasons when read in context; it is unnecessary, however, for the reasons to describe each "landmark" along the path (at para 24).

(ii) Standard of Review on a Claim of Insufficient Reasons

[48] Insufficient reasons are not a "free-standing right of appeal" entitling appellate intervention (*Sheppard* at para 53). Finding an error of law on the basis of insufficient reasons is a two-stage analysis: "(1) are the reasons inadequate; (2) if so, do they prevent appellate review" (*R v Gagnon*, 2006 SCC 17 at para 13).

[49] The analysis requires an appellate court to take a "functional approach" (*Vuradin* at para 10). The appellate court should start its analysis from a "stance of deference toward the trial judge's perceptions of the facts" (*REM* at para 54). The trial judge's reasons should be read "as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered" (*ibid* at para 16).

[50] Intervention is not justified simply because the appellate court believes that the trial judge has done a poor job in expressing himself or herself (see *Sheppard* at para 26; and *FH v McDougall,* 2008 SCC 53 at para 99). Language is often open to "multiple interpretations or characterizations" (*Gagnon* at para 19). Therefore, the appellate court should not dissect reasons minutely and must be cautious not to seize on ambiguous language (*ibid*; see also *R v CLY*, 2008 SCC 2 at para 11). The task of the appellate court is to assess "the overall, common sense meaning, not to parse the individual linguistic components" (*Gagnon* at para 19).

[51] If the reasons are objectively inadequate, they may nevertheless not be inscrutable for the purpose of appellate review if the "basis of the trial judge's conclusion is apparent from the record, even without being articulated" (*Sheppard* at para 55; see also *Dinardo* at para 32).

[52] In deciding whether reasons are "sufficiently amenable to appellate review", the appellate court should not confuse the need for sufficient reasons with the examination of the sufficiency of the evidence which raises the separate issue of the reasonableness of the verdict (*Gagnon* at para 16).

[53] The net effect of these legal principles is that the role of the appellate court in deciding a claim of insufficient reasons, while important, is also limited in its scope. The appellate court cannot substitute its own view of the evidence, and its significance, for that of the trial judge. Findings of fact, including findings relating to credibility, cannot be disturbed absent demonstration of palpable and overriding error (*ibid* at para 20; see also *R v Jovel*, 2019 MBCA 116 at paras 26-30). The appellate court cannot "mask" its disagreement with a trial judge by concluding the reasons provided were insufficient (*Braich* at para 41; see also *R v HSB*, 2008 SCC 52 at para 15). Equally true, the appellate court cannot reassess aspects of the case unresolved by the trial judge where the basis for his or her conclusion is not apparent from the reasons or the record (see *Dinardo* at para 32; and *R v Black*, 2017 ONCA 599 at para 40, rev'd 2018 SCC 10 at para 3).

[54] Given the deferential standard of review on credibility findings, where the outcome at trial turned largely on determinations of credibility, "rarely" will alleged deficiencies in reasons merit appellate intervention (*Dinardo* at para 26; and *Vuradin* at para 11). However, while assessing

credibility is a "difficult and delicate matter that does not always lend itself to precise and complete verbalization", an accused is entitled to know why his denial of an allegation does not raise a reasonable doubt (*REM* at para 49; see also *Dinardo* at para 26; and *Gagnon* at paras 20-21).

[55] In a credibility case such as this, the focus for the appellate court is whether the trial judge failed to "sufficiently articulate how credibility concerns were resolved" and, if so, whether the error merits appellate intervention (*Dinardo* at para 26). In *Vuradin*, a case involving an allegation of the sexual assault of a child where, like here, the verdict turned on a credibility assessment of a complainant and an accused, Karakatsanis J framed her discussion of the sufficiency of the reasons by asking this question: "Do the reasons, read in context, show why the judge decided as he did on the counts relating to the complainant" (at para 15; see also *Dinardo* at paras 25-29; and *REM* at paras 52-57).

Application of the Law

[56] The accused says his denial of ever sexually touching the complainant was plausible as there was no readily obvious defect with his narrative of events. He argues that the trial judge's reasons were conclusory because he failed to give "specific reasons" as to why the accused's evidence did not raise a reasonable doubt. I reject this submission.

[57] The record in this case is extensive in relation to the only live issue. In such a situation, brief reasons can be acceptable to permit appellate review (see *REM* at para 29).

[58] Given the context of the accused's evidence being a bare denial that any sexual touching occurred, there was little the trial judge could have said as to why the accused was disbelieved (see *R v FHO*, 2014 ABCA 30 at para 5). In *REM* (see para 66) and *Vuradin* (see para 13), the Supreme Court of Canada explained that the rejection of an accused's plausible denial of a charge does not make a trial judge's reasons insufficient where the trial judge's reasons demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence (see also *R v Menow*, 2013 MBCA 72 at para 60). That is the situation here. When the trial judge's reasons are read in context, it is clear that the path he took in rejecting the accused's evidence and finding that the accused had sexually touched the complainant beyond a reasonable doubt was based on a considered and reasoned acceptance of the complainant's evidence despite certain frailties in it.

[59] I would address my colleague's concern that the trial judge's reasons were conclusory and her rhetorical question, "But what was it in the evidence that satisfied the trial judge that the events described occurred as the complainant described them" (at para 156), in the following manner.

[60] The issue here is sufficiency of the trial judge's reasons, not sufficiency of the evidence (see *Gagnon* at para 19). It is not a ground of appeal that, based on the evidence put forward in the trial, the verdict was unreasonable (see section 686(1)(a)(i) of the *Code*). As Hamilton JA remarked in similar circumstances in *R v NHP*, 2013 MBCA 30, "this appeal is not about the judge's credibility findings. Rather, it is about whether his reasons adequately explained his credibility findings with respect to the accused" (at para 38).

[61] A conclusion without explanation gives rise to the concern that the result was reached without all of the relevant considerations being considered. In my judgment, that is not what occurred here. When the trial judge's reasons are read in context and mindful of the reality that inconsistencies in a child's evidence may be of less importance in assessing credibility than in the case of a reasonable adult (see *R v B (G)*, [1990] 2 SCR 30 at 54-55; and *R v W (R)*, [1992] 2 SCR 122 at 132-34), there are number of comments he made explaining his reasoning for his credibility findings:

i) The trial judge reviewed the complainant's evidence about the sexual touching by the accused in detail (see paras 12-17, 19-22). He found her to be honest (see para 48) and straightforward (see para 46) in her narrative of the accused sexually touching her despite her relative lack of sophistication (see para 49). She had no reason to be hostile to the accused based on the accused's evidence (see paras 48, 50). She did not embellish or make up facts about the accused sexually touching her despite incremental disclosure (see para 45; see also *R v AJS*, 2019 MBCA 93 at para 22) .

ii) He was satisfied that the complainant gave a clear account of the sexual touching by the accused and had a good recollection of what happened in each of the three residences (see para 46). He also was of the view that, despite her young age and relative lack of sophistication, she did not become confused in her narrative despite the accused's previous counsel blurring the three locations in his questions (see para 49).

iii) He found the frailties in her evidence, whether it be a discrepancy (such as her brother sexually touching her) or an incremental disclosure, were not of such significance to detract from her overall credibility on the live issue (see paras 44-47).

[62] The disagreement here turns on the appropriate standard as to what are adequate reasons. With respect, my colleague is applying a standard higher than the case law requires given that the analysis is a functional one. The trial judge was not required to deliver "watch me think" reasons (*REM* at para 17).

[63] The trial judge's reasons confirm that he "grappled with the substance of the live issues on the trial" (*REM* at para 64) in his application of the *W(D)* framework. He said that the complainant was "very credible" (at para 53) on the central allegation despite the alleged frailties with her evidence. His assessment of her credibility satisfied him not just that he could reject the accused's evidence, but also that the Crown had proven beyond a reasonable doubt that the accused had sexually touched the complainant. That explanation tells the accused why he was convicted, provides public accountability and permits effective appellate review. Based on *REM* and *Vuradin*, the trial judge's reasons articulate a discernable pathway to the verdicts reached.

[64] The accused's other submission is about how the trial judge dealt with incremental disclosure. He says that the trial judge ignored "significant changes" in the complainant's evidence relating to the additional location (the Spence residence); what he calls the "bribery" (i.e., gifts of candy and hamsters); sexual touching in relation to her brother; showing the complainant child pornography; and taking a nude photograph. My colleague concludes

that these additional details went to the "core element of the offences" (at para 164) and says that the complainant's delay in disclosing additional facts "should" have been addressed by the trial judge in more than a conclusory fashion in his reasons when he assessed the complainant's credibility (at para 165). I have come to a contrary position than my colleague and would not accede to the accused's argument.

[65] Delayed or incremental disclosure is a common occurrence in sexual assault cases, particularly those involving children. Trimble J put it well when he stated in *R v MH*, 2018 ONSC 7366 (at para 74):

> Some victims of sexual assault will report immediately, some later; some incrementally, and some not at all. Some will tell the truth, initially, and some later. Their reasons for not reporting, delayed reporting, or not being truthful when initially reporting are as many and varied as the victims, but include fear, guilt, embarrassment, or lack of understanding and knowledge. . . .

[66] In *R v DD*, 2000 SCC 43, the Supreme Court of Canada explained that there is "no inviolable rule" (at para 65) as to how different people react to sexual trauma. A mere delay in disclosure is not enough by itself to give rise to a negative inference against the credibility of a complainant. Questions regarding the timing of disclosure of sexual abuse are individual ones which are unique to each complainant (see *R v CAM*, 2017 MBCA 70 at para 53; and *R v ARJD*, 2018 SCC 6 at para 2).

[67] In *R v DP*, 2017 ONCA 263, leave to appeal to SCC refused, 37658 (23 November 2017), the complainant failed to disclose all of the historical sexual assaults committed against him by his step-father in his first statement to police. The trial judge dealt with the incremental disclosure by stating (at

para 30): "The decision to disclose is a difficult one that can be very painful for victims. It cannot be surprising that it would take [the complainant] more than one occasion to shed a burden that had been weighing on him for years."

[68] Applying *DD*, the Court found no error in the trial judge refusing to negatively assess the complainant's credibility because of the "delayed and bifurcated disclosure" (at para 31). It said that the principles in *DD* apply equally to the situation of incremental disclosure. Accordingly, the impact of incremental disclosure will depend on the circumstances of the case. There is no presumptive negative consequence to a complainant's credibility due to him or her making incremental disclosure of sexual abuse.

[69] The circumstances of this case speak for themselves. The complainant said she had been molested by someone she trusted as a father figure and had a positive relationship with. It took her several years before she was able to tell her mother about the sexual touching which she described made her feel "stressed out." The accused had threatened her that, if she told anyone, her mother would go to jail and she would be alone. She then, at age 10, had to describe what happened in the first video statement to a stranger, a male police officer. At age 11, she testified at the preliminary inquiry in a courtroom where she had to relive the events during cross-examination. The complainant's mother testified that the second disclosure occurred once the complainant learned she had to testify again in court and she began to cry and told her mother that she had "more details" to tell her. As part of the second disclosure, the complainant, then 12, revealed the difficult fact that she had also engaged in sexual touching with her brother. Unlike in many cases involving allegations of child sexual abuse, there was no claim that the complainant was prone to tailoring her evidence based on

suggestions from others (see, for example, *R v Slatter*, 2019 ONCA 807 at paras 61-62).

[70] The transcript makes clear that the issue of the impact of incremental disclosure on the credibility of the complainant was fully argued in closing submissions. According to the principles set out in *DD* and *DP*, the trial judge had to decide how little or how much the incremental disclosure affected the complainant's credibility.

[71] The trial judge was alive to the fact there was incremental disclosure (see paras 18, 43, 45); however, he found that, despite incremental disclosure, "[the complainant's] testimony was consistent and clear in the central allegations" (at para 43) relating to sexual touching at the three residences. As earlier explained, during his credibility assessment, the trial judge properly took a common-sense approach, taking into consideration the complainant's attributes as a child, such as her being relatively unsophisticated (see *R v Horton*, 1999 BCCA 150 at para 21; and *R v Desjarlais*, 2014 MBQB 15 at para 22, aff'd 2016 MBCA 69 at paras 34-37).

[72] In reviewing the trial judge's finding about the effect of incremental disclosure, I would note that the nature of the sexual touching at the Spence residence did not really differ from the other two residences except that there were others at the Spence residence when the sexual touching occurred and the accused locked the door to his bedroom. I am also mindful that the complainant's particulars of the sexual touching done by the accused were not bizarre and did not consist of contradictory evidence as to how he touched her which may have warranted more discussion by the trial judge (see *R v R (D)*, [1996] 2 SCR 291 at paras 53-55; *Sheppard* at para 28; and *REM* at para 44).

[73] Although the allegations were serious, this was a simple case. The exigencies of it did not require lengthy reasons. As was explained in *REM*, the trial judge did not have to detail his findings on controverted facts "so long as the findings linking the evidence to the verdict can be logically discerned" (at para 20). If a trial judge's reasons, when read in context, "show that the [trial] judge has seized the substance of the matter", he or she is not required to conduct a detailed recitation of the evidence or the law (*ibid* at para 43; see also para 64).

[74] The trial judge was also not obligated to demonstrate in extensive reasons how long and hard he had thought about the effect the additional details that came out incrementally had on the complainant's credibility (see *Braich* at paras 37-39). It was not an error by him to fail to draw a negative inference with the complainant's evidence simply because of incremental disclosure. He had the great advantage over this Court of witnessing all of the sights and sounds during the drama of the trial first-hand, none of which can be properly appreciated reading the text of a lifeless transcript. I see no principled reason why deference should not be given to his perception of the facts and the insignificance of incremental disclosure to the complainant's credibility (see *REM* at para 54).

[75] The additional details regarding sexual touching between the complainant and her brother raise a further point, namely, that sufficient reasons require that *material* inconsistencies be addressed—not *all* inconsistencies. In *Sheppard*, it was noted that reasons are of "particular importance" to "resolve confused and contradictory evidence on a <u>key issue</u>" (at para 55) (emphasis added).

[76] In *HSB*, McLachlin CJC explained that it is important, when conducting a functional analysis of reasons, to be mindful of whether a frailty in the evidence relates to something that is "core" or "peripheral" to the live issue(s) in the case (at para 14).

[77] Important to bear in mind is that the allegations set out in the indictment did not require proof of the accused inviting sexual touching between the complainant and her brother. That is a separate criminal offence (see section 152 of the *Code*) for which the accused was not on trial.

[78] Here, the trial judge was attuned to the fact that some of the complainant's evidence had nothing to do with the accused sexually touching her and went to conduct not covered by the indictment. He said that the complainant's comments about sexual activity with her brother did not "go to establish guilt" or "raise a reasonable doubt" as to the accused's guilt "<u>of the charges set out in the indictment</u>" (at para 47) (emphasis added).

[79] It is apparent from these comments that he was of the view that, although there was delayed disclosure by the complainant about sexual touching involving her brother and she gave contradictory evidence as to whether her brother sexually touched her, that was a matter of little relevance and materiality to the accused's charges. He said her evidence about sexual touching with her brother did not "detract" from her credibility as to whether the accused sexually touched her (at para 47). He was entitled to decide how much weight to give to the complainant's evidence despite the difficulties with it (see *R v WH*, 2013 SCC 22 at para 32).

[80] The one final comment I would make about the evidence of sexual touching between the complainant and her brother is the effect of

section 276(1) of the *Code*. Section 276(1) absolutely barred evidence of sexual activity involving the complainant and her brother being used to support an inference that she was "less worthy of belief" on the charges the accused faced (*R v Barton*, 2019 SCC 33 at para 60; and *R v Darrach*, 2000 SCC 46 at para 2).

[81] As I have pointed out, counsel for the accused, in his closing submission, attempted to use the purported false allegation of the complainant engaging in sexual touching with her brother to discredit her credibility generally. This approach is what Professor Craig has described as an "end run around the protections created under section 276" (Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Can Bar Rev 45 at para 67 (QL)). Put simply, the trial judge was asked to use an irrelevant subject to the charges the accused faced for a legally forbidden purpose, thus leading to the potential of the trial process being distorted. Fortunately, the trial judge did not follow that path.

[82] Ideally, the admissibility of the extrinsic sexual activity of the complainant with her brother should have been addressed when the second video statement was tendered by the Crown (see *Barton* at para 80; and *R v RV*, 2019 SCC 41 at para 78). Cross-examination of the complainant on her sexual activity with her brother also should not have proceeded without strict adherence to the requirements of section 276 to avoid the "end run" problem that occurred in closing submissions.

[83] It would have been an error for the trial judge to have doubts about the credibility of the complainant on the charges the accused faced simply

because of how she recounted her extrinsic sexual activity with her brother. The fact that the trial judge said little about sexual touching between the complainant and her brother does not make his reasons inadequate. What he did say on the point makes crystal clear that he was of the view that this evidence neither helped, nor hurt, the accused on the charges he faced.

[84] To assess the adequacy of the trial judge's reasons, it is instructive to look closely at the cases of *Dinardo* and *Vuradin* in comparison.

[85] In *Dinardo*, the allegation was that a taxi driver sexually touched a mildly mentally challenged complainant on one occasion while she was a passenger in his cab. The complainant tended to lie and be manipulative, and gave confusing and contradictory evidence about inventing the allegation the accused was charged with and whether she knew what it meant to invent a story. The trial judge said the accused "testified well" (at para 16) but rejected his evidence. He said that the complainant did not contradict herself on the "important facts, only on certain details that the Court does not consider important enough for the contradictions to affect her credibility" (at para 17).

[86] The Supreme Court of Canada agreed with the dissenting justice from the Québec Court of Appeal that the trial judge's reasons were insufficient because they did not respond to the live issue in the case. Charron J noted that the complainant's testimony "wavered on *the* central issue at trial: that is, whether [the accused] committed the acts for which he was charged, or whether the story was invented" (at para 29). She said this "context" made it "incumbent upon the trial judge to explain, even in succinct terms, how he resolved these difficulties to reach a verdict beyond a reasonable doubt" (*ibid*).

[87] In *Vuradin*, the accused was charged with sexually assaulting an 11-year-old child, C.A., while driving her on multiple occasions. The trial judge's reasons were "sparse" and did not directly address the accused's denial of sexual touching (at para 4).

[88] The Supreme Court of Canada agreed with the majority of the Alberta Court of Appeal that the trial judge's reasons, while less than ideal, were, on a functional analysis, sufficient. The trial judge found C.A.'s evidence credible because, as he explained, he found her narrative of the assaults in her video statement "compelling" (at para 5). He recognised the "problems in [C.A.'s] evidence" in his reasons and dealt with them "briefly," finding them "inconsequential to his conclusion" (at para 17). Finally, he considered the accused's denial but rejected it because he accepted C.A.'s evidence where it conflicted with the accused's evidence (see paras 18-19).

[89] I agree with my colleague that, *had* the accused been charged with invitation to sexual touching, the inconsistencies in the complainant's evidence about what happened between her and her brother, like in *Dinardo*, would have made it incumbent on the trial judge to explain how he resolved problems with the complainant's evidence regarding her brother to reach his verdict. Ultimately, akin to what occurred in *Vuradin*, the trial judge was alive to this problem with the complainant's evidence but, as has been noted, he was entitled to summarily conclude that the frailty did not materially impact her credibility on the live issue (see *WH* at para 32).

[90] In summary, the trial judge's reasons were sufficiently articulate in explaining how the credibility concerns were resolved on the only live issue in the case. His reasons were not "generic" (*Sheppard* at para 32), nor did he

display a "laconic style" in them (*R v Vuradin*, 2011 ABCA 280 at para 95). He fairly summarised the evidence of each of the three witnesses; properly instructed himself on the applicable law and then grappled with the only live issue; and gave an intelligible pathway to the result he reached. That included him considering frailties with the complainant's evidence but rejecting them as insignificant.

[91] In my view, his credibility assessment was neither inadequate nor inscrutable for the purposes of review. It is not the role of this Court to re-weigh the significance of difficulties with the complainant's evidence and come to a different conclusion on credibility. When the trial judge's reasons are read as a whole, in the context of the evidence and arguments and with appreciation of the purposes or functions for which they were delivered, they show the accused, the public and this Court why he decided as he did on the counts of sexual assault and sexual interference. It has not been established that this is one of the rare cases, like *Dinardo*, where an error of law has occurred because the trial judge's reasons were insufficient.

Claim of the Credibility Contest Error

The Law

[92] The purpose of the framework discussed in *W(D)* is "to reinforce the point that a criminal prosecution is not a simple credibility contest, to avoid shifting the burden of proof to the accused and to remind the trier of fact that the standard of proof is a high one — beyond a reasonable doubt" (Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) at 236). As was explained in *Vuradin*, "The paramount question in a criminal case is whether,

on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused" (at para 21; see also *CLY* at para 6).

[93] The credibility contest error, also called the "either/or approach," occurs when a conviction is based simply on the preference of a competing narrative of events to that given by an accused without considering if a reasonable doubt as to guilt remains (*R v S (WD)*, [1994] 3 SCR 521 at 533-35; see also *CLY* at paras 6-8; and *R v JHS*, 2008 SCC 30 at para 9). As Binnie J explained (*ibid*), "The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt" (at para 13).

[94] In *CLY*, Abella J made a number of observations for consideration regarding claims of a credibility contest error:

i) The steps discussed in *W(D)* need not be "religiously followed or articulated." What is important "is whether the correct burden and standard of proof were applied, not what words were used in applying them" (at para 7).

ii) A trial judge is presumed to know the law and the *W(D)* framework even if it is not stated in his or her reasons (see paras 9-10).

iii) Ambiguities in the reasons of a trial judge as to the application of the correct burden and standard of proof should be resolved on the basis of presumed knowledge of the law as opposed to erroneous application of it (see paras 11-12).

[95] Finally, there is nothing improper with a trial judge comparing the evidence of an accused with that of a complainant in assessing the credibility of an accused. A problem only arises where that is all the trial judge does to convict an accused as that ignores the requirement to apply the burden and standard of proof beyond a reasonable doubt to the whole of the evidence (see *R v C*, 2004 NSCA 135 at paras 24-26; and *R v Hull*, 2006 CarswellOnt 4786 at para 5 (CA)).

Application of the Law

[96] It is evident from the trial judge's reasons that he did not decide this case simply by choosing a version of events as the accused argues.

[97] This is not a situation where, although the trial judge properly instructed himself on *W(D)*, he then ignored that framework by focussing simply on the question of whose evidence he "preferred" (see, for example, *R v T (S)*, 2015 MBCA 36 at para 3). In my view, there is nothing from the trial judge's reasons confirming that he did not respect the substance of the *W(D)* framework; in fact, his reasons reflect that he followed his self-instruction (see *Dinardo* at para 23; and *R v Szczerbaniwicz*, 2010 SCC 15 at para 14).

[98] The concern my colleague raises is that, while it was permissible for the trial judge to consider the complainant's motives when assessing her credibility, the trial judge "shift[ed] the burden of proof" (at para 168) onto the accused to show why she was lying about the accused sexually touching her. I do not agree with that characterisation of what the trial judge did on reading his reasons in context.

[99] In his closing argument, the accused's counsel conceded that the defence could not "point to [a] motive" for the complainant to make a false complaint against the accused but warned the trial judge about hidden motives because false complaints do happen. In his closing submissions, Crown counsel made clear to the trial judge that the "defence doesn't have to prove motive to lie" on the part of the complainant. Accordingly, there is nothing in the record to suggest that the trial judge was misled on the law regarding motive and credibility that he is presumed to know.

[100] The trial judge discussed the complainant's absence of motive to fabricate as one of many factors he considered in assessing her credibility which he was entitled to do (see para 48; *R v P(HP)* (1996), 112 CCC (3d) 140 at 150 (Man CA); *R v Batte* (2000), 145 CCC (3d) 449 at para 120 (Ont CA); and *R v Storheim (SKW)*, 2015 MBCA 14 at para 38). He did not place "undue emphasis" on motive for believing the complainant when his reasons are read in their totality (*P(HP)* at p 150; see also *R v Jackson*, 1995 CarswellOnt 3388 at para 5 (CA)). He made only passing reference to her motive. Finally, nothing in his reasons suggests that he was of the view the accused had an obligation to prove a motive to fabricate (see *Batte* at para 121; *R v DDS*, 2006 NSCA 34 at para 64; *R v LL*, 2009 ONCA 413 at para 53; *Storheim* at para 38; and *R v Houle*, 2019 MBCA 17 at para 5).

Claim of Misapprehension of the Evidence

The Law

[101] In *R v Whiteway (BDT) et al*, 2015 MBCA 24, the concept of a misapprehension of evidence was discussed in the following manner (at para 32):

> A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence (*R. v. Morrissey (R.J.)* (1995), 80 O.A.C. 161 at para. 83; and *R. v. Sinclair*, 2011 SCC 40 at para. 13, [2011] 3 S.C.R. 3). A misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge (*R. v. Lee*, 2010 SCC 52 at para. 4, [2010] 3 S.C.R. 99). It is insufficient that the judge may have misapprehended the evidence; the error must be readily obvious (*Sinclair* at para. 53).

[102] In *Jovel*, the standard of review for an appellate court in relation to an allegation of misapprehension of the evidence was summarised as follows (at para 31):

> . . . There are two aspects to a successful claim of a misapprehension of the evidence. The misapprehension must be a "readily obvious" error that goes to the substance of the material parts of the evidence rather than to the detail (*R v Sinclair*, 2011 SCC 40 at para 53). If that first hurdle is met, it must be further demonstrated that the error played an essential part in the reasoning process resulting in the conviction, which means that striking the error "would leave the trial judge's reasoning on which the conviction is based on unsteady ground" (*Sinclair* at para 56; see also *R v Lohrer*, 2004 SCC 80 at paras 1, 4, 9).

[103] In adjudicating a claim of a misapprehension of the evidence, the appellate court must take care to not usurp the role of the trial court—particularly where the claim relates to interpretation of evidence based on a credibility assessment (*ibid* at para 35).

Application of the Law

[104] As my colleague notes in her reasons, the focus of the accused's claim of a misapprehension of evidence is the trial judge's comments about

the accused's opportunity to be alone with the complainant. In his reasons, he said (at para 52):

> The cross-examination of the complainant by the accused's counsel and the testimony of the accused sought to establish that there was simply no opportunity for this many, if any, incidents of sexual activity to have taken place between the complainant and the accused. My review of the evidence is that given the irregular hours that the mother and the accused worked over the years during which the accused was in this relationship with the complainant's mother, there were more than enough opportunities for the accused and the complainant to have been alone together without being concerned that the mother or some other family member would have disturbed the two together.

[105] I read the significance of this passage differently than my colleague.

[106] The record is clear that the accused's opportunity to be alone with the complainant was a fact in dispute throughout the trial.

[107] The complainant's mother testified that, when the complainant was in grade two and was living at the Redwood residence, "sometimes" the accused would drive her to school by himself or pick her up at daycare because the mother was working or running errands. In contrast, the accused said in his evidence that that never happened.

[108] As has been highlighted, the accused gave two quite different answers to whether he was ever alone with the complainant at the Redwood residence. To repeat, on direct examination, he said he did not "recall" being alone with her at the Redwood residence; on cross-examination, he said it was "possible" that the two were alone together at the Redwood residence. This uncertainty in his evidence was commented on by both counsel during their closing submissions in discussing the credibility of the accused.

[109] The complainant's mother further testified that, when the complainant lived at the Donald residence, sometimes the accused would drive the complainant to school by himself. Again, the accused said the opposite. He testified that, while living at the Donald residence, he never drove the complainant to school by himself and, the only time he picked her up from school, the complainant's mother was with him.

[110] As discussed earlier, the accused denied ever being alone with the complainant at the Spence residence despite her evidence to the contrary.

[111] I regret that I cannot agree with my colleague's conclusion that the trial judge misapprehended the evidence because, as she states, "the accused never denied that he was alone with the complainant at various times and had the opportunity" (at para 170). His opportunity to be alone with the complainant was very much in dispute in his evidence in relation to two of the three residences, and even with respect to the Donald residence to some degree where, although he admitted being alone with the complainant, he denied some opportunities in relation to being alone with her before she went to school on some days. In my view, the trial judge's interpretation of the evidence was reasonably open to him on the record. The accused has not demonstrated the first requirement of a misapprehension of the evidence—a readily obvious error that goes to the substance of the material parts of the evidence rather than a detail (see *Sinclair* at para 53).

New Issue—Reliance on Demeanour Evidence

The Law

[112] Demeanour evidence is a factor that may be taken into consideration in the assessment of credibility (see *White v The King*, [1947] SCR 268 at 272; and *R v NS*, 2012 SCC 72 at para 25). The ability to observe the demeanour of witnesses is part of the "advantage" a trial judge or jury enjoys over the Court of Appeal in the assessment of credibility (*R v François*, [1994] 2 SCR 827 at 837). However, it is well recognised that there are "hallmark flaws" to the reliability of demeanour evidence for reasons such as its evaluation relies on a subjective impression and interpretation of behaviour; culture and other background attributes of the witness (or trier of fact) may cause misinterpretation; stereotypical attitudes may prejudice its use; and the stress of giving evidence in the intimidating and unusual confines of a courtroom may produce behaviour that may wrongly suggest untruthfulness (*R v White*, 2011 SCC 13 at para 75; see also *R v SHP-P*, 2003 NSCA 53 at para 30; and *R v Rhayel*, 2015 ONCA 377 at para 85).

[113] Accordingly, in assessing credibility, caution should be exercised in reliance on demeanour evidence; undue weight should not be placed on it. It is an error of law "when a trial judge's assessment of the witness's demeanour becomes the sole or dominant basis for determining credibility, and where the trial judge appears to be unaware of the risks associated with over-reliance on demeanour" (*R v Bourgeois*, 2017 ABCA 32 at para 21, aff'd 2017 SCC 49).

Application of the Law

[114] My colleague finds an error on the basis that the trial judge "relied heavily on demeanor evidence" (at para 157).

[115] I have reservations as to whether the issue of undue reliance on demeanour evidence reasonably stems from the issues raised by the parties (see *R v Mian*, 2014 SCC 54 at paras 30-35). It was not referred to in the written or oral submissions of counsel or the questions of the Court during the hearing and I do not see it as part of the backdrop of the appeal. It is a discrete error separate and apart from insufficient reasons, the credibility contest error or misapprehension of the evidence.

[116] Leaving those process concerns to the side, I am not convinced demeanour evidence was the sole or dominant basis for how the trial judge assessed credibility. Demeanour evidence was appropriately referred to by both counsel in their closing submissions but neither placed much significance on it. How a child between the ages of 10 and 13 described numerous and various sexual activities in two video statements and at trial was an appropriate factor for the trial judge to consider (see *R v TDA*, 2017 ONCA 910 at para 19). As already indicated, the trial judge's reasoning focussed on his finding that the complainant's account of the sexual touching by the accused was detailed and clear and that the problems with her evidence did not detract from her credibility on the only live issue in the case. The trial judge made only passing reference to demeanour evidence in his reasons as opposed to "persistent reference" throughout them (*SHP-P* at para 28). In my view, the mere fact that another judge might have relied less on demeanour

evidence does not make the trial judge's assessment of credibility "fatally flawed" (*R v DL*, 2020 ONCA 77 at para 7).

Conclusion

[117] With great respect to the contrary view of my colleague, I see no legal error in the trial judge's assessment of credibility.

Ground Two—Ineffective Assistance of Counsel

Background

[118] The accused argued that his previous counsel provided ineffective professional assistance which caused a miscarriage of justice. The argument is based solely on the transcript; there is no affidavit from the accused or previous counsel. The accused points to the combined effect of a concession made as to the admissibility of the second video statement of the complainant despite the statement being given several years after the alleged offences (see section 715.1 of the *Code*); the manner of cross-examination of the complainant and her mother; and the failure to object to the disclosures made by the complainant to her mother which the accused says were inadmissible because of the hearsay rule. In my judgment, none of these arguments are sound—particularly given the paucity of the record.

The Law

[119] Claims of ineffective assistance of counsel are questions of first instance; there is no standard of review for this Court to apply (see *R v Rhodes (KHC)*, 2015 MBCA 100 at para 13).

[120] In *R v Le (TD)*, 2011 MBCA 83, Scott CJM summarised the analysis to be followed in the following manner (at para 189):

> To recap, before a court will find incompetency affecting the reliability of the verdict, certain prerequisites must be met. These prerequisites include a factual component (is there a factual foundation to the claim), a prejudice component (is there a miscarriage of justice) and a performance component (is there actual incompetence). As the Supreme Court of Canada said in *G.D.B.* [*R v GDB*, 2000 SCC 22] at para. 29, there is no need to evaluate the performance component if the prejudice component has not been proven. In order to determine whether an appeal will be successful on this ground, the following analysis must be undertaken:
>
> (1) The factual component: an appellant must establish, on a balance of probabilities, the facts on which the claim of incompetency is based. If that is not established, there is no need to go any further.
>
> (2) The prejudice component: if the factual foundation has been made out, the court will, for the purposes of this component, assume incompetence on the part of counsel. See *Joanisse* [*R v Joanisse* (1995), 102 CCC (3d) 35 (Ont CA)] at p. 62, Doherty J.A. At this stage, an appellant must establish, on a balance of probabilities, that the presumed incompetence resulted in a miscarriage of justice. If it did not, there is no need to go any further.
>
> (3) The performance component: if it is determined that the reliability of the verdict was affected by the presumed incompetence, the court will then consider whether the actions of counsel were, in fact, incompetent. At this stage of the analysis, the presumption reverts to "a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" and the onus falls on an appellant to establish that it did not (*G.D.B.* at para. 27). Again, that analysis is conducted without the benefit of hindsight.

Application of the Law

[121] Caution must be exercised in adjudicating a claim of ineffective assistance of counsel. It is rare where there is not some aspect of counsel's performance that could not be legitimately criticised (see *R v Joanisse* (1995), 102 CCC (3d) 35 at 58 (Ont CA)). Additionally, the appellate court is typically acting in a factual vacuum to some degree (*ibid* at p 59). It often lacks an understanding of the full picture to place trial counsel's conduct and strategy in context in terms of all of the evidence (not just the record at trial), the instructions of the accused and the ethical obligations that the particular circumstances of the case place on counsel.

[122] Given the comments in *R v GDB*, 2000 SCC 22, that there is a strong presumption of competence and there is an admonition against appellate courts using the "wisdom of hindsight", the importance of the accused establishing a proper factual foundation to support his or her claim cannot be understated (at para 27).

[123] In *Le*, given the seriousness of an allegation of ineffective assistance of counsel and the difficulties such a claim presents to the Court of Appeal, it was underscored that appellate counsel make "every effort to have evidence adduced from trial counsel" (at para 258).

[124] Unfortunately, there is no explanation from the accused's previous counsel before us as to his conduct at trial and no evidence as to what inquiries were made of him to explain his actions. All counsel for the accused could say at the hearing of the appeal is that previous counsel had been given notice of the allegation against him and a copy of the factum, had retained his own counsel and had said nothing.

[125] It would be perilous, to put it mildly, to draw an inference from previous counsel's silence. Previous counsel is not a party to these proceedings, giving him the right (or duty) to independently file submissions or to seek to admit further evidence. More importantly, he must respect his ethical duty of confidentiality to the accused. The Court must be mindful that the confidential nature of the relationship between a lawyer and a client can be manipulated by an accused on a claim of ineffective representation of counsel (*ibid* at para 173).

[126] At the end of the day, the onus of proof lies with the accused to establish the necessary facts. As was noted in *Le*, it is only in unusual cases where the transcript "reveals everything about the allegation" of ineffective assistance of counsel (at para 178). While it is not impossible to establish a successful claim based on the transcript alone, it is very difficult to do so—particularly because the reasonableness of counsel's performance needs to be assessed in light of his or her explanation for acting in a particular way (*ibid* at para 170).

[127] I have not been persuaded that the necessary facts to establish ineffective assistance of counsel have been established. There is insufficient evidence on the prejudice component.

[128] According to counsel for the accused, this was a case where it was "clear that the accused was going to testify". At the hearing of the appeal, this Court heard a scathing critique of the manner of cross-examination by previous counsel; little was said about prejudice to the accused and a lack of evidence of prejudice was before the Court.

[129] I do not accept the accused's supposition that it is "clear" that the ineffective cross-examination by previous counsel "contribut[ed] to the finding that the complainant's evidence was credible and reliable." Previous counsel for the accused did not fail to cross-examine on multiple material prior inconsistent statements or to challenge the complainant on obvious frailties in her evidence known to previous counsel (see *R v RS*, 2016 ONCA 655 at paras 26-30). Indeed, his cross-examination of the complainant brought out the incremental disclosure of the nude picture in the closet and the inconsistency as to whether her brother sexually touched her, both of which the accused's present counsel relied heavily on in his closing submissions and in this Court. The frailties in the complainant's evidence were satisfactorily brought to the attention of the trial judge before the accused testified; he had the necessary tools to fairly assess credibility. Given the circumstances and the lack of sufficient evidence of prejudice, it is not necessary to consider the performance component of previous counsel's cross-examination in any greater detail (see *GDB* at para 29)

[130] There is no merit to the accused's other concerns about the concession on the admissibility of the second video statement or the failure to object to evidence from the complainant's mother about the complainant's disclosure to her.

[131] The admissibility of a video statement under section 715.1 of the *Code* is not determined simply based on the calculation of the time between the alleged offence and the recording (see *R v PS*, 2019 ONCA 637 at para 19). Delays of many years can be reasonable depending on the circumstances (see *R v WEB*, 2012 MBCA 23 at paras 20-22). It would be speculative for this Court to accept the accused's submission that the second

video statement was not taken within a reasonable time simply because of the delay alone. The accused has not met his burden of proving the concession on the second video statement was prejudicial.

[132] The prior consistent statements of the complainant to her mother were admissible for a limited purpose despite the hearsay rule (see *R v Stirling*, 2008 SCC 10 at para 5; and *Dinardo* at paras 37-39).

[133] While my comments deal with the arguments made, the circumstances of this case necessitate some further general remarks.

[134] Appellate counsel should not lightly embark on a claim of ineffective assistance of counsel. It is an exceptional submission, not a routine one. This case is one of many appeals this Court has recently heard where there has been no or insufficient inquiries made with trial counsel before the ground of appeal is advanced. The tactic employed is simply to take the trial transcript and to perform an autopsy on it without evidence of the trial counsel's motivations for acting in the way he or she did. That strategy was criticised in *Joanisse* (see p 58). I agree with the Ontario Court of Appeal's admonition against such an approach. There should be no confusion that the law requires that this Court have a complete record to properly deal with this ground of appeal and there is an obligation on appellate counsel to marshal it. Paragraphs 167-79 of *Le* set out the road map to follow. If roadblocks emerge for appellate counsel to adduce a proper record, this Court has the necessary powers under section 683 of the *Code* to ensure meritorious claims of ineffective assistance of counsel are not obstructed. Appellate counsel should be mindful of the reality that not following the *Le* blueprint may jeopardize the likelihood of a successful appeal.

Ground Three—Refusal to Grant a Mistrial or Recall Witnesses for Further Cross-Examination

Background

[135] The trial judge refused to grant a mistrial or recall witnesses for further cross-examination because the accused had failed to establish the necessary "factual foundation underlying the allegation" of ineffective assistance of counsel (2018 MBQB 35 at para 17). The accused submits the decision undermined the fairness of his trial. I disagree.

The Law

[136] The decisions to grant or refuse a mistrial or to recall a witness for further cross-examination are matters of judicial discretion (see *R v Khan*, 2001 SCC 86 at para 36; and *R v L (R)*, 2002 CarswellOnt 2582 at para 6 (CA)). The standard of review is therefore highly deferential even if the appellate court would have come to a different assessment of the facts. Appellate intervention is only justified if the trial judge misdirects him or herself in law, commits a reviewable error of fact or renders a decision that is so clearly wrong as to amount to an injustice (see *R v Regan*, 2002 SCC 12 at para 117; and *R v Babos*, 2014 SCC 16 at para 48).

[137] A mistrial should only be declared "as a last resort, in the clearest of cases and where no remedy short of that relief will adequately redress the actual harm occasioned" (*R v Toutissani*, 2007 ONCA 773 at para 9; and *R v Cansanay (JH)*, 2012 MBCA 103 at para 6).

[138] In a criminal case, the discretion to recall a witness for further cross-examination should be exercised "very cautiously" (particularly if the witness is the accused) (*L (R)* at para 6). The orderly and adversarial nature of the trial should not be unduly interfered with; recalling a witness should only be permitted where it is "essential to do justice in the case" (*R v Owens*, 2018 MBCA 94 at para 18).

Application of the Law

[139] There is no basis to interfere with the trial judge's refusal to grant a mistrial. I see no reversible error or resulting injustice. There was a lack of evidence of prejudice to the accused filed on the motion in relation to the claim of ineffective assistance of counsel; the submission was based on conjecture. Moreover, the accused conceded a mistrial was not a last resort in this case as he believed recalling the complainant and her mother for cross-examination could have saved the trial.

[140] I would also not interfere with the trial judge's summary dismissal of the request to recall the complainant and her mother for further cross-examination. This was not a case of a new disclosure coming to light after the complainant or her mother testified. Nor is there any suggestion, let alone evidence, that essential evidence from the complainant or her mother was not adduced or challenged by the accused's previous counsel due to incompetence.

[141] The argument of the accused is based entirely on a hindsight analysis that a better job could have been done by a different lawyer. The difficulty with that submission is that, in our system of justice, when there is a change of counsel, the new counsel picks up the brief in the shape that it is in, not in

the shape that he or she may hope it to be in; there is no right to start over. It would have been highly disruptive to the fairness of the trial for the two witnesses to have been recalled almost a year after they previously testified simply because the accused wanted a different lawyer to redo cross-examination in the speculative hope that his situation would improve. There is nothing in the record to suggest that it was essential to do justice in the case for the two witnesses to be recalled for further cross-examination.

Disposition

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

"Mainella JA"

I agree: "Burnette JA"

STEEL JA (dissenting):

Introduction

[143] I have read my colleague, Mainella JA's, reasons for decision. I agree with his disposition in respect of the grounds of appeal that allege a miscarriage of justice due to ineffective representation of counsel and that the trial judge erred in law in dismissing the accused's motion for a remedy after former counsel was dismissed.

[144] Unfortunately, I am unable to agree with my colleague's disposition of the accused's ground of appeal that the trial judge erred in law in his application of the principles arising from the case of *R v W(D)*, [1991] 1 SCR 742, to the credibility analysis in this case. I find that the trial judge erred in his application of the principles of *W(D)* to the credibility analysis in this case for the reasons that follow. Consequently, I find that a new trial should be ordered. Given the reasons of my colleague, it is unnecessary for me to repeat the facts or the explanation as to the appropriate standard of review.

Analysis

[145] Assessing credibility is one of the most difficult tasks of a trial judge. As the Supreme Court of Canada has stated: "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" (*R v Gagnon*, 2006 SCC 17 at para 20).

[146] Moreover, the complainant in this case was a child and it was appropriate to consider her age when evaluating her evidence and assessing her credibility. The seminal case regarding child witness evidence in criminal matters is *R v W (R)*, [1992] 2 SCR 122. It explained that there is no longer any presumption that the evidence of children is any less reliable than the evidence of adults. Each must be evaluated on the particular circumstances of the case. As well, although there is no suggestion that the standard of proof is any lower, there is an appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. "Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection" (at p 133; see also pp 132, 134). Rather, a trial judge should apply a common sense approach when assessing the evidence of young children (see, for example, *R v RGB*, 2012 MBCA 5; *AR c R*, 2016 QCCA 1793; and *Gavin v R*, 2019 NBCA 19).

[147] The accused submits that the trial judge misapplied the principles set out in the case of *W(D)*. That decision was an attempt to assist primarily juries, but trial judges as well, in applying the concept of reasonable doubt to an evaluation of the testimony of witnesses. The decision arose out of a jury trial and was an attempt by the Supreme Court of Canada to assist juries in their analysis of whether reasonable doubt existed in a particular case and to avoid making a decision based on a credibility contest (see p 758). The central point was to warn the trier of fact away from simply choosing between the prosecution and defence evidence. Since its release, it has become a fertile ground of appeal (see *R v JHS*, 2008 SCC 30 at para 8).

[148] Over the years, the test developed in that decision has been applied with more nuance to the circumstances of each case. Several matters have become clear in the jurisprudence. That decision is applicable whenever the case turns, at least in part, on credibility and whenever there is evidence capable of raising a reasonable doubt. The order in which the trial judge evaluates the evidence or the precise recitation of the formula is irrelevant. What an appellate court looks for is not the recitation of the test, but its application. As pointed out in *R v Vuradin*, 2013 SCC 38, the "order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration" (at para 21).

[149] As Code J explained, when referring to *W(D)* in *R v Thomas*, 2012 ONSC 6653 (at paras 23-24):

> . . . That case does not describe three sequential analytical steps that a trier of fact must pass through, one at a time. Rather, it describes three distinct findings of fact that a trier of fact can arrive at, when considering all the evidence at the end of the case, namely, complete acceptance of the accused's exculpatory account ("step 1"), complete acceptance of the Crown witnesses' inculpatory account ("step 3"), or uncertainty as to which account to believe ("step 2"). . . .
>
> . . . In other words, these decisions are all made at the same time on the basis of the same total body of evidence. The so-called "three steps" in *W.D.* are simply different results, or alternative findings of fact, arrived at by the trier of fact at the end of the case when considering the totality of the evidence.

[150] In his reasons for decision, the trial judge appropriately recognised the test to be applied to a case where credibility was at issue. However, it is the application of the test to the circumstances of this case that concerns me.

[151] Of particular relevance in this case, courts have made clear that a court can convict an accused based solely on the evidence of the complainant where the judge has conducted a considered and reasoned explanation as to why the complainant's evidence is of such nature that it leads the trial judge to disbelieve the accused. When "[t]he reasons reveal that the trial judge accepted the complainant's evidence where it conflicted with the [accused's] evidence", then "[n]o further explanation for rejecting the [accused's] evidence was required" (*Vuradin* at para 19).

[152] Turning to the credibility assessment of this complainant, the trial judge was entitled to reject the accused's evidence "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence" (*R v D (JJR)* (2006), 215 CCC (3d) 252 at para 53 (Ont CA); see also *R v RA*, 2017 ONCA 714 at paras 4, 55-56, aff'd 2018 SCC 13).

[153] This is a difficult situation because the trial judge's decision-making can so easily slide into a credibility contest, the very thing that *W(D)* attempted to avoid. It is true that "[i]t is very difficult for a trial judge to articulate with precision" his or her conclusion on credibility but, in order to allow effective appellate review, accountability and transparency, there must be an explanation linked to the evidence or the absence of evidence which convinced the trial judge beyond a reasonable doubt (*Gagnon* at para 20). In those situations, where the reasons have explained, in a reasoned way, why the complainant's evidence is of such nature that it leads the trial judge to disbelieve the accused, that will be sufficient.

[154] So what is a considered and reasoned explanation?

[155] It is an explanation that is not conclusory. Referring to the complainant, the trial judge stated that "her testimony was consistent and clear in the central allegations relating to the accused sexually assaulting and touching her for a sexual purpose in all of the three locations" (at para 43). He goes on to state: "I am satisfied that the events described at all three locations by the complainant occurred as she described them. In listening to her evidence, I am satisfied that there is no attempt to embellish or add fanciful details" (at para 45).

[156] But what was it in the evidence that satisfied the trial judge that the events described occurred as the complainant described them? The trial judge must draw a link from the evidence to his findings of fact and from his findings of fact to his conclusion. Repeating that the trial judge is satisfied that the events occurred as described by the complainant is a conclusion. It does not tell us why or which evidence adduced at trial persuaded the trial judge beyond a reasonable doubt, as opposed to simply deciding to choose the evidence of the complainant over that of the accused.

[157] As well, in this case, the trial judge relied heavily on demeanour evidence. For example, he stated, "The complainant struck me as a polite, intelligent and honest child without any motivation to lie about these incidents" (at para 48). A considered and reasoned explanation is an explanation that does not rely solely on demeanour. While our law has long held that the trier of fact may consider a witness's demeanour in assessing credibility (see *R v NS*, 2012 SCC 72 at para 21), and trial judges regularly refer to demeanour in making findings on credibility, courts have questioned the exclusive or primary reliance on demeanour in credibility assessments—especially when the credibility assessment is the principal basis for conviction

(see, for example, *R v Rhayel*, 2015 ONCA 377 at paras 84-89; and *R v Giroux*, 2017 ABCA 270).

[158] Reliance on demeanour must be approached cautiously. Courts have repeatedly cautioned against giving undue weight to demeanour evidence because of its fallibility as a predictor of the accuracy of a witness's testimony. It can be affected by any number of factors, including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom (see *NS* at paras 18, 26; and *R v Santhosh*, 2016 ONCA 731).

[159] For example, in *R v Hemsworth*, 2016 ONCA 85, the trial judge in that case expressed his concern about how the appellant testified. He stated that it was his impression that the appellant testified in a careful fashion which lacked any spontaneity. The Ontario Court of Appeal criticised this assessment, finding that (at para 50): "Although the trial judge was entitled to consider the appellant's demeanour in assessing his credibility, he erred by considering factors that had little, if any, evidentiary foundation, and by generally over-emphasizing how the appellant appeared in the witness box."

[160] There will certainly be cases where the Crown's case is overwhelming or when the accused's evidence is inherently problematic or where the testimony of the complainant contains inherent markers of reliability. In those cases, it becomes clear why the acceptance of the complainant's evidence inevitably leads to a lack of belief in the evidence of the accused and, instead, belief in guilt beyond a reasonable doubt. For example, in *R v DWS*, 2007 NSCA 16, the Nova Scotia Court of Appeal held it was not an error for the trial judge to rely on the sophisticated and specific

sexual language of the five-year-old complainant in finding that the accused's testimony was not credible and did not raise a reasonable doubt (see also *D (JJR)*).

[161] However, "the credibility of inculpatory evidence must be particularly impressive before that evidence can be credited beyond a reasonable doubt in the face of facially unassailable exculpatory evidence" (David M Paciocco, "Doubt about Doubt: Coping with R. v. W. (D.) and Credibility Assessment" (2017) 22 Can Crim L Rev 31 at 48 (WL Can)).

[162] As well, besides being conclusory and relying heavily on demeanour, the trial judge did not deal with major inconsistencies in the evidence of the complainant. The trial judge stated that the "inconsistencies involved only insignificant peripheral matters and do not detract from the overall credibility of her testimony" (at para 46). The trial judge refers to this when he states (at para 45):

> These incidents occurred over a period of years. The incidents which she testified occurred at the Redwood Avenue residence were related to the police immediately upon her return to Canada from Colombia in November 2013. Although the incidents related to Donald Street and the Lemos' residence were related to the police a number of years later when the court hearings were already underway against the accused . . ., I am satisfied that the events described at all three locations by the complainant occurred as she described them. In listening to her evidence, I am satisfied that there is no attempt to embellish or add fanciful details.

[163] The timing of the reporting of a sexual assault means nothing in and of itself. I agree this is also true of incremental disclosure. The timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case (see *R v DD*, 2000 SCC 43 at para 65).

[164] However, in this case, the additional details revealed in the second video statement were hardly peripheral. The complaint evolved over time with details that significantly changed from the first video statement to the second video statement. These are inconsistencies on material issues as they went to the core element of the offences. The additional location of sexual assault, the bribery, the sexual touching of her brother, the pornography and the taking of a photograph cannot be said to be insignificant or peripheral.

[165] Moreover, no explanation was given as to the more than two-year delay between statements and the evolving disclosure. The first video statement was taken in November 2013. The preliminary hearing was held in October 2014. The second video statement was taken in February 2016. Thus, the second video statement and additional disclosure arose after court preparation and direct and cross-examination at the preliminary hearing. These were issues that the trial judge should have dealt with when assessing credibility. Instead, the only comments made by the trial judge are conclusory and do not deal with these significant issues.

[166] Turning to the accused, in rejecting his evidence, the trial judge gave no specific reason as to why his evidence was disbelieved or did not raise a reasonable doubt. The trial judge dealt with the evidence of the accused in three paragraphs as follows (at paras 50-52):

> Dealing specifically with the evidence of the accused, and the first step of the ***W.(D.)*** test, I find that I do not believe the evidence of the accused. In this case the accused simply denies that the alleged sexual assault and sexual interference occurred. Indeed, the only substantive insight which the accused gives into his relationship with the complainant and her attitude toward him, is that she appears to be sympathetic and supportive of him when he is involved in physical altercations with her mother. Generally

> speaking, he described his relationship with the complainant as good.
>
> I would also note that it appears very odd that he would tell the complainant at the airport before her trip to Colombia that he was leaving her mother, but that he did not tell the mother that he was leaving the relationship. However, that disclosure by itself, does not demonstrate any improper relationship between the two.
>
> The cross-examination of the complainant by the accused's counsel and the testimony of the accused sought to establish that there was simply no opportunity for this many, if any, incidents of sexual activity to have taken place between the complainant and the accused. My review of the evidence is that given the irregular hours that the mother and the accused worked over the years during which the accused was in this relationship with the complainant's mother, there were more than enough opportunities for the accused and the complainant to have been alone together without being concerned that the mother or some other family member would have disturbed the two together.

[167] In these three paragraphs, the trial judge does several things. He states specifically that the fact that the accused told the complainant at the airport that he was breaking up with her mother was not a factor that he took into account as a reason to disbelieve the accused.

[168] So, what reason is given for not believing the accused? The trial judge referred to the fact that the relationship seemed to be a good one between the two, implying that there was no reason for the complainant to lie. While motive or absence of motive can be a factor to be taken into account when assessing the credibility of the person in question, it should not be up to the accused to explain why the complainant was making these allegations (see *R v TM*, 2014 ONCA 854; and *R v Bartholomew*, 2019 ONCA 377 at para 23). This shifts the burden of proof onto the accused to show why the complainant would be lying.

[169] Next, the error with respect to the credibility assessment is further compounded due to the trial judge's misapprehension of the evidence, a misapprehension which was material and substantive in terms of the accused's defence. The trial judge indicated that "[t]here is extensive testimony both in the course of the cross-examination of the complainant and in the evidence of the accused when he took the stand about whether or not there was any opportunity for these assaults to have occurred given the presence of other people in the various residences" (at para 27) and, later, "The cross-examination of the complainant by the accused's counsel and the testimony of the accused sought to establish that there was simply no opportunity for this many, if any, incidents of sexual activity to have taken place between the complainant and the accused" (at para 52).

[170] However, the accused never denied that he was alone with the complainant at various times and had the opportunity. When questioned, the accused agreed that it was feasible he was alone with the complainant at the Redwood residence at times and readily agreed that was the case at the Donald residence. He simply denied that it ever occurred. Lack of opportunity was not his defence and the trial judge misapprehended the evidence on this point. In reaching this conclusion, I am keenly aware that a trial judge occupies a singular perch in assessing credibility; however, based on the record in this case, it is clear that part of the trial judge's basis for disbelieving the accused rested on a misapprehension of his evidence and played a critical role in the conviction, rendering it insupportable.

Conclusion

[171] A proper evaluation of a witness's evidence needs to be undertaken when assessing credibility. It must be a reasoned explanation. The trial judge acknowledged that "the task of the trial judge is not simply to choose one version of events over another" but, in his reasons, it appears that that is exactly what he has done.

[172] I would set aside the conviction and order a new trial.

"Steel JA"