CITATION: R. v. D.K.S., 2024 ONSC 1865
COURT FILE NO.: 22-8712-AP
DATE: 2024-03-28

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HIS MAJESTY THE KING	)	
Respondent	)	*David Didiodato*, for the Respondent
– and –	)	
D.K.S.	)	*Mark C. Halfyard*, for the Appellant
Appellant	)	
	)	**HEARD:** October 20, 2023

PUBLICATION BAN PURSUANT TO S. 486.4 OF THE *CRIMINAL CODE OF CANADA*

RASAIAH J.

REASONS ON APPEAL

OVERVIEW

[1] This decision relates to an appeal against conviction.

[2] The appellant, D.K.S., was tried and convicted after a two-day trial before the Honourable Justice Condon in the Ontario Court of Justice ("trial judge") on a single count of sexual assault, contrary to s. 271 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 ("*Code*"). D.K.S. was sentenced on January 10, 2023, and received a conditional discharge. The appellant's probationary terms for the discharge are subject to a stay order pending appeal.

[3] In this case, the complainant, C.G., worked as a server for the appellant at the White River Bar and Grill ("the Establishment"), located in White River, Ontario; owned by the appellant.

[4] The acts complained of were alleged to have occurred during the evening of May 15, 2019, while the complainant was working as a server at the Establishment.

[5] At trial, the Crown called two witnesses: the complainant and another server, S.K. The appellant testified and called the Establishment's former manager, M.S. as a witness.

[6] Both M.S. and S.K. were working on May 15, 2019.

[7] At the hearing of the appeal, the appellant submits the following grounds:

1. The trial judge erroneously discounted a significant inconsistency in the complainant's evidence based on inapplicable principles involving delayed disclosure and sexual stereotypes.

2. The trial judge failed to deal with the inherent implausibility of the complainant's version of events in assessing her credibility.

3. The trial judge materially misapprehended the evidence.

4. There is fresh evidence that shows the appellant was truthful on a material point in his evidence for which the trial judge made a negative credibility finding.

[8] The appellant relies on:

1. The transcript of the proceedings of January 11, 2022;

2. The transcript of the proceedings of January 12, 2022;

3. The transcript of the proceedings of February 22, 2022;

4. The written reasons for judgment, released on February 22, 2022; and

5. Fresh evidence if the court admits same.

[9] The appellant confirmed at the hearing of this appeal that he was no longer advancing the ground of misapprehension of the camera evidence.

[10] The appellant seeks an order allowing the appeal, quashing the conviction, and ordering a new trial.

[11] The respondent Crown asks that the appeal be dismissed.

[12] The Crown filed an appeal against sentence. However, on agreement, on the basis that the result of the appeal will dictate whether or not the cross-appeal is proceeded with, the cross-appeal was not dealt with.

[13] I have reviewed all the evidence filed and considered all submissions and authorities relied on although I may not refer to all individually.

DISCUSSION/CONSIDERATIONS/ANALYSIS

ISSUES

[14] The following are the issues raised by this appeal:

1. Leave to introduce fresh evidence;
2. Error to discount an inconsistency;
3. Three submitted misapprehensions of evidence;
    i. D.K.S.'s evidence regarding the vehicle he was operating on May 15, 2019;
    ii. D.K.S.'s evidence/use of the word "sitting" to describe the location of the complainant at the time he was obtaining the promotional materials he was obtaining from his vehicle; and
    iii. Good character evidence led.

EVIDENCE

Evidence of the Complainant

[15] The complainant worked as a bartender/server for the appellant at the Establishment. She had also previously worked for him at an A&W restaurant that he owned, when she was younger. She started working at the Establishment in January of 2019, about five months before the alleged occurrence.

[16] The complainant testified that on May 15, 2019, she worked an afternoon shift. She asked to leave early — at 10:00 p.m. — because she wanted to go out with her friend, J., for J's birthday.

[17] The complainant drew a floor plan of the Establishment and labelled certain areas, including location of doors, the bar, a pool table, two dining rooms, washrooms, the kitchen, and prep area.

[18] The complainant testified that she and S.K. were good co-workers with a good relationship – that she worked on her shift. They had worked over "100 shifts" together but were not friends outside of work. In cross-examination she admitted the "100 shifts" comment was not accurate; they had only worked a few shifts together. However, their shifts overlapped quite a bit and so it felt like hundreds of times they worked together. They interacted with each other either behind the bar when making drinks or when

waiting for food to come out. They had good conversations. The appellant raised this as one example of issues of credibility at trial he asked for the trial judge to consider in the assessment of her evidence. An important piece for the appellant was the overall assessment of credibility and reliability of the evidence of C.G. and not necessarily an individualized assessment of each issue noted.

[19] C.G. identified the appellant as her "boss", that she first met at age 13, when she worked her first job at A&W. He had taken over ownership of the A&W from her initial employer. She believed she had been employed there for approximately a year before the appellant and his wife took over the A&W. She was a dishwasher at that time. She was not certain of the year they took over. She worked there until she was 17. She eventually left that job at A&W to work at another restaurant. Other than when the appellant was at the A&W and ultimately at the Establishment after she got a job there, she saw the appellant in passing at the grocery store. She also took his daughter skating when she was younger at the arena, but these interactions were mainly with his wife and child. These interactions occurred when she was working at A&W.

[20] On May 15, 2019, the complainant testified that her co-worker, S.K.; the restaurant's manager, M.S.; and cook, G., were working. The complainant's friend J. and her boyfriend, M., had come and were at the Establishment before her shift ended. She started her shift that day around 3:30 or 4:00 p.m. She believes she was scheduled to midnight.

[21] The complainant testified that on this evening, the Establishment was not busy. It was her friend J.'s birthday and there were maybe 10 people in the restaurant, which is why she asked to leave early, to spend some time with her friend and boyfriend. She was not sure who she asked.

[22] C.G. remembered that the appellant was at the bar in the Establishment, having dinner. According to the complainant, the appellant only came to the Establishment a couple of times a month, or every couple of weeks, leaving the day-to-day operation to the manager, M.S.

[23] After C.G. asked to leave early that evening, but before the end of her shift, the complainant testified that the appellant asked her if she could go in the back and grab some boxes. In addition to being a server, she was also the promoter for the Establishment. She explained that the appellant and his wife would give her things to give out to people that she worked with or people within the community. The complainant testified that at the time she was also helping the appellant with the Establishment's website and promotions. By May 15, 2019, she had that role for about a month or two. At the time, he asked her to do this, she was by the bar, on the serving side behind it, and he was on the other side of the bar, dining side of it. He asked if she could do this before she left. She testified they went right away after he asked her. Based on her evidence, this would be at around 10:30pm to 11:00pm.

[24] At around 10:30pm to 11:00pm, the complainant states that she followed the appellant into the back of the Establishment through the kitchen, then out of the whole building, to his vehicle. They exited through the back door after going through the prep area straight through the back doors to his Cadillac Escalade, which was parked outside, near a dumpster. C.G. added the dumpster which she named 'dumpster" and the vehicle she named "car", meaning the appellants' vehicle on to the floor plan drawing filed.

[25] C.G. stated that nobody was outside when they went outside but as they passed through the kitchen, S.K. or maybe one of the cooks could have possibly seen her walk past with the appellant. She was not sure if they were paying attention.

[26] C.G. stated the boxes were in the backseat of the appellant's vehicle, the boxes being 2 feet long and 3 feet high which she corrected to a foot and a half high - cardboard. She went on to state that they were fairly heavy but indicated that they "weren't too bad". The two boxes were initially described by her as one on top of each other. C.G. stated that the appellant picked up the boxes and handed them to her and put them in her arms. She had both her hands underneath the box with them resting within her forearms against her body which she described as "cradling them" because she did not want to drop them – palms face up, forearms extended 90 degrees cupping the boxes. When she was being handed the boxes, the appellant was facing her and her right shoulder was facing the building and her left shoulder, the bush line. During cross-examination, C.G. when it was put to her that it was only one box, not two, testified that it was a box inside of a box because there were breakable items so there was a box inside of a box. She also testified that the one box that was on top of the other was not sitting well inside of the underneath box.

[27] C.G. stated that as the appellant gave her the boxes, when he took his hands away, he had brushed down her front with his hand and that hand contacted her vagina over her clothing (the "swiping"). The swiping was demonstrated as the knuckle side of his hand touching the upper chest area and rubbing down her torso. She places his hands as he was giving her the boxes as underneath the boxes – like holding it to give it to her and this is why she thought maybe the swiping was an accident. But then she states, he grabbed her buttocks twice and that is when she connected "two and two together". C.G. stated the swiping took probably 30 seconds and stated that while he was swiping, she was walking away. She then explained that when he contacted her vagina that is when she had started to walk away and as she started to walk away, he grabbed her buttocks twice. Her thoughts that he "was grabbing" her occurred at this moment of time. She stated that she continued to walk away, kept the boxes in her arms and left. She testified that the swiping was a 30-second swipe, followed by "it was, I don't know", followed by "like 20 seconds, 30 seconds", followed by "It was quick. It was brief.". The Crown asked her to provide the length of time starting from the time she feels the swiping to her turning around to walk away. She would explain then, it was almost instantly, and that she turned around right away once she felt the contact. When she felt her buttocks being grabbed, she was now facing the building. The left side of her buttocks was grabbed first followed by the right side, almost immediately after. The left grab she stated lasted three to four seconds and the right side, the same amount of time. She testified that at this point, she

kind of looked back at him because she wanted to say something, but she did not. She does not remember if he said anything. She did not want to make a scene. She just wanted to get out of there.

[28] After getting the boxes, she testified that as she was walking through the bar in the Establishment after the incident, she looked at her friend J. and asked her to go outside with her, to open her vehicle door for her. She described that J. went outside with her and once outside, she told J. about the incident. There was a plan that night to call a driver to come and take the complainant's vehicle and drive them home because they wanted to have a couple of drinks, but after the incident that did not happen. They ended up just leaving. She asked J. not to say anything to her boyfriend because she did not want him to create any animosity and/or get angry.

[29] After a morning break, C.G. continued to testify and stated that J. was in the left side area dining room in the Establishment when she asked her to help her. She then stated that she was pretty sure it was her vehicle she had that evening because she always drives herself to work - but that she could not really remember. She went to whatever vehicle it was because she wanted to bring the boxes to her vehicle so that she could bring it to her other job. The boxes get placed in that vehicle. C.G. states they were placed in the backseat of her car. After, she and J. go back into the Establishment because the whole plan was to celebrate J.'s birthday. However, that all just came to an end. She asked if they could go home and back to her boyfriend's apartment. That is what happened after she waited for them to finish their beverages. She placed her boyfriend at the back table in the far-left corner of the Establishment. On cross-examination, C.G. stated that when she came inside with the box/boxes she stopped to talk to J. to ask her to come outside with her. She relayed her complaint to J. right then and there. She explained this was because she was distraught and did not know if that is what really happened or not and she needed to process it and say it out loud.

[30] C.G. tested that if she would have had a drink that evening, it would have been after her shift and after the incident because within the time frame that she was done her clean-up it happened right away, and she did not have time to sit down because her shift ended at 10:00 p.m.

[31] After the incident, after she had re-entered the Establishment, C.G. stated she did not see the appellant again, stating that he had left right away. She explained that after she came back into the Establishment after placing boxes in her vehicle, he was already gone. She was not sure if he left through the front door or the back door.

[32] When she and J. returned to the Establishment, she stayed with J. and her boyfriend for a short time before they left. She testified that she did not consume any alcohol or drugs. The complainant testified that the appellant left the Establishment right after he gave her the boxes; she never saw him in the Establishment after she returned from storing the boxes in her car. The complainant reported the incident to the police about a week later, after messaging the appellant's wife - S.S. - and telling S.S. that she would not be in for

her next couple of shifts. She did not actually speak to S.S. until after she had gone to the police.

[33] On cross-examination C.G. denied that she took a drink from her boyfriend's drink after she came back in. When it was put to her that if S.K. said she did it would be wrong and her response was that she did not remember having anything to drink. She did not remember staying for half an hour to an hour at the establishment with her friends drinking after the incident. She just remembered waiting for them to finish their drinks and food and driving them home.

[34] After the incident, C.G. denied going to the bar and speaking to M.S. stating she will try to follow the rules and make them happy or something along those lines. She also denied being upset with the appellant that night related to him speaking to her about her work performance.

[35] When asked by the court how long she was in the Establishment after the incident she responded that she honestly did not remember but that it was less than an hour.

[36] The complainant acknowledged that she did not get along with people at her work, including one of the cooks, L., and the manager, M.S. She was aware they both had made complaints about her work - the cook L. made complaints all the time. In cross, C.G. stated she did not remember if cook G. was there but that M.S. certainly was.

[37] C.G. again denied that the appellant had talked to her about her work performance on May 15. She did not agree that the appellant was in the Establishment more than every couple of weeks or once a month. She did agree that when the appellant did come, he would deal with staffing issues and things like that, and deal with M.S. a lot. She stated the appellant was mainly in the office. When it was suggested to her there was a staff meeting the evening on May 15, C.G. stated she did not remember. She did not remember him meeting with cook L. or S.K. or M.S. - stating she "was busy serving people". She was not really hanging around or paying attention to what these others were doing; she was paying attention to her customers. C.G. also testified that she did not remember if the appellant met with her about some job complaints, he had with her, that day. It was suggested to her that in fact in the kitchen area, he met with her about some complaints he had from staff members that she was sometimes late for work. Her response was "Yes. Because I had two jobs. I worked two jobs.". She had a job at a school 35 minutes away. She denied that he asked her about shortages in drinks and money or checking IDs or not cleaning up after herself in the kitchen area. She complained to the appellant about others not checking IDs and added that it was never dealt with. She testified that cook L. had never liked her and they did not get along. She was not surprised if cook L. had complained. She acknowledged that she heard complaints about her drinking at the bar and she was not sure if it was a complaint made by M.S. or another. She testified that the appellant had talked to her previously about it. She also remembers having sent a text to him saying she had filled shot glasses with water and juice to pretend she was taking shots with customers. She sent the text to let him know in case it was thought she was actually drinking at work and was not. She agreed the text was sent May 4th, responding

to complaints about her drinking at the bar. She denied any conversations about fixing work performance issues on May 15. She agreed in her evidence she was suggesting that it was earlier, not that day. She sent the text to the appellant on May 4th because she felt that M.S. had it out for her. M.S. and cook L. were in cahoots against her. She felt everyone was complaining about her work performance. She indicated she sent the text to the appellant because M.S. confronted her about drinking and she knew he would be calling the appellant right away complaining about her like he always did so she just wanted to start defending herself. She agreed it would make sense that the appellant would receive complaints about employees and have to address them. C.G. repeatedly answered that no complaints were addressed with her on May 15.

[38] C.G. later acknowledged the appellant did express concerns about her being late for work. She denied that he spoke to her about shortages in cash and/or alcohol taken from the bar or her not checking identifications. She acknowledged that the appellant had spoken to her about drinking at the bar while working but stated that was on a previous occasion—not May 15, 2019. The complainant did not move from her evidence that the appellant did not speak to her about her work performance on May 15, 2019. The complaints about her drinking at the bar went back to May 4, 2019.

[39] On re-examination, C.G. was asked if she ever had a conversation with the appellant about her work performance. She responded that she did not have a conversation with him. His wife asked her about it. It was one night after her shift that she asked C.G. to pick up the pace and help out more around the restaurant, which conversation happened well before the incident. When asked about M.S., C.G. stated that M.S. would always bug her and other servers about their work ethic. He would all the time give them little jabs, but it was never a conversation to ask them to work better or harder.

[40] C.G. was asked in cross-examination on whether the appellant's vehicle that night was a F150 pickup truck rather than his Escalade, and she responded that she did not remember. She explained it was dark outside and what she remembered as "going into was their Cadillac Escalade, four-door truck". It was presented to her that she was assuming, and she responded it was the Escalade. She presented as certain stating: "I know for a…fact it was." The complainant did not recall making any comments to D.K.S. about him getting a new truck or him responding he was leasing it. She clarified it did not happen. When asked again about the vehicle after a break, C.G. stated that she just remembered it being a black vehicle and him driving a black Escalade. She agreed she could not remember if she had her own vehicle that night. She was not absolutely sure that it was not a F150.

[41] C.G. agreed that when the appellant handed her the box, his hands were underneath the box and that this was where she stated she placed her hands. When asked again later, C.G. stated one of his hands was underneath the box and one was on top to give it to her. Both of her hands were underneath. She confirmed that she was suggesting that at the point when he handed her the box that he took away his hands and for about 30 seconds he touched her front with the back of his hand. She thought nothing of him taking his hands away from the box until she turned around and he grabbed her buttocks.

[42] To the suggestion that when they went back into the Establishment that C.G. told the appellant that she will try to be better at work or something along those lines, she responded that she did not remember. When asked if it possible she did, she responded that she did not remember.

[43] C.G. did not remember seeing M.S. in the kitchen when they came back inside. She stated that he was always behind the bar. He never left the bar. He was the person that would make their drinks and so he was always behind the bar all the time. When it was put to her that if M.S. said he was and saw her walk through that he would be wrong, she responded she was not sure. She explained that when something like that happens you don't really recall. She just remembers getting walked outside. She agreed she presumed that M.S. was behind the bar because that is where he normally was.

Evidence of S.K.

[44] S.K. worked with the complainant. She testified that she did not know the complainant very well, or outside of work and they rarely worked the same shifts, indicating it was "a couple of shifts."

[45] S.K. testified that the appellant owned the Establishment but did not work there. Prior to being employed by him, she knew him as her landlord and her husband's boss. He came to there to check up on it. He usually came on the weekend to supervise but sometimes during the week if there was an issue at the establishment.

[46] S.K. testified that the appellant was at the Establishment on May 15. He came during afternoon, or evening sometime or all day but then changed to that she could not even remember.

[47] S.K. recalled the Establishment not being busy; she and the complainant were working together with M.S. and the cook. She stated that because it was not busy, the complainant left early. She identified M.S. as the manager and being there that evening, along with cook, G.

[48] S.K. stated that the appellant was always appropriate and professional with her. He never put her or ever saw him put anyone else in an uncomfortable position. She indicated that he never said anything inappropriate to her.

[49] S.K. confirmed she wrote a letter wherein she recalled that all had a meeting at work that day about everybody, what needs to be improved – employer and employee. It was not basically only for C.G. It was for everybody else too. She recalled C.G. having a conversation with the appellant but did not remember if it was about her work performance or about the event they were going to organize.

[50] S.K. recalled seeing C.G. for a few seconds before C.G. left that evening and C.G. presented to her as bothered/upset. She had no idea why. She did not know why her letter did not include her observation of C.G. being upset but maintained that observation.

[51] S.K. recognized that the timing in her letter about when she saw C.G. and/or C.G. left that evening did not coincide with her trial testimony (namely, shortly after her shift, "tenish" versus 11:30 p.m.) and apologized, stating that she did not remember the timing.

[52] S.K. did recall C.G. drinking some of her boyfriend's drink before she left the Establishment. C.G. was only carrying a bag.

Evidence of M.S.

[53] M.S. managed the Establishment for nine months—January to September in 2019. He worked with the complainant in his capacity as manager from January of 2019 (when the Establishment opened) until the alleged incident in May of 2019.

[54] On work performance, M.S. testified that the complainant sometimes was late, she was not doing her job properly, and she had issues with her co-workers. One concern included drinks missing from her shifts - he spoke to her a number of times about this issue.

[55] On the night of the alleged incident, M.S. stated that he and cook, L. spoke to the appellant about the complainant's work performance, as M.S. put it: "[w]hat needs to be done or what not." M.S. acknowledged that he had spoken to the appellant before about issues. M.S. later overheard the appellant talk to the complainant about work issues in the kitchen sometime around 9:00 p.m. to 10:00 p.m.; and stated that conversation lasted five to six minutes.

[56] After this said discussion that he overheard, M.S. stated that the appellant asked the complainant to get the promotional materials from his vehicle, which M.S. said was parked three or four feet from the back kitchen door. M.S. said the appellant usually drove a black Cadillac Escalade and parked at the back, but he did not see the vehicle on May 15, 2019.

[57] As to what he saw related to retrieval of the boxes, M.S. testified that the complainant mainly stayed at the back door to the kitchen while the appellant went to retrieve the boxes; she might have stepped outside for "about two seconds" to get the boxes. He could see her through the screen door. He saw her take the boxes. He did not see anything indicative of inappropriate touching. He acknowledged that there was a brief period of time when he could not see her, but she was only gone a few seconds. She came back into the kitchen with the boxes and took them into the bar area. The complainant stayed at the Establishment for about an hour before leaving. She had some drinks at the bar with a few people from town that he did not know—friends of hers. He later saw her take the boxes with her when she left. The appellant left about 10 to 20 minutes after the appellant gave the complainant the boxes. The complainant appeared to be acting "normal". Before she left the Establishment, the complainant told M.S. that the work issues were "not going to happen again" and she would "try to improve."

[58] M.S. testified that he had never seen the appellant do anything inappropriate with any staff members.

[59] M.S. testified that there was a camera at the entrance to the bar, two in the kitchen, two in the bar area, one near the pool tables, and two in the main lobby. He said he never checked the cameras to see if the complainant was stealing or giving away alcohol, because that would make the issue get "bigger." He said the cameras did not record but he had a live mobile feed that could be accessed on his and the appellant's cell phones. There was no system at the Establishment to review footage. He would have to watch through the cameras in real time on his phone. He testified that he had watched servers (not specifically the complainant) pour drinks for customers and not ring them in many times. He would report this to the appellant.

Evidence of the Appellant

[60] The appellant testified. He denied the allegations. His first language is not English. He chose to testify without the aid of an interpreter. Note: It is agreed by all that D.K.S. has a very strong accent.

[61] The appellant at the time was a long-time businessman, who owned four or five businesses in White River and Sault Ste. Marie, together with his wife, S.S.—including a Days Inn, Soo Blaster (a sports bar), Taj (an Indian restaurant), A&W and the Establishment. He testified that he would attend the Establishment about once a week to check up on the business (i.e., to go through the books and talk about issues, etc.), but the day-to-day operations were handled by M.S..

[62] On May 15, 2019, D.K.S. arrived at the Establishment and spoke with M.S., who raised issues with the complainant's work performance including drinking on the job, not checking identification, being late for work, and running short on inventory. He testified that the cook, L. was very upset with the complainant. M.S. could not handle it. The appellant told M.S. that he would speak to the complainant. He spoke to the complainant for about 10 minutes about these issues. The appellant thought this conversation happened around 8:00 or 8:30pm. The complainant denied some of the concerns to him. The appellant told her: "this is last time, we can't take it (sic) more longer", but he did not fire her; it was agreed he gave her "a warning." He stated she apologized and said she would change. He explained that part of the conversation included telling her that she was grown up and not to do that kind of stuff. He stated he told her "it has to be take final decisions. I told her that. I give her warning. Said, like, I had to make, uh, serious decisions".

[63] After the conversation, the appellant stated that he told the complainant about the materials for the "Girls Night Out" promotion, which included coffee mugs and flyers. This was a different conversation that evening. He wanted the complainant to distribute these materials in Pic Mobert at the Days Inn and at a medical centre, where the complainant worked a second job. Together they went to the back of the Establishment, through the kitchen. The appellant went outside through the kitchen door. The complainant did not come outside; she remained in the doorway. The appellant thought the kitchen door was closed when he went outside.

[64] The appellant's first words used to describe the location of the promotional items were "that was in my truck". Next description was "I went to my truck…". Next description, "I went to my truck…" Next description "I opened the truck". The next description, "Box in my car. Backseat." He was asked what it was, a car or truck. He answered "truck". On cross-examination, while giving evidence, he stated, "I went to the car". Next, he stated "she didn't come to the truck.".

[65] The appellant had testified that he was driving a rented truck that day, a Ford-150. He normally drove a Cadillac Escalade. However, the Cadillac was leased, and he was close to the limit on his kilometers under his lease. He rented the truck to drive to his businesses. The appellant testified that the complainant asked him whether he had a new vehicle when she saw the truck. The promotional materials were on the truck's back seat. He removed the boxes and handed them to her. He said his hands were on the sides of the boxes. He did not touch her. He also denied touching her buttocks. The complainant took the box from the kitchen into the bar area; he believed she took them to her car, but he did not see that. The appellant left the Establishment shortly after giving her the boxes; at most he stayed for another 30 minutes.

GENERAL LEGAL PRINCIPLES

[66] Reasonable doubt applies to the issue of credibility. On any given point, the trial judge may believe a witness, disbelieve a witness, or not be able to decide. The judge need not fully believe or disbelieve one witness or a group of witnesses. If the judge has a reasonable doubt about the accused's guilt arising from the credibility of a/ witness/es, then he must find the accused not guilty.

[67] Reliability is a separate issue from credibility. As noted by Watt, J.A. in *R. v. C.(H.)*, [2009] O.J. No. 214 (C.A.), credibility focuses on a witness's veracity, while reliability has to do with the witness's accuracy. Accuracy involves the ability to observe, recall and recount events that are in issue. Of note, at para 41, the court wrote, "Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence."

LEAVE TO INTRODUCE FRESH EVIDENCE

Overview

[68] An appellate court has broad discretion to receive fresh evidence on appeal where "it considers it in the interests of justice", based on the following criteria:

> i. Is the evidence admissible under the operative rules of evidence (admissibility criterion);
>
> ii. Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict (cogency criterion); and,

iii. What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence (due diligence criterion)?

The due diligence criterion does not apply as strictly in criminal cases where liberty is at stake: *Code*, s. 683(1); *R. v. L.C.*, 2021 ONCA 848, at para. 13; *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775; *R. v. Truscott*, 2007 ONCA 575, at para. 92.

[69] The applicant seeks an order pursuant to the provisions of s. 683 of the *Code* that the affidavit of R.B. and attached exhibit, namely, the rental agreement for the F-150 truck be received and considered. The appellant submits that the rental agreement supports his evidence that he had rented and was driving an F-150 truck on May 15, 2019.

Admissibility Criterion

[70] The respondent concedes the rental agreement would be admissible at trial and the admissibility criterion is established.

Cogency Criterion

[71] I find the cogency criterion is met.

[72] At paragraph 56 of his decision, the trial judge notes: "regarding the attendance at the rear of the bar, it was put to C.G. that D.K.S. was driving a Ford F-150 truck as opposed to his Cadillac Escalade. Her response was that she did not remember seeing a truck that night. As for the suggestion that she had asked D.K.S. if he had a new vehicle, C.G. said that there was no such conversation. She initially presented as certain. However, C.G. would go on to testify that she was not certain whether the truck in the back was the Cadillac Escalade or the Ford F-150." When pressed further, C.G. also testified that she did not remember commenting on whether D.K.S. had a new vehicle. Based on this, it is clear to me that the trial judge was alive to the issue of the different evidence as to what vehicle the appellant was driving and a consideration for him.

[73] The transcript of C.G.'s trial evidence at page 88 is as follows:

> Q: [C.G.], I think I was just asking you questions about the vehicle that [D.K.S.] had out back, and I suggest to you it was a Ford F150, but you don't agree with that, right?
>
> A: No. I just remember it being a black vehicle and I just remember him driving a black Cadillac Escalade.
>
> Q: Okay. But you don't even remember what if you had your own vehicle. Right?
>
> A: Yes.

> Q: Okay. So, I take it then, my suggestion that it could have been an F150 you are not absolutely sure about that?
>
> A: No.

[74] At page 93, the trial evidence of C.G. is:

> Q: Right? You presume that [D.K.S.] had a Cadillac Escalade because that's what he normally has. Right?
>
> A: Yeah. Because that's… that was his normal vehicle at the time, and I don't remember asking him about what vehicle he was driving.

[75] The evidence does present that the complainant was initially confident in her answer that it was the appellant's black Escalade, but that her confidence was diminished later in her cross-examination. By the end of her cross-examination, she was "not absolutely sure" that it was not an F150, only that she "remembers it being a black vehicle".

[76] Regarding the vehicle being operated by the appellant May 15, 2019, the trial judge does make specific reference to the different evidence regarding the vehicle, writing the following:

> C.G. testified that the accused had his Cadillac Escalade at the back of the bar. As noted earlier, when pressed on this issue she was less than certain about that recollection. D.K.S. gave evidence that he had a rented Ford F-150 truck on this date. He explained that he did so because the Cadillac Escalade was leased, and he was being cognizant of the mileage on that leased vehicle. However, this court notes the following additional evidence on this point:
>
> > a) At one point, during his examination in-chief, the accused said that he took the box of promotional items from his "car". It was then at the specific invitation of his counsel that the accused said that the items were taken from the "truck".
> >
> > b) M.S. gave evidence about the location of the vehicle behind the business. After he acknowledged that he had not seen the vehicle being used by the accused, M.S. said that he had seen D.K.S. in White River driving either the Cadillac Escalade or white SUV that belonged to his wife. If D.K.S. was concerned about mileage on the leased Cadillac, is there a reason that he did not drive his wife's SUV to White River as opposed to renting another vehicle?

[77] In fairness to the trial judge, it was the Crown who specifically raised the evidence about the vehicle during submissions after trial and not just in passing. The Crown was identifying same as one of very few contradictory statements in her evidence, inviting the judge to consider same.

[78] The trial judge's comments as set out above, in my view, objectively present as if he was assessing the veracity of the appellant's evidence, both when he made the comment about

using the word “car” and querying as to why the appellant would not have been using his wife’s vehicle (side note: he was not even asked that question). It is fair to state that as written, the comments present as a discrepancy or contradictory evidence he was trying to resolve, in comparing versions - an exercise in assessing credibility and reliability, a main issue at this trial. It is fair to state that it presents as though the trial judge was assessing actual words used by the appellant and his evidence on what he stated he was driving. The last line of the trial judge’s decision on this point presents objectively as questioning the evidence of the appellant that he had in fact rented and/or was driving a rental truck that day. In my view, there is no other alternative interpretation for its inclusion. He presents as questioning why the appellant would rent a vehicle when his wife had one. He is questioning the appellant’s evidence, thus credibility and reliability of his evidence. Side note: the appellant testified that his wife was not with him that day.

[79] Further, the appellant used the word “truck” more than once before the evidence he gave when he used the word “car” as identified by the trial judge. Therefore, in my view, it would not be fair to state that there was a “change” at the specific invitation of his counsel. Further, I do not think it fair to find that the appellant meant the Cadillac when one adds consideration of the language used by the appellant throughout the trial. He used wrong words and/or incorrect grammar, more than once. It in my view was evident that at times he struggled in putting together his evidence in English.

[80] While I agree that the rental agreement would not confirm that D.K.S. was, in fact, driving a black Ford F150 on May 15, 2019, it certainly shows that he had rented a Ford F150 in that time frame. The trial judge may not have doubted the appellant’s version had the rental agreement been tendered and it is not clear how important this was in the assessment of the appellant’s evidence. At the very least, the only reasonable interpretation in the passage about the vehicle was that there was a negative impact on that issue/question as to his veracity.

Due Diligence Criterion

[81] The respondent submits that the appellant clearly had the rental agreement in his possession at the time of the trial – it was not kept from him, or lost, or unavailable.

[82] The appellant in explaining his decision for not tendering the rental agreement at trial states that he “was not aware that this would take on such importance at his trial”. I accept this. In this situation, D.K.S. was testifying that he was driving the truck, and the evidence by the point he testified, included C.G. going from being certain to not remembering, and no other witness knowing.

[83] It would not have been an obligation on the appellant to prove he was driving the Ford-150, only to raise doubt with respect to the evidence/credibility/reliability, in the context of a case that included assertion of motive to fabricate related to employment discipline on the part of the complainant, and a case where it was also submitted the complainant changed her evidence, or could not remember events, and/or exaggerated and/or confirmed previous evidence as assumptions, and/or was contradicted by other witness

evidence including but not limited to how many times she worked with S.K, complaints made about her, where people were and what they were doing, a staff meeting that evening, and what she herself was driving or if she had her own vehicle. This is not to be taken as this court stating that the evidence of the complainant is not credible. That is not my task. I do so to look at the context and the Crown argument on the appellant not tendering the rental agreement.

[84] The respondent submits that the vehicle being driven by D.K.S. was not a central issue in this trial and challenges the submission that same took on "importance". The Crown submits it only became an issue because of the defence strategy to cross-examine the complainant at length about the make and model of the vehicle.

[85] The respondent further submits that the appellant's position is contrary to the defence strategy at trial, which involved cross-examination of the complainant about the make and model of the vehicle he was driving. The make and model of the vehicle being driven was brought up in passing by the respondent, when C.G. was describing the diagram of the scene that she had drawn. During the Crown questioning the following exchange occurred:

> [Crown]. Is that right? Okay. And so, the dumpster speaks for itself. The car is D.K.S.'s car?
>
> A. Yes.
>
> Q. What type of car or vehicle is that?
>
> A. Um, I, I think it was an Escalade. Like, a, an SUV Escalade.
>
> Q. Can you help us with the colour?
>
> A. Um, black. It was a Cadillac Escalade.

[86] There are approximately five pages of transcript evidence of cross-examination of C.G. on the make and model of the car, and whether she was certain it was the black Cadillac, but again, the context was as outlined by me above.

[87] With the greatest of respect, while I agree that this was an issue that arose during the trial, in my view, the Crown spent more than passing time on this issue in submissions. If I had been the trial judge, based on the Crown submissions, I would have interpreted, as it appears the trial judge did, that this was an issue to consider/reconcile when analyzing credibility and reliability - invited by the Crown. The defence submissions did not highlight the vehicle.

[88] The Crown argued that the appellant's evidence ought not to be accepted or believed. The Crown also raised the issue of the credibility of C.G. stating that the only real inconsistency the Crown could see was with respect to her description of the black Escalade as being the vehicle that the appellant was driving. In this context, the Crown

raises that the appellant first described the vehicle as being the Escalade but changed. The point is that the Crown made it an issue as to what vehicle was being driven in analyzing inconsistencies of C.G. and identifying same as an issue of credibility – "That's simply a credibility issue of who do you believe when they describe the vehicle that they think he was driving on, on that particular day". It was one of two times the Crown submitted that C.G. changed her evidence. The second was the timing issue in respect to the alleged frontal contact of her body which was suggested to be a qualification of the initial time frame provided.

[89] For all these reasons, I grant leave to admit the evidence on the appeal.

Did the trial judge erroneously discount a significant inconsistency in the complainant's evidence based on inapplicable principles involving delayed disclosure and sexual stereotypes?

[90] The appellant submits that the trial judge fell into error in the manner in which he addressed a significant inconsistency in the complainant's evidence about the first allegation of sexual touching, when the appellant handed her the promotional material boxes; that the trial judge had trouble with the length of the touching and the physical impossibility of it taking 20 to 30 seconds and; the trial judge resolved this inconsistency by relying on the jurisprudence involving delayed disclosure.

[91] While acknowledging that the judge went on to provide a number of reasons why she might have gotten this detail wrong, including her age, background and her employment relationship, among others, the appellant submits none of these factors explained the major inconsistency; the principles around delayed disclosure, and the importance of not relying on sexual stereotypes, in no way negates a significant inconsistency in the complainant's version of events that was part of the *actus reus.* The timing of the touching – around 30 (20-30) seconds – defies common sense both in terms of the length of the touching generally and her evidence that she was unsure whether the touching was accidental or intentional; and as such, the trial judge's approach to resolving material inconsistency amounts to a legal error.

[92] The respondent submits that the appellant's submissions mischaracterize the reasoning of the trial judge; contrary to the appellant's position, the trial judge was not concerned with the length of time that the physical touching occurred, or of the physical impossibility of it taking that long; the trial judge was considering a very different question: namely, whether it is credible that it could have taken the complainant 20-30 seconds before she realized the touching was of a sexual nature; and the trial judge specifically poses this as the question that he will be asking at the beginning of this section of analysis, writing, "Is it beyond credible that such touching could occur for 20 to 30 seconds <u>without the complainant understanding what was occurring</u> [emphasis mine]? There are a number of factors to consider in making this assessment."

[93] I agree reviewing the decision that in the context of a credibility assessment, that the trial judge considered cases about delayed disclosure as they relate to the credibility

assessment of sexual assault victims, in the context of explaining that victims of sexual assault may experience those sexual assaults differently depending on a number of factors unique to them, and that courts should not jump to stereotypes about how victims of sexual assaults will react and was dealing with the issue identified by the Crown. Paragraph 155 of the decision acknowledges that the case is not one of delayed disclosure. However, he was assessing her evidence. The trial judge states at paragraphs 157 and 158, "Thus, the complainant's purported reactions must be assessed based on evidence in the trial as opposed to some predetermined or standardized response. In that regard, there are characteristics of C.G. that must be considered..."

[94] In paragraph 158, the trial judge outlines a number of factors about C.G. and her relationship to the accused that he considered relevant in considering her reaction, including her age and background, her relationship to Mr. and Ms. D.K.S., her employment, her background circumstances, and immediate circumstances, as well as her reaction to the incident. All of these factors were considered to determine whether it was credible for C.G. to state that she was not sure if the touching was accidental or intentional despite it lasting 20 – 30 seconds.

[95] The issue I have is the actual evidence. She stated that she knew when he touched her buttocks, twice – which is before she re-entered the Establishment. She also gave contradictory evidence as to when she states she discussed the incident with J. First it was outside at her vehicle when putting the boxes in same, then it changed to as soon as she got back in the Establishment inside the Establishment before going outside. What I understand the appellant to be arguing is that this was a major point of evidence in the context she described as a hand over of boxes, the timing of the swiping, when she started to turn, whether she just kept walking or turned back to look at him after he touched her buttocks. Thirty seconds is objectively in this context not a short time. There was other evidence to consider that came from the complainant herself. In my view, all the foregoing was relevant evidence to consider in the analysis, namely – what she actually thought and when – when trying to analyze what she was understanding or understood. In my view, as such, an error arises.

MISAPPREHENSION OF EVIDENCE

General

[96] A conviction that rests on a material misapprehension of the evidence cannot stand. However, it is not enough for an appellant to show that the trial judge simply made a mistake in his view of the evidence.

[97] To succeed on this ground of appeal, an appellant must show that the trial judge made a material misapprehension that went to the substance of the evidence and the reasoning process resulting in the conviction. This is a stringent standard, but an appellant does not need to show that he would have been acquitted but for the misapprehension. If the misapprehension could have affected the outcome, then the verdict must be set aside. It does not matter whether the rest of the evidence was capable of supporting the verdict, as

a misapprehension impacts trial fairness: *R. v. Lohrer,* 2004 SCC 80, at para. 2, citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.); *R. v. Smith*, 2021 SCC 16 at para 2; and *R. v. Scott*, 2022 ONCA 317 at para. 29.

Did the trial judge misapprehend M.S.'s evidence?

[98] The appellant submits that it was never directly suggested to M.S. that he could not see outside, or that the door blocked his vantage point or that C.G.'s body blocked his vantage point, to provide him the opportunity to even provide an explanation. This is correct.

[99] At paragraph 136 the trial judge held,

> M.S. also testified in-chief that C.G. was at the back door and that she might have left the building for two seconds in order to grab the box. He was able to observe this because she could be seen "easily" through the outer screen door. However, when that evidence was tested in cross-examination, MS. acknowledged that when D.K.S. went out to get the box there was a time when M.S. could not see the accused. Thus, at best, this witness would have seen C.G.'s back through the screen door thereby resulting in her body blocking M.S.'s view of the accused. Even when she turned to re-enter the building her body would have been between M.S. and D.K.S. Thus, his observations of the accused were very limited, particularly in relation to whether the accused's hand was touching the front of C.G.'s body.

[100] First, the timing of the touching was in issue, whether what C.G. states happened. Seeing her clearly is not necessarily the issue. He saw her step out very briefly in comparison to the length of time she described for the three touches. One touch she describes as 30, then 20 to 30 seconds, then "quick and brief" outside but maintaining 20-30 seconds. Two other touches are seconds after she turned around. The point is that although M.S. agreed that she could have been out of his view, he described it as only seconds, which does not contradict the appellant's evidence that the complainant stepped outside of the door briefly to get the box from him, and that she stayed mainly in the doorway. M.S. not being able to see what was going on, does not translate to him not being able to give reliable evidence as to how long she was actually outside.

[101] There were discrepancies as to if the complainant had stepped outside to D.K.S.'s vehicle at all. In the trial submissions, the issue of where C.G was at the relevant time was in issue, namely standing by the door or outside – and whether the door was open or closed.

[102] For these reasons, I am of the view an error was made and the evidence misapprehended.

Did the trial judge apply proper care to the Appellant's language difficulties?

[103] The appellant submits that the trial judge found inconsistencies in the appellant's evidence, that were not argued; and the trial judge did not give the appellant a chance to explain. The appellant points to para. 126 of the decision where the trial judge noted:

> ...In addition, the accused testified that when he gave the box to C.G. she was sitting. There is no evidence that there was anything in the doorway upon which she could have been seated. How would it have been possible for her to be seated n the doorway if the doors were closed? Moreover, the version of the events in which C.G. was seated at the door was never put to her. These contradictions in his evidence are significant and undermine his credibility.

[104] The evidence of the appellant in-chief was:

> Q. And go slowly. Just tell the court what you did?
>
> A. So, I took the box, and I gave it to C.G.
>
> Q. Yes.
>
> A. She was sitting by the door.

[105] The appellant submits that it was abundantly clear that English was not the appellant's first language; an interpreter did not aid him at trial; the appellant also used the word "sitting" to describe the positions of other people during his trial evidence, in situations where it was unlikely that they were actually sitting as opposed to standing; and this was a single word he used in his testimony without context. I agree.

[106] The appellant asserts legal error; namely that care must be applied to assessing credibility of a witness whose first language is not English, where he or she speaks with a heavy accent or uses an odd choice of words. I agree.

[107] It is a misapprehension of evidence, in failing to give language issues proper effect, by relying on something innocuous to undercut the appellant's credibility and not applying the proper care to the appellant's evidence given language difficulties: *R. v. Hubbs,* 2014 ONCJ 32 at paras. 169-170; *R. v. Ghani*, 2015 ABPC 136, at paras. 78-79; *Fu v. Zhu*, 2018 BCSC 9 at paras. 39-42.

[108] The respondent concedes that English is not the appellant's first language, and that he did testify with an accent at trial but asserts that this does not mean that his evidence can simply be re-interpreted in a manner that benefits him. There was nothing in the context of D.K.S.'s evidence that should have caused the trial judge to be concerned that D.K.S. did not mean "sitting" when he said "sitting".

[109] In the context of the whole of the appellant's evidence, I disagree. It was much more than simply that the appellant "spoke with an accent". He used wrong words. He sometimes excludes articles, verbs. He does not always pluralize. There were various language issues I noted. There were many examples of use of broken English during the course of his evidence. I reproduce some examples, just to demonstrate:

> 1. Q. Okay. And how many employees were employed at that place on May 15th, 2019?

A. I am not exactly correct. I am thinking around eight people.

2. MR. CARTER: Q. And Manpreet Singh, what was his job?
   A. He is the, entitled to manager. You are doing bar and also you are doing some days bar, and you are taking care of the bar overall.

3. Q. Okay. And how long have you known [CG]?

   A. So, we moved to White River 2011, July. Since that point because it's small town, we know.

4. Q. Okay. And I want to take you back to May 15th, 2019. We have heard from witnesses what took place on that day from their point of view. When - do you remember at what time did you arrive that day at the White River Bar & Grill?

   A. Not exactly sure. I am thinking around seven o'clock, afternoon. After my done the A&W things, I went to the bar.

5. Q. And what do you normally do when you visit, I think you said once a week, what do you normally when you go?

   A. Just collecting, uh, all the papers and paperworks and anything, any new we are want come to promote some new wines and talking to the issues with the employees, things, or anything like that. Small thing. Mostly manager will take care.

6. A. Yeah. Inventory.

   Q. What does that mean?

   A. That's mean we, every day we, bartender, every day we are counting the bottles.

   Q. Counting the bottles.

   A. Yeah. Whenever she working, the bottle is short.

7. Q. So, you didn't actually think she was stealing alcohol from you then? You didn't think that was true?

   A. Um, because, um, we know a little bit because she never punched in person. We have a rules, policies. Everybody before take any beer or anything, they have to, must punch it in the PO system. She never does it. Every time Manpreet has to remind her. She take the bottle and give it to the people, customer, without punch it in. So, that's, uh, only person she is, the one who is doing that.

   Q. I see. So, you didn't think she was stealing alcohol. You just thought she was giving it to the customers without typing it into the system correctly?

> A. Yeah. End of the day they are giving her extra tips because she not punch it in.
>
> Q. Sorry. I didn't understand that last thing you said.
>
> A. So, end of the day, they giving extra tips, tipping out because she is not punching in and extra tips her friends come or anybody comes because she knows she is supposed to punch it in. The friends coming in so she just standing all the beer without punch it in. So, our inventory short.

[110] Further, the "sitting" was not the only description the appellant gave as to C.G. location in his evidence. He did say she was sitting by the door. But he would also testify during the course of his evidence that C.G. was by the door, just by the door, inside the door. I did not see that any witness was asked if there was a stool or chair to sit on in the area of the back door. When describing the event to get the boxes and give them to C.G., the appellant states "less than 30 minute or 30 seconds". "Just she was walking middle of the kitchen". Another example that he did not always use words correctly when trying to communicate and may not meant to use the word "sitting", the way it was interpreted.

[111] In fairness to the trial judge, I recognize that part of defence submissions at trial included presenting that the appellant's language skills were very good, but defence did outline that his accent was sometimes hard to understand which should not be taken as a credibility issue. Defence acknowledged that hearing with the accent is sometimes more difficult, but that the appellant understood and there was nothing in his evidence to take away from his credibility in his expressions that he did not touch C.G.

[112] I am not concluding that his English is poor and that is not my task, because it is not. The point is isolating language used and determining if that is an error. There was enough, in my view in this case, in fairness to the applicant, that isolating certain words should have been something the trial judge should have been cautious of, especially when he was not asked to explain what he meant and no one was asked what was by the door. The bottom line for me, reviewing the transcript, assuming it is prepared accurately, the appellant presents as understandable, but his English is certainly not perfect.

Did the trial judge fail to address good character evidence resulting in a failure to deal with material evidence?

[113] Justice Hill summarized in *R. v. Khan*:

> The trial judge accepted that evidence of good character was led through the appellant's own testimony which can stand as a legitimate source for such information: *R. v. Mohan*, [1994] 2 S.C.R. 9, at para. 31. In appropriate cases, good character evidence may be sufficient of itself to raise a reasonable doubt: *R. v. Smith* (2001), 161 C.D.C. (3d) 1 (Ont. C.A.), at paras. 99-101.

> Where good character evidence is properly admitted, it may be capable (1) of supporting the accused's credibility as a witness and (2) may circumstantially enhance the improbability that he or she committed the offence(s) charged: *R. v. Charlebois*, [2000] 2 S.C.R. 674, at para. 29; *R. v. Sheriffe*, 2015 ONCA 880, at para. 69 (leave to appeal refused [2016] S.C.CA. No. 299); *R. v. F.E.E.*, 2011 ONCA 783, at para. 67; *R. v. Dees* (1978), 40 C.C.C. (2d) 58 (Ont. C.A.), at p. 65: *R. v. Khan*, 2017 ONSC 7109 at paras. 77-78.

[114] Character evidence relates to the one's reputation within the community such that they are not the sort of person who would commit the crime in question. I agree that a wtiness simply stating that they were not sexually assaulted is not the same thing as saying, "the appellant is not the sort of person who would commit a sexual assault."

[115] The appellant is arguing that there are three sources of character evidence relating to D.K.S. that were introduced at the trial:

(a) First, D.K.S.'s claims that he is a successful businessman with a wife and kids;

(b) Second, S.K.'s evidence that D.K.S. had never sexually assaulted her; and

(c) Third, M.S.'s evidence that he never saw D.K.S. be inappropriate with any employees.

[116] The appellant acknowledges at paragraph 37 of his factum notes that the Supreme Court has noted the limited weight that may be ascribed to cases of sexual assault as perpetrators of sexual assault often come before the court with good reputations within the community and with an unblemished criminal record.

[117] Evidence of good character may be entitled to less weight: *R. v. Profit*, [1992] O.J. No. 2238 (C.A.), per Griffiths J.A., aff'd by *R. v. Profit*, [1993] 3S.C.R. 637.

[118] However, the appellant submits that in the reasons for judgment the trial judge did not avert to the "good character" aspect of the evidence, nor did he indicate whether this favourably impacted the appellant's credibility, or whether this evidence standing alone could have led to reasonable doubt; and that this amounts to a legal error.

[119] The appellant further states the trial judge seemed to use good character evidence against the appellant, noting that his evidence on this issue was "marginally responsive to the allegations against him that are alleged to have occurred in less than one minute", which in the appellant's submission, misses its probative value.

[120] The appellant testified that he was a successful businessman who would not have committed this offence because he had a wife and three kids; and that witnesses that worked with the appellant – M.S. and S.K. – all testified they had never seen the applicant act inappropriate towards female staff members; and that the defence made arguments about good character in submissions.

[121] The respondent concedes that at the very least that D.K.S.'s evidence is properly described as character evidence. In response to being asked if he touched C.G. for a sexual purpose he stated: "No, sir. It's untrue. I have three kids. My wife and, uh, I don't have a time for these, uh, unnecessary things. I am running four, five businesses."

[122] Defence did raise for the court's consideration, in trial submissions, the fact that S.K. never noted any inappropriate behaviour on the part of the appellant.

[123] This piece of D.K.S.'s evidence was specifically addressed by the trial judge at paragraph 130 of the decision. The trial judge found that "I don't have time for these unnecessary things" is not a reasonable excuse to rebut a sexual assault that lasted lass than one minute. This was not, for example, an allegation of an ongoing affair or long-term sexual assault that would have been impacted by his time constraints.

[124] I agree that a trial judge is not required to examine every piece of evidence in detail. The trial judge by his reasons does demonstrate that he considered character evidence. What he did consider he discounted for reasons stated. He was not required to set out all character evidence.

CONCLUSION

[125] I have made findings of error. Accordingly, for the reasons articulated above, I find these errors are of a degree to allow the appeal. The appeal is allowed, the conviction is quashed, and I order a new trial.

[126] This matter is remanded to April 10, 2024, at 10:00 a.m. to address the cross-appeal.

Rasaiah J.

Released: March 28, 2024

CITATION: R. v. D.K.S., 2024 ONSC 1865
COURT FILE NO.: 22-8712-AP
DATE: 2024-03-28

ONTARIO

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

– and –

D.K.S.

REASONS ON APPEAL

Rasaiah J.

Released: March 28, 2024