COA-24-CR-1164

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HIS MAJESTY THE KING

Respondent

-and-

JACK DENSMORE

Appellant

FACTUM OF THE APPELLANT

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[1] At first instance, this matter was subject to a publication ban under ss. 486.4(2.1) and 486.4(2.2) of the *Criminal Code*. In order to comply with this court order, the names of the victims are excluded from the Appellant's Factum.

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PART I STATEMENT OF THE CASE AND OVERVIEW

A. Statement of the Case

1. The Appellant, Jack Densmore, was charged with a single count of sexual assault against the complainant, SM. He was convicted by the Honourable Justice Krawchenko of the Ontario Superior Court of Justice on July 26, 2024 and sentenced to three years' incarceration. Mr. Densmore appeals from conviction only.

B. Overview of the Appellant's Position

2. Like many sexual assault allegations, this case heard testimony from only two witnesses – SM and Mr. Densmore – and the result turned on an assessment of their credibility and reliability. In cases with little supporting evidence, the application of *WD* is especially critical. Here, unfortunately, the trial judge failed to apply *WD* correctly, resulting in an illegitimate verdict.

3. Most notably, the trial judge improperly adopted a "piecemeal" approach to the evidence, parsing the sexual encounter into four discrete phases that were assessed separately against the burden of proof: 1) the initial kissing; 2) the kissing of SM's breasts and digital penetration; 3) oral sex; and, 4) sexual intercourse. Instead of considering the reliability and credibility of each witness's version as a whole, the trial judge treated each phase as a separate element of the sexual encounter, deciding whose description of events he believed more.

4. The trial judge accepted Mr. Densmore's evidence about Phase 2,[1] explicitly finding that the "communication of disapproval or lack of consent did not occur in the manner or with the intensity that the complainant described," in respect of both sexual acts. The trial judge explicitly rejected SM's testimony about Mr. Densmore roughly biting her breasts, causing "pai[n]

[1] Both parties agreed that the kissing at Phase 1 was consensual.

resul[ting] in redness and swelling that persisted for several days after," concluding it was inconsistent with the physical evidence.

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 697/31 – 698/1, 698/8-10

5. Nonetheless, when it came time to consider Phases 3 & 4, the trial judge proceeded as if the earlier conflicts in the evidence no longer mattered. After isolating the acts of oral sex and intercourse, Justice Krawchenko concluded that SM's evidence "was credible, and… the evidence of the accused… unworthy of belief." Mr. Densmore's received no testimonial 'credit' for providing an accurate recounting of Phase 2, and Justice Krawchenko never considered how SM's exaggerations (or lies) about Mr. Densmore's "biting her breasts", and digitally penetrating her without consent, informed his assessment of her credibility *overall*. While trial judges are entitled to accept *part* of a witness's testimony, they must provide a "clear and logical basis" for doing so. The rejected portion of SM's evidence was not even considered, let alone logically distinguished.

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 697/10 – 699/2, 701/1-3*; R v Reid* (2003), 167 OAC 336 (Ont CA) at para 5

6. In stark contrast to the credibility analysis discussed by this Court in *R v Rappaport*, the trial judge did *not* "thoroughly engage with all necessary issues"; nor did he address the weaknesses in SM's credibility as a witness "directly, [analyze] them thoroughly, and ultimately [explain] why they did not give him cause for concern." Critically, at no point in his analysis did he "acknowledge the need to…consider problematic features of the complainant's evidence "in the context of the evidence as a whole.""

> *R v Rappaport*, 2025 ONCA 400 at para 28

7. The trial judge's assessment of credibility is also insufficient in a different respect, as it did not meaningfully address *any* of the defence's stated concerns with her testimony. These highlighted shortcomings cried out for an explanation, and none was provided.

PART II SUMMARY OF THE FACTS

8. In 2019, Mr. Densmore attended McMaster University's Homecoming to film content for his highly successful YouTube channel. Unbeknownst to him, SM was also at this party. Mr. Densmore and SM did not interact at this time. However, a photo of SM taken by a member of Mr. Densmore's production team was selected as the thumbnail image for a YouTube video, in which she was briefly featured.[2]

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 695/11-24

9. One year later, Mr. Densmore saw SM on Tinder.[3] He recognized her from the thumbnail image and swiped right, indicating his potential interest in connecting with her. When he did this, the parties matched, meaning that SM had also swiped right on him. Because they matched, the parties could then exchange messages. No messages were shared over Tinder, however.

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 695/26-32; Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 419/25-28

10. A day later, Mr. Densmore reached out to SM through Instagram. The parties engaged in a flirtatious conversation, leading Mr. Densmore to suggest that they meet for a date. SM agreed, and the parties arranged to meet for a hike and to get drinks. When their initial plans fell through, they rescheduled.

> Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 422/7-15; Reasons for Judgment, *Trial Transcript*, Vol. 2, at 696/1-6

11. On August 5, 2020, SM arrived at Mr. Densmore's home at 8:35 P.M. She and Mr. Densmore hugged at the door, and he welcomed her inside. After Mr. Densmore gave her a tour and showed her his film equipment, they left to go on a hike. However, by the time they arrived at the trailhead, they realized that it was too dark to hike, especially since the trail ran along a cliff's

[2] The footage of SM involved her being interviewed by a member of Mr. Densmore's camera crew.
[3] Tinder is a popular dating application.

edge. As an alternative, Mr. Densmore "suggested [they] go back to [his] house and…watch Netflix and chill."[4] SM agreed, and the parties drove to Mr. Densmore's home.

Reasons for Judgment, *Trial Transcript*, Vol. 2, at 696/8-10; Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 432/5-24, 433/1-30

12. The parties returned to Mr. Densmore's home, and he offered her a drink. She declined, and the parties went upstairs to Mr. Densmore's bedroom, where they sat beside each other on the bed, watching an episode of Brooklyn 99. After a few moments, the parties began kissing. From this point on, the stories diverged dramatically.

Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 436/2-5, 447/11-15

(a) Evidence of SM

13. In her examination-in-chief, SM described an "aggressive" sexual assault. It began when Mr. Densmore removed her t-shirt and pulled down her dress, exposing her breasts. She testified that Mr. Densmore kissed and bit her breasts, which "was quite painful," and that the biting left bruises and red marks that lingered for two to three days after their encounter. He then pushed her onto her back, got on top of her, and penetrated her digitally.

Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 30/2 -8, 30/25 - 31/15

14. Mr. Densmore then told SM to get on the floor, put his penis in her mouth, and she performed oral sex. Shortly thereafter, she noticed he was holding his phone above her head, filming her, causing her to pull away. When she told him he did not have permission to film her, Mr. Densmore put his phone away.

Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 31/16 – 33/3

[4] The phrase "*Netflix and chill* is a playful, suggestive slang expression that refers to (having) a casual sexual encounter between two people hanging out at home, possibly prefaced by watching a streaming service like Netflix." See, "Netflix and chill," (last modified 23 January 2025), online: *Merriam Webster* <https://www.merriam-webster.com/slang/netflix-and-chill>

15. At this point, she stood up and began dressing herself because things "had already gone farther than [she] would like… and [she] was ready to leave." Before she could leave, however, Mr. Densmore came up behind her, digitally penetrated her, pushed her onto the bed, and had vaginal sex with her for a few minutes before ejaculating on her back. She cleaned herself off with a paper towel and cried in his bathroom before he asked her to leave.

Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 33/4-14, 34/8-28, 35/16-30

16. In cross-examination, however, SM provided a noticeably different version of events. She admitted that at the outset of Phase 2, after the initial kissing, she swung her legs over Mr. Densmore, straddling him, and removed her own shirt before kissing him again. She further disclosed that she had expressed her interest in Mr. Densmore during Phases 1 & 2 by moaning, breathing heavily, and telling him, "I like that." She also conceded that "it was possible" that she had continued to perform oral sex on Mr. Densmore *after* the phone incident.

Cross-Examination of SM, *Trial Transcript*, April 17, 2024, at 102/20-26, 107/11-13, 109/5-12, 133/6-22

(b) Evidence of Mr. Densmore

17. Mr. Densmore related a very different end to the evening, testifying to a mutually consensual sexual encounter that naturally progressed from kissing to penetrative vaginal sex. As the kissing progressed, Mr. Densmore asked SM to remove her shirt, which she did voluntarily. He then kissed her right breast before SM swung her legs over him, positioning her groin on top of his. After a few minutes of kissing in this position, Mr. Densmore motioned to SM to lie down on the bed. She did, and the parties began to mutually touch each other's genitals.

Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 453/3-15, 454/15/29, 458/8 – 459/14, 461/10 – 463/6, 468/28 – 477/12

18. Mr. Densmore then told SM to get off the bed. She got onto her knees, Mr. Densmore removed his pants, and SM touched his exposed penis and performed fellatio. As she did this, Mr.

Densmore grabbed his phone to record a "consent video".[5] When SM stated that she did not wish to be recorded, Mr. Densmore stopped and showed her that he had deleted the video.[6] Once it was deleted, SM resumed engaging in fellatio for another minute or two.

> Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 484/25 – 485/4, 486/12 – 488/11, 490/28 – 491/4, 497/6 – 503/10

19. At this point, Mr. Densmore told SM to stand. She stood, faced him, and they kissed, pressing their bodies together and touching each other's genitals. Mr. Densmore asked her to turn around, and she did so, placing her forearms on the bed. With SM's assistance, Mr. Densmore then removed her dress and underwear and attempted to penetrate her vaginally. Due to their height difference, Mr. Densmore had difficulties doing so at this angle, however. To accommodate, SM stood on her toes and lowered her body onto the bed. The parties engaged in penetrative vaginal sex for approximately three minutes before Mr. Densmore ejaculated on her back. Mr. Densmore testified that SM was an active and willing participant in the sexual activity, expressing her consent "through groaning, moaning, use of specific words, and her actions."

> Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 504/8 – 506/1, 507/3 – 508/12, 514/11 – 516/27, 518/14 – 525/25; Reasons for Judgment, *Trial Transcript*, Vol. 2, at 697/18-21

20. Promptly thereafter, Mr. Densmore retrieved paper towels to wipe off SM's back. Mr. Densmore testified that he was acting awkwardly at that moment because he was embarrassed about his sexual performance, having ejaculated sooner than intended. The parties dressed, and SM went to use the washroom. There was some joking between the two as they got dressed.

> Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 529/27 – 533/1, 534/14 – 535/1

[5] Mr. Densmore testified that a consent video was a means to protect himself in the case of a false sexual assault allegation. When he engaged in sexual activities with women who were familiar with his work as a YouTube content creator, he would film a brief video where he would ask his sexual partner to vocalize their consent. According to Mr. Densmore, he had met "a lot of athletes, celebrities, DJs, and musicians" who had advised him that this was a necessary practice given his public status as a YouTube creator (Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 540/28 – 543/20).

[6] The police seized and examined Mr. Densmore's phone upon arrest. No video of SM was found.

21. After briefly engaging in small talk, Mr. Densmore suggested that SM leave because he had to be up early the next morning. Mr. Densmore testified that SM was annoyed by this suggestion. Before she left, he walked her to the door, kissed her on the cheek, and hugged her goodbye.

Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 536/5 – 537/20, 540/14-20

PART III ISSUES AND LAW

A. Grounds of Appeal

22. Mr. Densmore raises two grounds of appeal. Ground One concerns the trial judge's credibility analysis and application of the *W(D)* framework. Mr. Densmore argues that the trial judge erroneously assessed the evidence in a "piecemeal" fashion, failed to perform the mandatory third step of the *W(D)* analysis, and drew adverse inferences from misapprehended evidence.

23. With respect to Ground Two, Mr. Densmore argues that the trial judge's reasons for judgment are legally insufficient.

B. Standard of Review

24. Ground One relates to the trial judge's failure to properly apply the burden of proof in assessing credibility. It is well known that "a trial judge's assessment of credibility should be afforded great deference." This being said, "a legal error made in the assessment of credibility may displace the deference usually afforded to a trial judge's credibility assessment and require appellate intervention." As stated by the Alberta Court of Appeal in *R v SMC*, the "[a]pplication of the legal principles from *W(D)* must be assessed on a standard of correctness."

R v Luceno, 2015 ONCA 759 at para 34; *R v SMC*, 2020 ABCA 19 at para 18; See also *R v Wadforth*, 2009 ONCA 716 at paras 50-51; *R v AP*, 2013 ONCA 344 at para 39

25. Ground Two challenges the legal sufficiency of the reasons for judgment—specifically, the trial judge's reasons concerning credibility findings. On review, an appellate court must assess

whether the reasons demonstrate the reasoning path taken by the trial judge in the context of the record, the submissions of counsel, and the live issues at trial. While deficiencies in respect of credibility findings will rarely merit appellate intervention, the "failure to sufficiently articulate *how* credibility concerns were resolved may constitute reversible error."

> *R v Dinardo*, 2008 SCC 24 at para 26.

GROUND 1: THE TRIAL JUDGE ERRED IN APPLYING THE BURDEN OF PROOF

A. Legal Overview: WD

26. In cases that turn on witness credibility, the burden of proof is normally assessed by following the framework established by the Supreme Court in *R v WD*. As Abella J pointed out in *R v CLY,* the purpose of conducting a *WD* analysis is to ensure that "triers of fact – judge or juries – understand that the verdict should not be based on a choice between the accused's and the Crown's evidence, but on whether, based on the whole of the evidence, they are left with a reasonable doubt as to the accused's guilt." It follows that a proper application of *WD* is intended to prevent a shifting of the burden of proof and "ensure that the trier of fact remains focused on the principle of reasonable doubt."

> *R v WD*, [1991] 1 SCR 742; *R v Lifchus*, [1997] 3 SCR 320 at para 13; *R v CLY*, 2008 SCC 2 at paras 6, 8; See also *R v SMC*, 2020 ABCA 19 at para 23

27. While Justice Krawchenko accurately cited the *WD* framework, the issue lies in his *application* of it. After all, as Justice Abella emphasized in *R v CLY*, "[a] correct statement of the burden of proof can scarcely save its evident misapplication."

> *R v CLY*, 2008 SCC 2 at para 32; See also *R v AP*, 2013 ONCA 344 at para 39

B. A Trial Judge's Obligation When Accepting "Part" of a Witness's Testimony

28. Trial judges are entitled to accept "some, none, or all, of each witness's evidence." If a trial judge believes "all" or "none" of the testimony, their obligations are not onerous. So long as the

trial judge "applies the proper legal principles to evaluate [the] testimony" and "articulates how credibility concerns were resolved", their reasons will be afforded deference.

> *R v Powell*, 2021 ONCA 271 at para 43; See also *R v Zimunya*, 2013 ONCA 265 at para 4; *R v RH*, 2024 ONCA 672 at para 29; *R v AM*, 2014 ONCA 769 at para 23

29. This is not the case where a trial judge rejects some aspects of a witness's testimony but accepts others, however. As this Court stated in *R v Reid*:

> A trier of fact may, of course, believe part of a witness's evidence even if other parts of that witness's evidence are found to be unreliable and incredible. However, where that witness is found to have deliberately fabricated a criminal allegation against an accused, we think the trier of fact *must have a clear and logical* basis for choosing to accept one part of that witness's testimony having rejected the rest of it.[7]

Further, in *R v Bristol*, this Court emphasized that in such cases, "a trial judge should explain *why* he is able to accept part of the evidence, despite serious adverse credibility findings respecting significant parts of the evidence."[8]

> *R v Reid* (2003), 167 OAC 336 (Ont CA)at para 5 [Emphasis added]; *R v Bristol*, 2011 ONCA 232 at para 14

30. In *Bristol*, this Court ultimately rejected the suggestion that the trial judge had improperly accepted part of a key witness's testimony without considering the frailties of the rejected portions. But the reason for doing so was because: "the trial judge was aware of [his] credibility issues;" "his reasons [showed] that he understood his task in assessing credibility;" "[h]e considered the appellant's evidence and [the witness's] evidence;" and, "[h]e applied *W.D* properly."

> *R v Bristol*, 2011 ONCA 232 at para 16

[7] See also *R v AF*, 2016 ONCA 263 at para 9 [Emphasis added]: "The trial judge carefully scrutinized the complainant's evidence. He acknowledged inconsistencies in her testimony and determined how much weight they should carry. He provided *clear and cogent* reasons for accepting much – but not all – of the complainant's evidence."
[8] See also *R v SS*, 2011 NBCA 75 at para 35: "[I]f a trial judge accepts *part* of the accused's testimony, in order to convict, he or she must explain at the second stage of the *W.(D).* test, why the accused's evidence nonetheless does not raise a reasonable doubt. Alternatively, if a trial judge perceives inconsistencies in the complainant's evidence, he or she must explain, at the third stage of the *W.D.* test, why the totality of the evidence nonetheless proves guilt beyond a reasonable doubt."

31. When a trial judge accepts only "part" of a witness's testimony, the expectation is that they will carefully "[sift] through and [weigh] the evidence." A trial judge's *WD* analysis will withstand scrutiny if there is clear evidence that they were "alive to the inconsistencies, and despite the inconsistencies…concluded that the [witness] was credible." As stated by the Supreme Court in *R v REM*, "[i]t is enough that the trial judge has demonstrated a recognition, where applicable, that the witness's credibility was a live issue."

> *R v SS*, 2004 BCCA 79 at para 18; *BN v Anglican Church*, 2020 MBCA 127 at para 20; *R v REM*, 2008 SCC 51 at para 64; See also *R v Duchesne*, 2010 QCCA 1745 at para 26

C. The Trial Judge's Fragmented Approach to the Evidence

32. The trial judge began his *W(D)* analysis by separating the conflicting evidence of Mr. Densmore and SM into four discrete phrases: (1) Initial Kissing; (2) Kissing (and biting) of SM's Breasts and Digital Penetration; (3) Oral Sex; and, (4) The Preparation and Execution of Sexual Intercourse. At no point in the judgment did Justice Krawchenko assess the witnesses' credibility or reliability in its totality.

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 697/21-23

33. Both parties testified to consensual kissing on the bed (Phase 1), but from that point on, their stories diverged. In respect of Phase 2, SM testified that Mr. Densmore suddenly became aggressive and began touching her in "painful" ways. After exposing her breasts, "he started kissing them and then biting them, and that was quite painful, so I kind of pushed away from him." From there, without consent, he mounted her and "started putting his fingers inside of me, which was also painful. I did not feel comfortable, so I started to push his hand away." Twice, SM pushed Mr. Densmore to get him to stop, expressing pain. Both times, he ignored her and continued.

> Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 29/30 – 31/15.

34. Though the events described above qualify as a violent sexual assault, Phase 2 did not actually unfold in this way. Justice Krawchenko flatly rejected SM's account, noting how it conflicted with evidence from the nurse who examined SM's breasts and found no bite marks or bruising. He also noted a major inconsistency about digital penetration that was brought out in cross-examination. The only caveat to this rejection of SM's evidence was that "[n]otwithstanding my findings that these two incidents did not occur as stated by the complainant, I do accept the evidence of the complainant that during the second phase… the complainant was having some misgivings about how far things had gone and wanted to end the evening and leave."

Reasons for Judgment, *Trial Transcript*, Vol. 2, at 698/14 – 699/9

35. In contrast, the trial judge expressly *accepted* Mr. Densmore's evidence that he had not bitten SM's breasts or digitally penetrated her without consent. On both points, Justice Krawchenko concluded that SM's "communication of disapproval or lack of consent did not occur in the manner or with the intensity that [she] described."

Reasons for Judgment, *Trial Transcript*, Vol. 2, at 697/27 – 698/12.

36. Turning to Phase 3, Justice Krawchenko rejected Mr. Densmore's testimony, largely because he did not believe the stated motivations for taking a 'consent video.' "[Mr. Densmore's] explanation [was] simply too incredible", he concluded, and "seemed to have been made up…to justify and explain away the introduction of his cell phone." The trial judge also disbelieved Mr. Densmore's testimony about deleting the video in front of SM.

Reasons for Judgment, *Trial Transcript*, Vol. 2, at 699/11 – 700/6

37. In contrast, the trial judge found "[t]he evidence of the complainant *on this point*…logical and believable" because she "was emphatic in her cross-examination that she did not witness any deletion of any videos," and expressed concern regarding the possibility that Mr. Densmore had a

compromising video of her following their sexual encounter. After considering "all the evidence on the issue of the video,"[9] he concluded that the complainant was credible, "[w]ith regards to *this area* of conflicting evidence."

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 700/19 – 701/4, 701/15-18 [Emphasis added]

38. Although the trial judge acknowledged that SM contradicted herself by conceding on cross-examination that she may have continued to fellate Mr. Densmore *after* the phone incident—rather than immediately trying to leave—he concluded that this evidence "did not diminish or adversely affect the credibility of the complainant; they simply highlighted that the time estimates she had given were not particularly reliable." Shortly thereafter, however, the trial judge cited the oral sex and the phone incident as the key moment when SM's:

> Initial misgivings crystallized both in the form of a subjective withdrawal of consent…[which was] then communicated in words to the accused when he tried to film [her]. At this moment, it ought to have been clear to the accused that he had overstepped.
>
> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 701/20 – 702/22

39. At the final stage of the *W(D)* analysis, the trial judge assessed two areas of conflicting evidence: 1) "how the complainant came to be positioned for intercourse" and the removal of her clothing; and, 2) "the issue of consent and…the execution of the unprotected sexual intercourse." Addressing the former, after outlining the evidence, Justice Krawchenko stated that he "reject[ed] the testimony of the accused *on these points*." He then "accept[ed] the testimony of the complainant as being logical [as] she already had serious misgivings after the video incident."

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 702/24 – 704/6

[9] It is worth noting that the trial judge mischaracterized SM's evidence in this section, stating that she "clearly communicated to the accused that she did not agree to being taped, and in response to that, the accused simply put the phone down." This is incorrect. Though it was not part of her initial evidence, in cross-examination, SM admitted that Mr. Densmore might have told her he had deleted the video before putting his phone away" (Cross-examination of SM, *Trial Transcript*, April 17, 2024, at 137/7 – 138/15).

40. The last area of conflicting evidence related to whether SM verbally consented. Here, the trial judge rejected Mr. Densmore's testimony about SM's verbal encouragement and requests to be spanked because he "testified to these alleged utterances in a manner that was flip and appeared to be made up on the spot."[10] As a result, the trial judge concluded that Mr. Densmore "did not have expressed verbal communicated consent to proceed to unprotected intercourse."

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 704/27-29, 706/1-3

D. The Trial Judge Assessed the Evidence in a Piecemeal Fashion

41. The errors in the trial judge's *WD* analysis are a symptom of his chosen methodology. Rather than addressing the evidence "as a whole", he segregated the conflicting testimony into discrete phases and assessed each in isolation. At no point did the trial judge consider how/whether his previous conclusions affected the credibility analysis at the later stages. In a manner analogous to this Court's decision in *R v AP*, "[t]he *structure* of the trial judge's reasons…demonstrate that [he] did not consider *all the evidence* related to the ultimate issue."

> *R v Morin*, [1988] 2 SCR 345 at para 28; *R v Stanton*, 2021 NSCA 57 at paras 74, 76; *R v Schaff*, 2017 SKCA 103 at para 38; *R v DF*, 2020 BCSC 2215 at para 18; *R v Lake*, 2005 NSCA 162 at para 22; *R v AP*, 2013 ONCA 344 at paras 35, 58 [Emphasis added]

42. In *R v PA*, the British Columbia Court of Appeal recently explained this type of error, noting that a *W(D)* analysis requires that "the evidence of the Crown's witnesses and any evidence adduced by the defence, including the testimony of the accused, *not be examined in isolation*." In other words, "[i]n a case that turns on credibility…the trial just must direct his or her mind to the

[10] The trial judge also stated that "the complainant was not cross-examined on these alleged words of direction or encouragement that she was said to have uttered, which supported the narrative of the accused that they were words of consent upon which he relied" (Reasons for Judgment, *Trial Transcript*, Vol. 2, at 704/22-27). This is incorrect. SM was repeatedly cross-examined on whether either party was making noises or speaking during the sexual encounter, and defence counsel specifically asked her if she had told Mr. Densmore to spank her (Cross-examination of SM, *Trial Transcript*, Vol. 2, at 264/15-27, 265/19-24, 267/10-11, 267/31 – 268/8, 274/21-26, 274/32 – 275/12, 275/26 – 276/2, 276/15-18, 276/26-28).

decisive question of whether the accused's evidence, *considered in the context of the evidence as a whole*, raised a reasonable doubt as to his guilt."

> *R v PA*, 2024 BCCA 93 at para 33 [Emphasis added]. See also *R v MJ*, 2022 SKCA 106; *R v Gilbert*, 2024 BCCA 310; *R v Dinardo*, 2008 SCC 24 at para 23 [Emphasis added]

43. The problem with approaching the encounter in this artificial "phase by phase" fashion is that it separates portions of the evidence into categories of "unbelievable" and "believable", when the trial judge must assess a witness's veracity and reliability in its entirety. As Justice Rouleau stated in *R v AP*, a corollary of the piecemeal approach is "that [the trial judge] did not consider all of the evidence in relation to the ultimate issue of whether the appellant's guilt [has] been proven beyond a reasonable doubt."

> *R v AP*, 2013 ONCA 344 at para 55. See also *R v Hoohing*, 2007 ONCA 577 at para 15

44. Other Canadian appellate courts have adopted the same approach. In *R v Schaff*, the Saskatchewan Court of Appeal pointed out that "[i]t is an error of law for a trial judge to examine evidence in a piecemeal fashion" because it is "[i]mplicit in [this] approach that the trial judge has considered each piece of evidence or testimony on the criminal standard of proof instead of consider the whole of the evidence on that standard." The Alberta Court of Appeal in *R v Gauthier*, referring to the *W(D)* analysis, was equally clear: the "steps must be taken in the context of all the evidence, cumulatively and not in isolation, and *specifically applied to all the exculpatory evidence* that the Crown must negate beyond a reasonable doubt."[11] A trial judge's credibility analysis must be conducted "with full knowledge of the evidence that has been adduced at the trial."

> *R v Gauthier*, 2022 ABCA 121 at para 28 [Emphasis added]; *R v Schaff*, 2017 SKCA 103 at para 38. See also *R v Lake*, 2005 NSCA 162 at para 22

[11] See also *R v JK*, 2015 NLCA 14 at para 16, per Rowe JA: "what should have occurred was a consideration of the "cumulative effect" of the evidence pointing away from the guilt of the accused against the "cumulative effect" of all the evidence pointing toward the guilt of the accused."

45. The argument raised here bears real similarities to *Schaff*, despite that appeal being dismissed. In that case, the appellant unsuccessfully argued that the trial judge erred in accepting inculpatory portions of a key witness's testimony without considering previous findings of unreliability. In dismissing this ground of appeal, the Court stated that:

> There is nothing in the trial judge's decision that demonstrates he failed to take into consideration Mr. Schell's faulty recollection on other transactions when he considered whether the two cheques had been authorized by him. He was alive to the totality and cumulative effect of the evidence of the other transactions. I say this because *he specifically distinguished Mr. Schell's reliability of recollection regarding the Nostadt cheques from his reliability of recollection with respect to all the other transactions*. *He considered Mr. Schell's evidence on the cheques and sponsorship in the context of and in contrast to all those other transactions* with the recognition that his recollection on those other transactions was unreliable.
>
> *R v Schaff*, 2017 SKCA 103 at para 40 [Emphasis added]

46. None of the factors relied upon to overcome the judge's "piecemeal" approach to the evidence in *Schaff* are present here. Nothing in the trial judge's reasons indicates he was "alive to the totality and cumulative effect of the evidence"; nor did he "specifically [distinguish]" SM's lack of credibility at Phase 2 from his acceptance of her testimony in the latter phases. *Schaff* implicitly affirms the notion that where a trial judge accepts only part of a witness's testimony, they must provide a rational and articulated basis for distinguishing between the credible and non-credible portions. No such reasons were provided in this case.

47. This Court's decision in *R v Rappaport* is equally instructive. In that case, this Court rejected the suggestion that the trial judge had "piecemealed" the evidence and failed to consider the cumulative impact of the complainant's testimonial frailties. But the reasons for dismissing the appeal constitute a checklist of what Justice Krawchenko *did not do*:

- "The trial judge specifically addressed each of the areas of the complainant's evidence that were said to adversely impact her credibility."

- "He was unable to resolve some of them but specifically concluded that, in relation to one unresolvable matter, it made "little difference in [his] assessment of the evidence as a whole."
- "In our view, the trial judge's extensive 250-paragraph judgment thoroughly engaged with all necessary issues. He understood the challenges to the complainant's credibility, addressed each of them directly, analyzed them thoroughly, and ultimately explained why they did not give him cause for concern."
- "He understood that the burden of proof remained on the Crown throughout… And, importantly, he repeatedly acknowledged the need to consider the evidence as a whole, specifically the need to consider problematic features of the complainant's evidence "in the context of the evidence as a whole."

  R v Rappaport, 2025 ONCA 400 at paras 26-28

48. The outcome of this case was entirely dependent upon the trial judge's credibility analysis, and the *only* indication that the trial judge was alive to *W(D)* was his initial recitation of the law. The trial judge never addressed challenges to the complainant's credibility, nor did he explain why "they did not give rise to concern." Crucially, the trial judge never "acknowledged the need to consider the evidence as a whole" or "the need to consider problematic features of the complainant's evidence."

E. The Trial Judge Did Not Perform the Third Step of the W(D) Analysis

49. Even if the trial judge was correct to disbelieve portions of Mr. Densmore's evidence, he still had an obligation to consider all the weaknesses in the complainant's evidence during the final stage of the *W(D)* analysis, and he did not do so. As the Prince Edward Court of Appeal held in *R v JMH*, a "proper application of the third step involves moving the focus from the evidence of the accused to the Crown's evidence and assessing it in its own right (in relation to all the evidence) on the criteria of coherency, reliability, and credibility."

R v JMH, 2012 PECA 6 at para 30; *R v Schaff*, 2017 SKCA 103 at para 38

50. The trial judge never performed this step. Because his analysis was focused on assessing Mr. Densmore's evidence against SM's *at each successive stage of the sexual encounter*, he never

truly considered her evidence independently, judging it against the standards of coherence, reliability and credibility. Instead, the trial judge relied on isolated elements of her testimony to conclude that she had not consented to the sexual activity at issue.

51. This approach is fundamentally flawed. Despite rejecting SM's testimony concerning the biting of her breasts and her claim that she withdrew consent during the first bout of digital penetration, he failed to grapple with how these findings informed his later conclusions. As the Nova Scotia Court of Appeal recently explained in *R v Stewart*:

> [B]ased on the evidentiary record, the trial judge could have accepted the complaint's evidence that she did not consent to the anal penetration she remembered and proceeded to enter a conviction on that narrow basis. However, in the context of this case, the trial judge would have needed to grapple with the impact on the required credibility assessment of having also found that the complainant did consent to the non-anal sexual activity despite her having asserted otherwise, and that the complainant's evidence she was crying and had repeatedly protested to the anal penetration was not accepted. If the trial judge considered these potential detractions from her credibility, and still concluded he was satisfied she had not consented to the anal penetration, a conviction was theoretically possible.
>
> *R v Stewart*, 2025 NSCA 57 at para 64

52. This step of the analysis was particularly important in light of SM's testimony, which did not demarcate the 'phases' of the sexual encounter as Justice Krawchenko did. Consider her testimony about how the sexual activity transitioned from phase 2 to 3:

> Q: So, you mentioned it continued with his hands — or sorry, was it — did you say hands or fingers penetrating you?
>
> A. His fingers.
>
> Q. Fingers. Did anything further happen?
>
> A. Yes. Then he told me… [t]hat he wanted me to sit on the floor by his bed.
>
> Q. All right. And did you do that?
>
> A. Yes.
>
> Q. Why did you do that?
>
> A. I was scared at that point. I knew that I didn't want it to progress as far as it did or any farther, and I felt like my attempts to stop what was happening from continuing had not been met.

Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 31/11-26

53. How can any of this not give rise to doubt about Phases 3 & 4? Justice Krawchenko's findings regarding Phase 2 indicate there was no reason for SM to be "scared," since everything that happened to that point was consensual, and not a violent sexual assault, as SM portrayed in her testimony. Moreover, her reason for not saying anything did not make sense either, as, according to the factual findings, *she had not made any attempts to stop what was happening*.

F. The Trial Judge Discredited Mr. Densmore for a Non-Existent Inconsistency

54. In the context of a credibility analysis, a misapprehension of evidence can warrant reversal if it significantly impacts the trial judge's assessment. As this Court stated in *R v SR*, "[i]f the trial judge mischaracterized parts of the accused's evidence that were central to the assessment of credibility, there is more likely to be a miscarriage of justice." To establish a miscarriage of justice, the appellant must demonstrate that the misapprehension was "of substance rather than detail… material rather than peripheral to the judge's reasoning and… play[ed] an essential role in the reasoning process."

R v SR, 2022 ONCA 192 at para 15; *R v Cloutier*, 2011 ONCA 484 at para 60

55. This case satisfies each of the required criteria. In Justice Krawchenko's analysis of how sexual intercourse began (during Phase 4), he stated that:

> The accused painted a confusing picture in his evidence relating to pursuing intercourse. On one hand, he was receiving specific verbal instructions, which he appeared to equate to consent in the form of the words, fuck me, etcetera, which I rejected as unworthy of belief. On the other hand, he testified that he did not ask to have penetrative intercourse, but rather took his cues from the complainant's body language, her moaning and the complainant saying she liked it when he touched her.

Reasons for Judgment, *Trial Transcript*, Vol. 2, at 705/22-32

56. The purported inconsistency, which was relied upon by the trial judge as a key reason to disbelieve Mr. Densmore's testimony, simply does not exist. Mr. Densmore did not "paint a

confusing picture... relating to pursuing intercourse". On the contrary, with respect, it was the trial judge who was confused. Throughout examination-in-chief and cross-examination, Mr. Densmore *consistently* explained that at the outset of intercourse, he was "going based off her body language, her moaning and her saying that she liked it when I touched her." He stated twice that SM's verbal instructions ("fuck me", etc) began *after* vaginal penetration began.

> Examination-in-Chief of Jack Densmore, *Trial Transcript*, Vol. 2, at 518/14 – 525/15; Cross-Examination of Jack Densmore, *Trial Transcript*, Vol. 2, at 580/3-23

57. Since Mr. Densmore's testimony was unequivocal, the so-called "confusing picture" is not a product of his evidence. The trial judge's confusion arose from his own mischaracterization of what was said. This was the *only* 'inconsistency' the trial judge identified in Mr. Densmore's testimony, and it was improperly used to discount the veracity of his evidence.

GROUND 2: THE TRIAL JUDGE'S REASONS WERE LEGALLY INSUFFICIENT

a. Overview

58. Judicial reasons serve the important function of explaining why a result was reached *and* ensuring trial judges are held accountable for their decisions. As Justice Côté emphasized in *R v Chouhan*, "reasons justifying and explaining the result are important both for the losing party and the public to know that justice has been done."

> *R v REM*, 2008 SCC 51 at para 15; *R v Sheppard*, 2002 SCC 26 at para 15*; R v Chouhan*, 2021 SCC 26 at para 258

59. For this reason, it is an error of law for a trial judge to fail to explain a decision in such a way that is sufficiently intelligible to permit appellate review. The sufficiency of reasons test was further elaborated on by the Supreme Court in *R v Gagnon*:

> Finding an error of law due to insufficient reasons requires two stages of analysis: (1) are the reasons inadequate; (2) if so, do they prevent appellate review? In other words, the Court [in *Sheppard*] concluded that even if the reasons are objectively inadequate, they

sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record.

R v Sheppard, 2002 SCC 26 at para 1; *R v Gagnon*, 2006 SCC 17 at para 13

60. There is no decisive rule dictating when meaningful appellate review is inhibited by insufficient reasons. Instead, appellate courts take a functional approach, "directed at whether the reasons respond to the live issues raised, with due regard to the evidence adduced and the positions advanced by counsel on both issues." To put it another way, there is "no obligation in law on a trial judge to record all or any specific part of the process of deliberation on a fact." However, "[a]n accused person should not be left in doubt about why a conviction has been entered."

R v Sheppard, 2002 SCC 26 at paras 28, 55; *R v Victoria*, 2018 ONCA 69 at para 44. See also *R v Dinardo*, 2008 SCC 24 at para 25; *R v REM*, 2008 SCC 51 at para 16; *R v Walle*, 2012 SCC 41 at para 34

61. Although credibility findings are granted significant deference, they are not immune from appellate scrutiny. In *R v Dinardo*, the Supreme Court concluded that it was an error for the trial judge to "fai[l] to explain how he resolved the significant issues of credibility concerning the complainant's testimony." Ultimately, trial judges are required "to explain their reasons on credibility and reasonable doubt in a way that permits adequate review by an appellate court."

R v Braich, 2002 SCC 27 at para 22; *R v Gagnon*, 2006 SCC 17 at para 19; See also *R v Dinardo*, 2008 SCC 24 at para 26

b. The Trial Judge Failed to Engage with Material Credibility Concerns

62. When reduced to its simplest terms, the path the trial judge took to convict Mr. Densmore is discernible from the record: he rejected Mr. Densmore's exculpatory evidence and accepted SM's version of events. Nonetheless, although the trial judge's reasons "explained *what* conclusion he had reached," they do not adequately describe "*why* he had come to it."

R v WDM, 2022 SKCA 64 at para 46

63. Through cross-examination and later in closing submissions, trial counsel highlighted several concerns with SM's evidence that undermined her credibility, including:

- Her strong motive to fabricate;
- The external pressure placed on her to complain to police;
- Her minimization of her participation in the sexual encounter;
- Inconsistencies in her testimony regarding the termination of oral sex; and,
- Her initial perception of the sexual encounter.

None of these were truly considered. While the trial judge was alive to *some* of the frailties,[12] the reasons do not "show that [he] came to grips with the issues thus defined by the defence."

> *R v Braich*, 2002 SCC 27 at para 25

(i) SM's Motive to Fabricate

64. A recurring theme of trial counsel's closing submissions was that the complainant had a motive to fabricate owing to her profound anxiety that Mr. Densmore's phone contained compromising images and/or videos of her. Trial counsel emphasized that SM was:

> More concerned about the possibility of him having a video, but she was unsure if she wanted to press criminal charges for a sexual assault. The – the day, the weeks even the months after her encounter with Mr. Densmore are preoccupied with her wish to have the police go and investigate whether he actually has anything [on his phone].

> Closing Submissions by Mark Fahmy, *Trial Transcript*, Vol 2, at 624/6-13

65. Following the sexual encounter, SM was reluctant to press charges. But she was determined to have the police speak to Mr. Densmore and look through his phone. In an email to her therapist, SM wrote: "And what about if he actually took a video? If he did, and that got out, that could ruin my entire life." Similarly, in her initial police report, she stated: "I am unsure if I want to press charges at this time, but I am deeply concerned as to if he has any video/photos of me."

> Cross-Examination of SM, *Trial Transcript*, Vol 2, at 132/26-30, 299/10-15

66. In closing submissions, trial counsel argued that SM's anxieties about the contents of Mr. Densmore's phone were amplified by the fact that he "unceremoniously… kicked her out of the

[12] For example, the absence of physical injuries, contradicting SM's testimony that Mr. Densmore bit her breasts.

house" after sex. Although SM told police that she was "obviously fine" with being asked to leave, her testimony at trial revealed otherwise. In cross-examination, she admitted that the dismissal "didn't feel good," and she agreed with trial counsel that she felt "worthless" because she was treated as a "conquest" or "notch on [Mr. Densmore's] bedpost".

> Closing Submissions by Mark Fahmy, *Trial Transcript*, Vol. 2, at 646/17-18; Cross-Examination of SM, *Trial Transcript*, Vol. 2, at 306/1- 307/12

67. In his reasons for judgment, Justice Krawchenko rejected Mr. Densmore's claim about deleting the video. He emphasized that SM's "*most significant concern* after leaving [his] home [was] the potential impact of this on her in the future," and concluded that "[i]f she had witnessed the double deletion that Mr. Densmore testified to, she would not have had those concerns."

> Reasons for Judgment, *Trial Transcript*, Vol 2, at 701/6-13 [Emphasis added]

68. Although this factual conclusion was not mandatory, given the evidence, reaching it meant that when SM left Mr. Densmore's home, she *believed* he possessed a compromising video of her on his phone, which *increased* the probative value of evidence supporting a potential motive to fabricate. As Justice Krawchenko concluded, SM's "most significant concern" was that Mr. Densmore had images or videos of her on his phone. Considering that Mr. Densmore had already shown a propensity to disrespect her,[13] it was essential to consider whether SM made the sexual assault allegation partly or fully to prompt police to access his device—especially since the police apparently would not take action unless she made a formal complaint.

69. In *R v WDM*, the Saskatchewan Court of Appeal stated that "[w]here credibility is a central issue and there is evidence suggesting a complainant may have been motivated to fabricate an allegation against the accused, the trier of fact is *required* to consider this information."[14] This

[13] Specifically, by dismissing her immediately after sex.
[14] See also *R v Ignacio*, 2021 ONCA 69 at para 35: "Moreover, the trial judge was required to consider motive to fabricate due to the defence allegation that the complainant had a motive to fabricate."

Court has repeatedly adopted a similar position, holding that trial judges must address any potential motivations to fabricate when assessing credibility. As emphasized by Justice Doherty in *R v Batte*:

> It is difficult to think of a factor which, as a matter of common sense and life experience, would be more germane to a witness' credibility than the existence of a motive to fabricate evidence.

R v WDM, 2022 SKCA 64 at para 42*;* See *R v Ignacio*, 2021 ONCA 69 at para 35; *R v SR*, 2022 ONCA 192 at para 30; *R v RP*, 2020 ONCA 637 at paras 19-20; *R v Batte* (2000), 145 CCC (3d) 449 at para 120 (Ont CA)

(ii) Pressure Faced by SM to Complain to Police

70. In the months following her sexual encounter, SM faced extensive pressure from her friends, family, and therapist to press charges against Mr. Densmore. According to SM's therapist, Mr. Densmore was a "predator" who was skilled in making "[s]mall changes to their plans until she was in his apartment" and had likely "done this before." SM received similar feedback from her friends, mother and stepfather, who – despite never meeting Mr. Densmore – told her that she "[needed] to press charges against Jack, because otherwise, [she was] letting him do that to other girls." This pressure culminated in SM "feeling guilty that if [she didn't] take any legal type of action, [she would be] responsible for him doing this to other girls."

Cross-Examination of SM, *Trial Transcript*, Vol. 2, at 320/29 – 321/3, 324/2-9, 336/17-26,

71. Trial counsel addressed this external pressure extensively in closing submissions, suggesting that the repeated comments from her friends, family, and therapist amounted to a form of collusion. However, he also argued that they provided a motive to fabricate, as SM was:

> [P]ressured with bringing down this monster who should pay for what he's done, not just to her, but to other countless women in the past, and then prevent it from happening in the future. They can't let him get away with it, he would just be doing it again. That's motive to fabricate.

Closing Submissions by Mark Fahmy, *Trial Transcript*, Vol. 2, at 631/27 – 632/10, 635/1-6

72. While the trial judge acknowledged these submissions, he reframed trial counsel's argument as one focused on "inadvertent tainting" only. He then summarily concluded that the evidence "had no effect on the reliability of the complainant's evidence as related to the critical issues in this trial."

Reasons for Judgment, *Trial Transcript*, Vol. 2, at 694/10-17

73. The difficulty with this conclusion is that it only addressed half of trial counsel's argument. Collusion or "inadvertent tainting" can certainly affect the *reliability* of a witness's testimony, as a person might have initial doubts about an event and be subtly convinced to adopt a 'negative spin' about them, despite having no improper motive for doing so. Such a witness testifies honestly, but unreliably, as a consequence.

74. But pressure to act can also create a motive to fabricate, which occurs when the witness is convinced to alter their story by the pursuit of a 'greater good'. The law recognizes that people are susceptible to this type of prejudicial motivation. Consider the rules restraining the use of bad character evidence. One of the underlying concerns with this type of proof is that jurors might lean towards a guilty verdict not because the evidence supports it, but because the accused *deserves* to be punished regardless. Applied to this case, SM might have concluded that "[Mr. Densmore] is a bad person who did bad things [to her] and ought to be punished, whether or not [he] committed the offences with which [he is] charged." A person applying this sort of logic does not believe they are acting immorally. On the contrary, they are punishing a person who did bad things – as Mr. Densmore did to SM in using her for sex and throwing her out afterwards– and is simply getting what they deserve.

R v ZWC, 2021 ONCA 116 at para 94

75. Even if Mr. Densmore's concern *was* that this pressure impacted only the *reliability* of SM's evidence, the trial judge's reasoning still provides no meaningful explanation as to *why* the repeated suggestions to SM that she had an obligation to protect other women from this calculated "predator" Mr. Densmore—a man who would continue to prey on other women unless she took action—had "no effect" on the reliability of her evidence. The trial judge did not consider how this ongoing encouragement may have consciously or unconsciously shaped SM's recollection of her encounter with Mr. Densmore.

(iii) SM's Minimization of her Participation

76. As trial counsel stated in closing submissions, "[SM's] evidence was that it was one continuous [non-consensual] encounter." According to SM's evidence on direct examination, Mr. Densmore forcefully initiated each step of the sexual activity, while she remained passive throughout. Her position "changed dramatically in cross-examination," however, as she shifted away from her testimony, which minimized her participation in the sexual encounter.

Closing Submissions by Mark Fahmy, *Trial Transcript*, Vol. 2, at 604/24-26

77. SM initially testified that Mr. Densmore "started by removing [her] shirt and pulling down [her] dress so that [her] breasts were exposed." She further insisted in cross-examination that he "didn't ask me to take it off. He just started to take it off." However, after being confronted with her police interview in which she said that Mr. Densmore had requested that *she* take her shirt off, she pivoted and agreed that she had done so, and was "showing interest or consenting" in the process. SM attempted to correct this inconsistency by stating that she was "mistaken before confusing taking off the shirt with sliding the straps down."

Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 30/2-3; Cross-Examination of SM, *Trial Transcript*, April 17, 2024, at 100/29-30, 102/25-26, 103/4-7

78. Similarly, when the Crown asked SM to explain how the kissing progressed, she immediately responded with details concerning what Mr. Densmore did without any mention of her own role. In cross-examination, however, SM admitted that after a few minutes of kissing Mr. Densmore, she swung her legs over his body and straddled him before removing her shirt.

> Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 29/30 – 30/8; Cross-Examination of SM, *Trial Transcript*, April 17, 2024, at 104/5-16, 114/8-14

79. Another inconsistency was SM's avowal that the vast majority of the sexual encounter took place in near silence. In chief, SM was a silent recipient of Mr. Densmore's advances. She testified that, other than providing her with specific directions, the only sound made by either party was Mr. Densmore calling her a "slut". In closing submissions, trial counsel described SM's initial depiction as an "incomprehensible narrative of a silent movie." It also seemed to be incomprehensible to SM, who admitted on cross-examination on multiple occasions that they were both moaning, that she was "breathing heavily", and that she "uttered the words, I like that."

> Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 30/9-14, 30/29-31, 31/9-10, 32/2-6;
> Closing Submission by Mark Fahmy, *Trial Transcript*, Vol. 2, at 643/5-6; Cross-Examination of SM, *Trial Transcript*, April 17, 2024, at 107/11-13, 109/5-13, 110/4-7

80. While the weight to be ascribed to inconsistencies falls within a trial judge's discretion, they need to be *addressed* in the reasons for judgment and not ignored, as occurred here. As the Nova Scotia Court of Appeal held in *R v M(CPJ)*:

> It is also true… that a judge is not required to address every inconsistency in the evidence or every argument advanced at trial. However, it is important for a judge to address *material inconsistencies* and *key arguments* advanced in their decision. That way, it is clear to those affected the judge grasped the relevant evidence and arguments.
>
> *R v M(CPJ)*, 2023 NSCA 73 at para 57 [Emphasis added]; see also *R v CG*, 2021 ONCA 809 at para 42; *R v RA*, 2017 ONCA 714 at paras 44, 77-78

(iv) Inconsistencies About Continuing with Oral Sex

81. In chief, SM testified that once Mr. Densmore took out his phone, she stood up, "started putting [her] shirt on and…looking for her purse because [she] had decided that…this had already gone farther the [she] would like or wanted it to, and [she] was ready to leave." This version of events did not hold up under cross-examination. When trial counsel asked SM whether she "continue[d] to engage with him in oral sex" after his phone was put away, she claimed that she did not remember. Upon further questioning, however, SM conceded that it was "possible" that she performed additional fellatio following the phone incident.

> Examination-in-Chief of SM, *Trial Transcript*, Vol. 1, at 33/8-11; Cross-Examination of SM, *Trial Transcript*, April 17, 2024, at 133/6-22

82. Despite acknowledging this discrepancy, the trial judge's treatment of it was cursory and dismissive. In his reasons for judgment, the trial judge simply stated that:

> Nothing turned on whether the complainant engaged or did not engage in further oral sex after the phone was put down. These answers given on cross-examination did not diminish or adversely affect the credibility of the complainant; they simply highlighted that the time estimates she had given were not particularly reliable.

This is an assertion, not an analysis. It offers no explanation as to *why* this inconsistency did not adversely affect SM's credibility. The statement is also logically incoherent in light of Justice Krawchenko's subsequent conclusion that there was a "subjective withdrawal of consent during the course of oral sex and were then communicated in words to the accused when he tried to film the complainant". If SM went back to performing oral sex once his phone was put away – a factual conclusion that "nothing turned on" – how would it have "been clear to [Mr. Densmore] that he had overstepped" in respect of the sexual activity?

> Reasons for Judgment, *Trial Transcript*, Vol. 2, at 702/4-22

83. As a consequence of the trial judge's refusal to resolve this discrepancy, he did not respond to trial counsel's submission that:

> If it's possible, as she said, that the oral sex continued afterwards and that Jack had not moved to create the means for her escape, it also [means] that all her evidence with respect to putting on her clothes, indicating to Jack that it was over, she was leaving, is not reconcilable at all.

SM's inconsistent account concerning the termination of oral sex needed to be resolved, as it bore *directly* on her credibility. In her examination-in-chief, she was adamant that she stopped performing oral sex the moment she realized Mr. Densmore took out his phone. Her later admission, under cross-examination, that she might have continued oral sex after that point is not a peripheral discrepancy. It relates to a critical moment of the sexual encounter—one that SM initially presented with clarity and certainty. Her omission of this detail raised serious concerns about her credibility that the trial judge did not meaningfully grapple with.

Closing Submissions by Mark Fahmy, *Trial Transcript*, Vol. 2, at 605/16-22

(v) SM's Initial Perception of the Sexual Encounter

84. Immediately after her interaction with Mr. Densmore and in the months leading up to her pressing charges, SM struggled to reconcile her perceptions of the sexual encounter. Throughout cross-examination, SM agreed to having thought that she was "being dramatic," "making this all up," "making a big deal out of nothing," "overthinking," and/or "reading into something that didn't happen." SM admitted to having expressed these concerns to friends, family, and her therapist.

Cross-Examination of SM, *Trial Transcript*, Vol. 2, at 296/25-30, 314/7-27, 317/18-23, 339/20-28

85. A complainant's reflective confusion about a sexual encounter and feelings that she might be to blame, standing alone, are not indicative of diminished credibility or reliability. But "this does not mean that no consideration whatsoever can be given to evidence of such." The significance of these statements here was heightened by the aforementioned concern regarding the potential influence of her friends, family, and therapist. As counsel suggested in closing submissions, the trial judge needed to at least consider that SM's "own perception, her reality of

what happened that evening was subject to this very real debate in her mind and her soul and her conscience that she was making it all up, blowing things out of proportion, an attempt to seek attention, and in her words, reading into something that did not happen."

> *R v DD*, 2000 SCC 43 at para 65; *R v ADG*, 2015 ABCA 149 at para 32; Closing Submissions by Mark Fahmy, *Trial Transcript*, Vol. 2, at 630/29 – 632/2

c. The Trial Judge's Reasons were Insufficient

86. A trial judge's credibility analysis is sufficient where there is some evidence that they identified and addressed the material shortcomings with a witness's evidence. In *R v Doma*, the trial judge convicted the accused of sexual assault after concluding that the complainant was credible because "the contradictions between her evidence and the statement provided to the police are of little moment." This was *more* than the trial judge provided in this case, yet in *Doma*, the Alberta Court of Appeal remitted the conviction for a new trial because the trial judge "never explained *why* he came to those conclusions…indicate whether [the contradictions] were substantive or peripheral, nor advise why they did not cause concern." As such, the trial judge "did not adequately address contradictory evidence on the issues related to credibility."

> *R v Doma*, 2022 ABCA 58 at paras 16, 21.

87. A similar conclusion was reached in *WDM,* where the Court set aside the trial judge's decision, explaining that:

> [T]he problem is not that the trial judge failed to reconcile frailties in the evidence. Rather, his reasons fail to even *identify* the key frailties, let alone explain how a finding that the Crown had proven its case against [the accused] beyond a reasonable doubt can be reconciled with them.

In that case, the Court emphasized that the trial judge's failure to "grapple with" the problematic evidence was exacerbated because it involved evidence "going to the central part of the case."

> *R v WDM*, 2022 SKCA 64 at paras 52, 57 [Emphasis in original]

88. SM's testimony can *only* be understood as being "central to the Crown's case". There was no supporting evidence, and a conviction relied exclusively on her testimony. Despite trial counsel's efforts to draw the judge's attention to the various concerns with SM's testimony, none were meaningfully addressed. As stated by the Newfoundland and Labrador Court of Appeal in *R v CD*, "[i]t may be that, notwithstanding the inconsistencies, the trial might have accepted some, part or even all of her testimony." However, in this case, "[w]e simply do not know what the trial judge concluded because there is no reference to this evidence in the decision."

R v WDM, 2022 SKCA 64 at para 57; *R v CD*, 2024 NLCA 22 at para 42

PART IV ORDER REQUESTED

89. Mr. Densmore requests that the appeal be allowed, his conviction be set aside, and a new trial ordered.

90. The estimated time required for oral argument is 1.25 hours.

PART V SEALING ORDERS, PUBLICATION BANS OR OTHER RESTRICTIONS ON PUBLIC ACCESS

91. Mr. Densmore has no submissions on the existing publication ban.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of July, 2025.

Peter Sankoff
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Mark Fahmy
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SCHEDULE A: AUTHORITIES TO BE CITED

BN v Anglican Church, 2020 MBCA 127

R v ADG, 2015 ABCA 149

R v AF, 2016 ONCA 263

R v AM, 2014 ONCA 769

R v AP, 2013 ONCA 344

R v Batte (2000), 145 CCC (3d) 449

R v Braich, 2002 SCC 27

R v Bristol, 2011 ONCA 232

R v CD, 2024 NLCA 22

R v CG, 2021 ONCA 809

R v Chouhan, 2021 SCC 26

R v Cloutier, 2011 ONCA 484

R v CLY, 2008 SCC 2

R v DD, 2000 SCC 43

R v DF, 2020 BCSC 2215

R v Dinardo, 2008 SCC 24

R v Doma, 2022 ABCA 58

R v Duchesne, 2010 QCCA 1745

R v Gagnon, 2006 SCC 17

R v Gauthier, 2022 ABCA 121

R v Gilbert, 2024 BCCA 310

R v Hoohing, 2007 ONCA 577

R v Ignacio, 2021 ONCA 69

R v JK, 2015 NLCA 14

R v JMH, 2012 PECA 6

R v Lake, 2005 NSCA 162

R v Lifchus, [1997] 3 SCR 320

COA-24-CR-1164

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HIS MAJESTY THE KING

Respondent

-and-

JACK DENSMORE

Appellant

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