

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

- (a) any of the following offences;
 - (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
 - (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
 - (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or
- (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

Gillese, Simmons and Blair JJ.A.

BETWEEN:

Her Majesty the Queen

Respondent

and

B.D.

Appellant

Paul S. Lewin and Daniel Stein, for the appellant

Benita Wassenaar, for the respondent

Heard: October 28, 2010

On appeal from the convictions imposed by Justice P.J. Flynn of the Superior Court of Justice, sitting with a jury, on August 17, 2005.

R.A. Blair J.A.:

OVERVIEW

[1] This case gives new meaning to the word “bizarre”. As the trial judge noted at the beginning of his reasons for sentence:

It would be the most muted form of understatement to say that this was an unusual case. Indeed, I have never encountered a more bizarre case in my quarter century in the law. ...

It was a trial that peeled back layer after layer of deception, corruption and evil. As the Crown case went in, the jury and I witnessed the daily unveiling of a stunning web of deceit and lies.

[2] Why the trial judge felt this way will become apparent as the facts are developed.

[3] B.D. was convicted of incest and 46 counts of forgery and uttering forged documents. Forty-seven years of age, B.D. lived with and is married to a man who was 21 years old at the relevant time, and with whom she has had at least three children. The Crown contends – and the jury obviously accepted – that this individual is B.D.’s son, Wafi. She maintains, however, that he is an entirely different person, namely, Prince Wafi R. Dz. Prince, she says, is a real prince – a descendent of ancient Nigerian/Ethiopian royalty. As for her son, Wafi, the evidence supporting the defence at trial feigned that he had died tragically in a volcano in the Congo.

[4] The appellant has seven children, including the three children fathered by the co-accused, whom I shall call “Wafi/Prince.” One of those three – a little girl named Oluwafu (“Wafu”)¹ – died in June, 2001, at the age of 2. Although she died of natural causes, Wafu exhibited signs characteristic of inbreeding.

[5] The central question at trial of the incest charge was one of identity: who was this man, Wafi/Prince? Had the Crown proved beyond a reasonable doubt that he was Wafi, the appellant’s son? The jury clearly accepted that the Crown had met this onus.

¹ “Oluwafu” (“Wafu”) is not the real name of this child. Nor are “Oluwafi” (“Wafi”), “Olaseni” (referred to later in these reasons), and “Prince Wafi R. Dz.” the real names of the appellant’s sons and the man she asserted was her husband. There is a publication ban in place. However, the reasons are more readily understood if names are used for these individuals, rather than initials, and I have accordingly employed fictitious names for them. The fictitious names do not, and are not intended to refer to real people.

[6] B.D. was also convicted of 46 forgery-related charges. They arose out of her attempts to obtain false birth certificates from the Office of the Registrar General for 7 fictitious children, using fraudulent affidavits and fraudulent birth certificates purportedly certified and stamped by non-existent churches and church officials. Much of the groundwork for this fraudulent scheme was carried out at a local Staples/Business Depot outlet where, through photocopying and other processes, she was able to put together the false documents. At trial, the Crown submitted various order forms and some of the photocopies that she had discarded in the trash can at the store and that had been seized by the police acting on a warrant.

[7] Wafi/Prince was a co-accused with the appellant at trial. He was convicted of incest and two counts of uttering forgeries and two counts of fabricating evidence in respect of a family court child protection proceeding. He has not appealed.

The Grounds of Appeal

[8] The appellant raises three grounds of appeal. She submits that the trial judge erred:

- a) by failing to strike down DNA warrants authorizing the police to take a blood sample from each of the appellant and her co-accused in order to compare their DNA with that of their deceased child, Wafu, and to determine whether Wafu was the product of an incestuous sexual relationship between the appellant and her son, Wafi;

- b) by failing to give a modified *W.(D.)* charge to the jury where there was conflicting testimony between the defence and Crown witnesses, i.e., by failing to relate the burden of proof to exculpatory evidence led on behalf of the appellant – in particular, the evidence of the appellant’s son, Olaseni, who testified that the appellant’s co-accused was his step-father, Prince, and not his brother, Wafi; and
- c) by admitting the documents seized from the Staples outlet.

[9] I would dismiss the appeal. Although I accept that s. 487.05 of the *Criminal Code* does not authorize the making of DNA comparisons between samples taken from the targets of the authorizing warrants themselves (in this case, the appellant and Wafi/Prince) in the single-step fashion resorted to here, the evidence concerning these comparisons ought not to be excluded under s. 24(2) of the *Charter*. Secondly, while I also accept that the trial judge erred in his charge to the jury with respect to the application of the doctrine of reasonable doubt to the defence evidence, this is one of those very rare cases where the curative proviso found in s. 686(1)(b)(iii) applies in such circumstances. Finally, I would not give effect to the ground of appeal respecting the seizure of the Staples/Business Depot documents.

[10] I arrive at these conclusions for the following reasons.

Fresh Evidence

[11] The appellant sought to introduce fresh evidence on the appeal. The thrust of that evidence is that the police apparently had discussions with different Crown Attorneys regarding the appropriateness of using s. 487.05(1) of the *Criminal Code* to obtain a warrant for DNA samples in circumstances such as this, and may have obtained differing opinions. This involved improper “Crown shopping,” according to the appellant, and should have been disclosed to the issuing justice, but was not.

[12] I would not admit the fresh evidence or give effect to this argument. The fresh evidence does not meet the requirements of the test set out in *R v. Palmer*, [1980] 1 S.C.R. 759, because the advice the police received in this regard is neither particularly relevant to the issues at trial nor dispositive. There is no suggestion in the record that the police misled the issuing justice, and they had no obligation to disclose their discussions to him, in my opinion: see *R. v. Campbell*, [1999] 1 S.C.R. 565, at paras. 49 and 54.

[13] Discussions of this nature, to the extent they involve the giving of legal advice, are privileged. As the trial judge concluded, it cannot be that where the police consult with Crown counsel during an investigation, whatever advice the Crown may give will automatically become a materially relevant fact and admissible at trial. Further, while it is the function of Crown counsel to provide legal advice when asked, Crown counsel cannot direct the police in their investigation. Police are not bound by that advice. In the circumstances of this case, the fact that various Crown counsel may or may not have had

differing views on the applicability of s. 487.05 is, as I have said, neither relevant to nor dispositive of the issues at trial.

The Appeal With Respect To The Staples/Business Depot Documents

[14] B.D. submits that her s. 7 and s. 8 *Charter* rights were violated when the police, acting on a tip from the Staples store manager, obtained a warrant and seized various order forms and some of the photocopies that she had discarded in the trash can at the store. Mr. Lewin and Mr. Stein did not press these submissions during oral argument, stating they were content to leave their submissions on the Staples' documents issue to those contained in their factum. I would not give effect to this ground of appeal, since I cannot see how B.D. could have any reasonable expectation of privacy in the documentation she left, discarded, in a store frequented by the general public. In addition, there was ample evidence upon which the trial judge could reject the claim that the store manager was acting as an agent of the police in these circumstances.

[15] I would dismiss the appeal with respect to the forgery-related charges.

FACTUAL BACKGROUND: INCEST CHARGE

[16] The appellant arrived in Canada from Nigeria in 1981, when she was about eighteen years old. According to psychiatric reports filed at the time of sentencing, she suffers from some "delusional psychosis", is "intellectually deficient" and has an I.Q. of 60. She has seven children, the eldest of whom (Wafi) is alleged by the Crown to be the father of her

three youngest children, including the little girl, Wafu, who died and whose death triggered the police investigation that ultimately led to the filing of the incest charges.

[17] Wafi/Prince called no evidence at trial.

The Death of Wafu

[18] On the morning of June 24, 2001, Wafi/Prince brought the lifeless body of Wafu to the Cambridge Memorial Hospital. Hospital staff were unsuccessful in their attempts to resuscitate the child who was then pronounced dead. In response to a question from one of the nurses, Ms. E., Wafi/Prince said that he was not the child's father; he was a brother. Later, when the appellant arrived at the hospital, she said that the man she called Prince was her husband and the biological father of the child.

[19] One of the nurses, Ms. M., asked the appellant who had brought the child to the hospital. The appellant responded that she did not know whether it was her 20-year old son or her husband. At trial, three of the hospital nurses – Ms. M., Ms. F., and Ms. E. – identified the man they saw that day at the hospital as the appellant's co-accused.

The DNA Warrants

[20] Given the circumstances of Wafu's death, an autopsy was conducted under a coroner's warrant. Blood samples were taken from the child's body and sent to the Centre for Forensic Sciences for toxicological testing. It appeared that Wafu had died from natural causes, although the autopsy determined that she had very thin adrenal glands, a condition

that can result from an incestuous conception. The police began to suspect incest, and asked the Centre to set aside a sample of Wafu's blood for future DNA testing.

[21] The police first attempted to obtain some DNA samples from the appellant and Wafi/Prince on a voluntary discarded material basis. They arranged a meeting with the two and left various articles, such as Kleenex, around. As it turned out, however, the samples obtained from the discarded materials were unsuitable for the extraction of DNA.

[22] Accordingly, on June 3, 2002, the police sought DNA warrants under s. 487.05(1) of the *Criminal Code*, authorizing the taking of a blood sample from each of the appellant and Wafi/Prince "for purposes of DNA analysis" in order to compare their DNA with that of the dead child and to determine whether the child "was the product of a sexual relationship between B.D. and her son, [Oluwafi] (D.)". The warrants were granted, and the subsequent tests established that the appellant and Wafi/Prince were the parents of Wafu *and* that the appellant is the mother of Wafi/Prince.

[23] No DNA warrant was obtained to authorize the use of the remaining sample of Wafu's blood for this comparative purpose, in spite of the fact that the sample was being used for a purpose different from that for which it had been taken in the first place, i.e., for purposes of the coroner's deliberations.

[24] I shall return to the DNA results and the issues on appeal relating to the DNA warrants shortly. In the meantime, some further elaboration of the facts is required.

Other Evidence Identifying “Wafi/Prince” as Wafi

The High School Principal

[25] The principal at Wafi’s high school identified the appellant’s co-accused as Wafi. There were not many black children in the school and he was familiar with Wafi as a result of some discipline problems. He also testified as to an incident where he received a call from the appellant – two years after Wafi had left the school – asking if she could bring her husband in so that the principal could identify that he was not her son (people were saying her husband was really her son, she said). On the appointed day, the appellant, Wafi/Prince and a woman identifying herself as a lawyer’s representative, arrived at the school. The woman said they were there to have the principal identify the male, whom she introduced as Prince. The principal’s response was: “Is this a joke? This is Wafi.” He told them he was confident that if they walked down the hall together, people would say “Hi, Mr. [Principal], hi, Wafi.”

The High School Teacher

[26] A high school teacher who taught Wafi in 1997 and for part of 1998 identified the appellant’s co-accused as Wafi D.. She spent more than 120 hours with him working on his Grade 12 (which he barely passed) and on his OAC (which he did not complete).

The Hospital Evidence

[27] As noted above, while their story to the hospital nurses at the time of Wafu’s death subsequently changed to that of husband/father Prince, when Wafi/Prince first arrived at the

hospital he told nurse E. that he was not the father of the child, but the brother (which would be correct if he were the appellant's son) and the appellant initially told nurse M. that she did not know whether it was her 20-year old son or her husband who had brought the child in.

The Orangeville Court Caper

[28] The appellant was involved in an Ontario Court proceeding in Orangeville that was heard at different times in 1999 and 2000. On February 9, 1999 Wafi and his brother, Olaseni, were called as witnesses. When the proceeding resumed on November 8, 2000 another witness was called who was introduced as Prince Wafi Dz.. The Ministry lawyer involved in the case was suspicious that this person was in fact the same person who had earlier identified himself as Wafi, this time pretending to be another person, Prince Wafi Dz.. At the appellant's trial, she identified that person in court as the appellant's co-accused.

[29] Because of her concerns during the Orangeville proceedings, the Ministry lawyer suggested that Wafi and Prince be produced together at the courthouse at the same time. On December 18, 2000, the appellant arrived at the courthouse accompanied by two men, one said to be Prince Wafi Dz., and the other identified as her son, Wafi. The Ministry lawyer testified that the moment she saw the second male, she knew it was not Wafi, but rather Olaseni, the other son who had testified in February, 1999. A call was placed to Olaseni's school but he was not there, and school records showed that he had a "parent approved"

absence on that day. His school principal testified that when Olaseni returned to school the next day, his hair colour had been dyed from dark to light.

[30] At the trial of the appellant and her co-accused, Wafi/Prince, Olaseni was called as a defence witness and denied that he had attended the meeting and pretended to be his brother, Wafi.

The “Prayer of Agreement Campaign” Card

[31] When the appellant was arrested, she was in possession of what appears to be an evangelical religious document entitled “Prayer of Agreement Campaign: Stepping Into God’s Circle of Blessing.” The holder of the card was invited to trace their right hand on the document and to write their miracle requests on the hand. The appellant had done so, and on the first finger had written: “I want Wafi to stay home. I want him to stop all his wrongful behaviour. I want hundred percent love from him.”

The Wafi/Prince Driver’s Licence Change and Dealing with the Ministry of Transportation

[32] The documentation admitted at trial through the testimony of R.B. of the Ministry of Transportation establishes that in October, 2000, *Prince* applied for and obtained from the Ministry a name change and date-of-birth change to the driver’s licence originally issued to *Wafi* in September, 1997. Amongst other exhibits, the driver’s licence history (Ex. 60) and the computer inquiry record (Ex. 65) make it clear – buttressed by R.B.’s unshaken testimony – that there was one driver’s licence, and that there was a change in name and date of birth applied to that driver’s licence, on Prince’s application, in October, 2000.

[33] Not long after that change – in July, 2001 – the appellant and her co-accused appear to have followed it up with a visit to the Ministry offices in Kitchener with a complaint that the Ministry had mistakenly imposed Prince's photo on the driver's licence of the appellant's son, Wafi. This led to the following sequence of events.

[34] R.B. testified that he was acting supervisor of the Ministry offices in Kitchener on July 27, 2001 when he was called by staff to meet with two individuals, who turned out to be the appellant and her co-accused. The appellant, who identified herself as B.D., told Mr. B. that her husband's photograph had been placed on her son's driver's licence information. The man gave Mr. B. his driver's licence, which was in the name of Prince Wafi R. Dz., and he was told that the son's name was Oluwafi D.. Mr. B. entered the licence number for Prince on the Ministry computer and was immediately cross-referenced to the information of Oluwafi D.. This told him that the Ministry considered both entities to be one and the same. Mr. B. then called head office in Toronto and learned that this case was under investigation by the Ministry. He went back and told the appellant and the man that they needed to contact someone else at the Ministry in Toronto and gave them a name. However, the appellant and the man insisted that Mr. B. provide them with a letter stating that the Ministry made an error and had placed the husband's photo on the son's driver's licence. Mr. B. stated that he would not do so and told them to contact the person he had previously indicated.

[35] A couple of hours later, R.B. was asked for assistance with the same couple again. The appellant was being aggressive in an effort to obtain written documentation indicating

the Ministry had erred. Because he wanted to leave, and in order to get the couple to leave the office as well, Mr. B. agreed to provide a letter, but only one indicating that there was conflicting information and that they hoped to resolve the problem. As the contents of the letter (Ex. 53), addressed to Prince Dz. and signed by Mr. B., are of some significance, I recite the pertinent parts here:

July 27, 2001

Dear Mr. Dz.:

Pursuant to our conversation on *Friday, (July 27, 2001)* this letter is to inform you that there is *an ongoing investigation into the possibility of inaccurate information appearing on both your driver's licence and your driving record.* [Emphasis added.]

...

[Signature]

R.B.

[36] Subsequently, Mr. B. received a fax from Family and Children's Services in Kitchener with a copy of a letter purportedly from him to Prince Dz. that had been provided to them. The letter was quite different, although it purported to bear Mr. B.'s signature. In part, the letter (Ex. 54) said:

November 6, 2000

Dear Mr. Dz.:

Pursuant to our conversation on *Monday (Nov, 6, 2000)* this letter is to inform you that *there will be an investigation* on this matter.

Staff member informed me of your visit to our office. That yourself and your stepson Oluwafi D. came together, at the kitchener brand [sic] intending to have this issues resolved.

Unfortunately merger of both driving-record was done by three different branches. Both drivers license had been merge.

It's possible that this was an honest mistake made by these department. [Emphasis added.] ...

...

[Signature]

R.B.

[37] R.B. denied writing this second letter and maintained that his signature had been traced onto it. The uncontradicted evidence of a forensic writing expert established that the two letters were produced by different printing processes, that the signatures on the two letters were written by different people, and that the signature on the July letter was used to produce the signature on the November letter, which did not contain a genuine signature.

The Driver's Licence Photos

[38] Two driver's licence photos (Exs. 92 and 93) became significant in the evidence as well. Ex. 93 is a photo taken in August, 1997 when Wafi first applied for his driver's licence. Ex. 92 is a photo that was taken on October 6, 2000, when Prince applied for the change of name and change of address with respect to that driver's licence. Ex. 92 is therefore a photo of the man calling himself Prince. Except for the glasses worn by Prince in Ex. 92, the two photos are strikingly similar.

Other Crown Evidence

Carmelia Maria Pereira Dos S.

[39] Ms. Dos S. met the appellant when she was working at a grocery chain and the appellant was a customer. At some point, the appellant asked if Ms. Dos S. would be a witness to her wedding. She agreed to do so. When first introduced to the man the appellant was to marry, she asked if he was the appellant's son because he looked much younger than the appellant. The appellant replied that it was her husband. Ms. Dos S. attended the wedding of the appellant and the man she later identified as the appellant's co-accused, on January 19, 2001.

L.B.: CAS Worker

[40] After Wafu's death the Children's Aid Society took the appellant's other children (except Wafi) into care: Olaseni, E.D., P.D., B.D. and L.D.. L.B. was their case worker. She testified that at one point she asked the appellant, in Prince's presence, if she could see Wafi. The appellant said Wafi had told her he could not come to the house because he would be questioned about physically assaulting her. L.B. then asked for Wafi's phone number, and was told that the appellant did not have one for him. The appellant said Wafi was living with his girlfriend in Rwanda. In January, 2002, the appellant contacted L.B. to inform her that Wafi had died in a volcano in the Congo. The appellant was not able to provide any contact information such as Wafi's roommate's name or telephone number, however. L.B. never saw a death certificate for Wafi, and was not aware of any of the children attending a funeral for him.

The Appellant's Attendance at the Police Station to Advise of Wafi's Death

[41] On January 23, 2002, the appellant attended at the Kitchener-Waterloo police station, stating that she had come to report the death of her son, Oluwafi D.. She gave a video statement that was filed at trial as an exhibit. In the video statement she stated that her son had died in a volcano in the Congo. She said he had been living in Rwanda with his girlfriend and a roommate. The roommate had called to say that Wafi had died and she wanted some help from the police to get the body back. She provided no names or contact particulars.

Evidence Relating to the Forgery Charges

[42] Although it is not necessary to outline the facts relating to the forgery charges in any detail because, as I have said, I would not give effect to the *Charter* grounds of appeal upon which the convictions are attacked, some of the evidence bears on the incest charge.

[43] At the heart of the forgery charges were attempts by the appellant to obtain delayed registrations of birth and/or birth certificates for various children, some of them non-existent. Two of the children for whom delayed registrations of birth were sought were Oluwafi, born August 10, 1980, and Prince Wafi R. Dz., born August 10, 1976.

[44] V.N., an employee at the Office of the Registrar General ("ORG") testified that she had several telephone discussions with the appellant in 1999 about what was needed for the delayed birth registrations of Wafi and Prince, and for the other birth registration documentation requested. The appellant asked numerous questions during these

conversations, including: “what if my child wasn’t born in a hospital, but was born on a street?” V.N. indicated the ORG would need affidavits from people who witnessed the birth.

[45] Two of the documents submitted in support of the application for Prince’s delayed registration were the following:

- Exhibit 29C was a purported affidavit from a person named W.O., in which he recounted having witnessed B.D. (called “Ms. Dz.”) pregnant, walking and screaming for help outside his building on August 10, 1976. The affidavit says Mr. O. accompanied Ms. Dz. to the apartment of a Mrs. S., another tenant in the building who had come along. Mrs. S. then left the apartment and came back with a doctor and her husband who agreed to help with the birth. Dr. L. “propped” for the birth, the document said, and in 20 minutes Prince was born. The affidavit was sworn September 29, 1996.
- Exhibit 29D was a Ministry of the Attorney General “General Form of Affidavit”, purportedly sworn by Dr. J. L. and Esserene V.W. on August 28, 1996. Exhibits 29E and 29F were respectively copies of a handwritten

statement by Esserene S. and a typewritten affidavit by Dr. L. expanding on the above explanation.

[46] When the police investigation began, an extensive though not exhaustive search was done for the people who, according to the affidavits, witnessed the various births (including Prince's referred to above). No trace of a W.O. was found. No trace of a Dr. L. No trace of a Mrs. S. The police were able to locate an Esserene W., who was in Kitchener Waterloo. Olaseni testified that Esserene W. was a friend of his mother's. Ms. W. did not testify.

The Defence Evidence

[47] The appellant did not testify at trial (although she did testify at pre-trial motions) but called three witnesses. Counsel agree that, for purposes of the appeal, it is the evidence of her son, Olaseni, that is pertinent. I have referred to this evidence earlier. He said that the appellant's co-accused was his stepfather, Prince, and not his brother, Wafi.

[48] Olaseni testified that he first met Prince in late 1999 and that in July, 2000, his brother Wafi moved out of the house to live with his girlfriend in the United States. In November, 2000, Prince Dz. moved in. Prince became his stepfather when he married the appellant in January, 2001.

[49] Olaseni also testified that:

- when he first met Prince, he thought he looked a lot like Wafi
- he gave evidence in the Orangeville case, but denied pretending he was Wafi so that Wafi could pretend he was Prince

- when Wafu died, Wafi was not at the appellant's home
- Prince slept in the same bedroom as the appellant
- Prince and the appellant had children together
- He did not go to a funeral for Wafi
- He did not know that his brother and his step-father had the same birthday
- He could not tell the difference between the photographs in Exs. 92 and 93

ANALYSIS AND LAW

The DNA Results

[50] The appellant's first major ground of appeal is that the trial judge erred by failing to strike down the DNA warrants authorizing the police to take a blood sample from each of the appellant and her co-accused in order to compare their DNA with that of their deceased child, Wafu, and in order to determine whether Wafu was the product of an incestuous sexual relationship between the appellant and her son, Wafi.

[51] Denis Charles Michaud, a forensic scientist at the Centre for Forensic Sciences, was qualified to give opinion evidence with respect to DNA analysis and interpretation. He conducted an analysis to determine whether:

- a) The appellant could be excluded as Wafi/Prince's biological mother, given that no comparison sample was available from the father; and

- b) Wafi/Prince could be excluded as Wafu's biological father, given that the appellant was the biological mother of the child.

[52] After comparing the blood sample of each of the appellant and Wafi/Prince to the blood sample taken from Wafu's body, he concluded that the appellant was Wafi/Prince's mother and that Wafi/Prince was the child's father. More precisely, in the negative fashion of the standard DNA approach, he concluded that:

- a) the appellant could not be excluded as Wafi/Prince's biological mother. The likelihood of obtaining the observed DNA profiles was estimated to be 5,300 times greater if the appellant was the biological mother of Wafi/Prince rather than if an unrelated random woman were the biological mother; and,
- b) that Wafi/Prince could not be excluded as Wafu's biological father. The likelihood of obtaining the observed DNA profiles was estimated to be 8.8 million times greater (assuming the appellant was Wafu's mother) if Wafi was the biological father of Wafu rather than if an unrelated random man were the biological father.

[53] The appellant admitted that she was Wafu's mother.

[54] This DNA evidence was not contradicted. However, the appellant attacks its admissibility. Mr. Lewin and Mr. Stein carefully argue on her behalf that:

- a) the use of Wafu's blood sample taken for purposes of the coroner's inquiry, without obtaining a further warrant, contravened the appellant's s. 8 rights;
- b) the warrants cannot stand because two of the pre-conditions for the issuing of a DNA warrant pursuant to s. 487.05(1) of the *Criminal Code* were not met, and accordingly that the trial judge erred in admitting the maternity/paternity results that flowed from the testing done pursuant to the warrant respecting Wafu;
- c) in any event, the warrants could not, and did not, authorize the comparison of the appellant's blood sample taken pursuant to them with the blood sample of Wafi/Prince also taken pursuant to them and the conducting of a DNA comparison based on those samples;
- d) given the breaches, the DNA evidence should be excluded under s. 24(2) of the *Charter*; and
- e) the trial judge erred in preventing defence counsel from asking police witnesses during the *voir dire* respecting the

DNA evidence about legal advice they had obtained concerning the applicability of s. 485.05(1) in the circumstances.

[55] I accept the argument summarized in (c) above, but am satisfied that those summarized in (a), (b), (d) and (e) cannot succeed. Before dealing with the arguments individually, I set out the relevant provisions of ss. 487.04 (definitions) and 487.05(1) of the *Criminal Code*, with notes inserted with respect to the particulars of this case.

[56] Sections 487.04 and 487.05(1) state:

487.04 In this section and in sections 487.05 to 487.0911, ...

“forensic DNA analysis”

(a) in relation to a bodily substance (appellant’s DNA via blood sample) that is taken from a person in execution of a warrant under section 487.05, means forensic DNA analysis of the bodily substance (appellant’s DNA via blood sample) and the comparison of the results of that analysis with the results of the analysis of the DNA in the bodily substance referred to in paragraph 487.05(1)(b) (Wafu’s DNA), and includes any incidental tests associated with that analysis...

487.05(1) A provincial court judge who on *ex parte* application made in Form 5.01 is satisfied by information on oath that there are reasonable grounds to believe

(a) that a designated offence (incest) has been committed,

(b) that a bodily substance (DNA) has been found or obtained

(i) at the place where the offence was committed,

(ii) on or within the body of the victim of the offence,

- (iii) on anything worn or carried by the victim at the time when the offence was committed, or
 - (iv) on or within the body of any person (within Wafu) or thing or at any place associated with the commission of the offence,
- (c) that a person (the appellant) was a party to the offence, and
- (d) that forensic DNA analysis of a bodily substance from the person (i.e., the appellant) will provide evidence about whether the bodily substance referred to in paragraph (b) (Wafu's DNA) was from that person (the appellant)

And who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in Form 5.02 authorizing the taking, from that person (the appellant), for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances (DNA via blood sample) that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1).

a) The Analysis of Wafu's Blood Without a Fresh Warrant

[57] The appellant submits that the police should have obtained a separate and fresh judicial authorization for the use of Wafu's blood sample properly gathered for one purpose (toxicology testing done by the coroner to determine cause of death) but now to be used for another, as yet unauthorized, purpose (learning about the appellant's DNA). She argues that she had a reasonable expectation of privacy in blood taken from Wafu's deceased body when the purpose of seizing that blood turned to gathering information about her.

[58] I do not accept this submission because I am not persuaded that the appellant had a reasonable expectation of privacy in the use of the dead Wafu's blood. .

[59] In *R v. Sanderson* (2000), 76 C.R.R. (2d) 23 (Ont. S.C.), Dambrot J. pointed out that “the expectation of privacy of a deceased person dies with that person.” The appellant attempts to place a gloss over this principle, however, by arguing that *a parent* – in this case the appellant – nonetheless retains a privacy interest in the blood taken from the deceased child’s body when the purpose of seizing the blood is to gather genetic information about the parent in furtherance of a criminal investigation concerning the parent. I disagree.

[60] As a parent, the appellant would have been entitled to give or to withhold consent to the taking of blood from the child, were the child still alive, but it does not follow that she retains that right following the child’s death. Like the trial judge, I know of no case law suggesting that one person has a *privacy interest* in the corpse or the blood of another person, even one’s child. It is not a question of undermining the privacy rights inherent in samples of one’s own bodily fluids, as established in such cases as *R v. Dyment*, [1988] 2 S.C.R. 417, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, and *Colarusso v. The Queen*, [1994] 1 S.C.R. 20. Here, unlike in *Colarusso*, the evidence was not appropriated by the Crown for use in a criminal prosecution *against the person from whom it was seized*. The blood sample was used by the Crown for purposes of a criminal prosecution against the dead girl’s parents.

[61] In addition, there was ample evidence to support the trial judge’s finding that, in fact, the appellant did not have any *reasonable* expectation of privacy in the dead child’s blood. He was entitled to reject her explanation that she would have refused permission for the taking of Wafu’s blood on various religious grounds, as he did. He rejected a similar

explanation proffered by her co-accused. As the trial judge found, neither accused “testified in any intelligible way about having or asserting any expectation in the privacy of blood in the corpse of their deceased child which they knew had been taken to the coroner’s.”

b) Pre-Conditions to the Applicability of s. 487.05(1)

[62] Mr. Lewin and Mr. Stein submit that two of the pre-conditions for resort to a s. 487.05(1) warrant were not met here. First, the police must have found or obtained the bodily substance referred to in s. 487.05(1)(b) at a place associated with the crime scene, which they did not do. Secondly, they argue that the “bodily substance” found or obtained must be that of the target of the warrant sought, since the purpose of the DNA testing authorized by the section is to determine whether the bodily substance referred to in (b) came from the suspect.

[63] The first of these points was not pressed in oral argument and is easily disposed of. It is not a requirement of s. 487.05(1) that the “bodily substance” referred to in paragraph (b) be found or obtained at a place associated with the crime scene. The submission appears to be based upon a combination of subparagraphs (i) and (iv):

(b) that a bodily substance has been found or obtained

- (i) at the place where the offence was committed,
- (ii) ...
- (iii) ... , or
- (iv) on or within the body of any person or thing or at any place associated with the commission of the offence ...

[Emphasis added.]

[64] The use of the disjunctive “or” at the end of subparagraph (iii) of the list of considerations under paragraph (b) makes it clear, however, that the bodily substance need only be found on one of the locations listed, not in all of them.

[65] Nor do I accept that s. 487.05(1)(b) is to be read so narrowly as to confine it to bodily substances of the suspect or target of the warrant in question. In *R v. S.A.B.*, [2003] 2 S.C.R. 678, Justice Arbour observed at para. 23, albeit in *obiter*, that the s. 487.05 warrant may be used to conduct a paternity test with an accused’s DNA, the exact purpose for which the blood sample was used here:

Typically, forensic DNA analysis will compare two samples of DNA to determine if they match. In this case, the forensic DNA analysis compared the appellant’s blood sample with the fetal tissue (the combined DNA of the complainant and the accused) taken from within the complainant’s body in order to confirm or deny that the appellant had fathered the fetus. Essentially, a paternity test was conducted with the appellant’s DNA. *Such use of the DNA is contemplated by the legislation per s. 487.05(1)(b)(ii).* [Emphasis added.]

[66] Certainly, one of the purposes of the s. 487.05(1) warrant is to determine whether the bodily substance found is that of the suspect (for example, semen in a sexual assault case), but an analysis of the wording of s. 487.05(1) bears out the broader interpretation suggested in *S.A.B.*, in my view. The section authorized the seizure of blood from the appellant, and from Wafi/Prince, in order to perform an analysis comparing their DNA to Wafu’s. All the pre-conditions required for a s. 487.05 warrant were met because the Information to Obtain set out reasonable and probable grounds to believe that:

(i) a designated offence (incest) had been committed:
para. (a);

(ii) a bodily substance (the DNA found in Wafu's blood sample) had been found within the body of the victim of the offence (Wafu), or within the body of a person associated with the commission of the offence (Wafu):² subparagraphs (b) (ii) and (iv);

(iii) the appellant and Wafi were parties to the offence:
paragraph (c); and

(iv) the forensic DNA analysis of the appellant's and Wafi/Prince's blood would provide evidence about whether the DNA in Wafu's blood "was from" the appellant and Wafi/Prince (i.e, about whether the bodily substance referred to in paragraph (b) "was from" that person): paragraph (d).

[67] The latter point requires some explanation. Here, the "bodily substance referred to in paragraph (b)" is the DNA contained in the blood sample taken from Wafu. I am satisfied that for the purposes of a reasonable interpretation of s. 487.05(1), DNA is "a bodily substance." "Substance" is "that of which a physical thing exists; the material of which a body is formed and in virtue of which it possesses certain properties": The Shorter Oxford English Dictionary, Vol. 2, p. 2172. DNA is a molecule comprised of the chemical,

² In the sense that the child was the product of the incestuous relationship.

deoxyribonucleic acid. It is the carrier of each person's genetic code. The DNA expert, Denis Michaud, testified that the DNA molecule contains all of the information necessary to determine the physical characteristics of a person; that DNA is inherited from parents to offspring, and that parents and offspring *share* some of their DNA. In the words of his report (Exhibit 86):

DNA is the genetic blueprint of life. The same DNA is found in all nucleated cells of the body. *Each biological parent contributes half of an individual's DNA.* With the exception of identical twins, no two individuals have exactly the same DNA. Forensic DNA analysis may be used to determine the profile of the donor of a body fluid or to assess kinship. [Emphasis added.]

[68] DNA is therefore the core bodily substance in terms of a person's individuality. Half of a person's DNA (in this case, Wafu's) is contributed by, or "comes from" each parent (in this case, the appellant and Wafi/Prince). As Mr. Michaud said:

So the child's DNA profile, half of it *comes from* the child's mother, half of it *from* the child's father.

[69] It can therefore be said that Wafu's DNA – "the bodily substance referred to in paragraph (b)" – "was from" the appellant and Wafi/Prince, as contemplated by paragraph (b) of s. 487.05(1).

[70] This interpretation is consistent with the broad purpose of the s. 487.05(1) warrant provisions of the *Code*, in my view, which is to permit the compulsory taking of samples of bodily substances from suspects for purposes of comparing those substances with another bodily substance obtained in the circumstances described in paragraph (b) with a view to obtaining a match that will advance a criminal investigation against those suspects.

[71] Moreover, to take the appellant's argument to its logical conclusion, the police could never properly investigate the circumstances of the death of a child – be it incest, or murder or some other crime – where DNA analysis of the child's blood was relevant to a Crown issue regarding a prosecution against a parent, unless the parent consented (something that is highly unlikely in such circumstances). As the trial judge rightly noted:

That simply cannot be. The *Criminal Code*, and this section in particular³ while to be construed strictly, must be presumed to have effect – not to create insurmountable gaps. The drafters must be presumed to have contemplated the situation just as this one, where the necessary analysis had to be obtained from a deceased child's body to prove a primary designated offence. It simply cannot be that the section is to be read so as to exclude the police from using the blood from a dead body for comparison purposes to the blood samples properly obtained from the accused under the auspices of a s. 487.05 warrant.

[72] This same sentiment was expressed by Saunders J. (as he then was) of the Nova Scotia Supreme Court, in *R. v. L.S.M.* (1999), 174 N.S.R. (2d) 286 (S.C.), at para. 42.

[73] I am satisfied, therefore, that s. 487.05(1) applied to permit the issuance of the DNA warrants here for the purposes of comparing Wafu's DNA with that of the appellant and that of Wafi/Prince.

c) Comparison of the Appellant's Blood Sample Taken Pursuant to a Warrant With the Blood Sample of Wafi/Prince Also Taken Pursuant to a Warrant

[74] In comparing the DNA profiles of the appellant and of Wafi/Prince, the DNA expert arrived at the conclusion that the appellant is the mother of Wafi/Prince. The question arises whether such a comparison was permissible pursuant to the warrants issued here.

³ That is, s. 487.05.

[75] I conclude that it was not.⁴

[76] To be reasonable, a search must be authorized by law: *R. v. Collins*, [1987] 1 S.C.R. 265.⁵ The taking of blood samples from the appellant and Wafi/Prince for purposes of comparing the DNA profiles as between those samples, for purposes of determining whether the appellant is the mother of Wafi/Prince, is not permitted by s. 487.05(1) and was not authorized by the initial set of warrants, in my view. To hold otherwise would require the past-tense words “*has been* found or obtained” in s. 487.05(1)(b) to be interpreted to mean the future-tense words “*may be* found or obtained.”

[77] Were it not for that difficulty, the analysis might fit. There were reasonable and probable grounds to believe not only that DNA analysis of Wafu’s blood, compared with samples taken from the appellant and Wafi/Prince, would comply with s. 487.05(1)(d), but that there were also reasonable and probable grounds to believe that (a) a designated offence (incest) had been committed, (b) a bodily substance (a DNA profile) *may be found* within the body of a person associated with the offence (Wafi/Prince) – paragraph (b)(iv) – and that (c) a person (the appellant) was party to the offence, and (d) that forensic DNA analysis from a bodily substance of that person (the appellant) would provide evidence about whether the DNA profile found in Wafi/Prince “was from” the appellant.

⁴ As noted later in these reasons, however, I am satisfied that once a sample of Wafi/Prince’s blood had been obtained pursuant to the initial set of warrants, a further warrant could have been issued to authorize the comparison.

⁵ A search will be reasonable if (a) it is authorized by law, (b) the law is itself reasonable, and (c) the manner in which the search is carried out is reasonable: *Collins*.

[78] I am not persuaded that even a broader interpretative approach to the provision can be stretched to that point, however. That a bodily substance (a DNA profile) may be found subsequent to the issuing of the warrant sought, is not enough.

[79] At the time the Information to Obtain (“ITO”) was presented to the judge, no bodily substance had as yet “been found or obtained” in or from either the appellant or Wafi/Prince. Had Parliament intended a single s. 487.05(1) warrant to encompass the double-barrelled taking of samples contemplated in the scenario described in para. 76 above, it could easily have worded paragraph 487.05(1)(b) to say “that a bodily substance has been *or will be* found or obtained.” It did not do so.

[80] Justice Hennessey came close to interpreting the words “has been found” to mean “may be found” or “will be found”, in *R v. Klasges*, 2010 ONSC 1827. But not quite.

[81] In that case, an accused charged with sexually assaulting a child in his foster care attempted to exclude the results of a DNA seizure. The victim, a 14-year old girl, gave birth to a baby boy. The police applied for and obtained a DNA warrant 7 days before the birth of the child, however. The accused argued that at that time no bodily substance “had been found” within the body of the victim of the crime (the complainant). Hennessey J. rejected this argument. She did so on the sensible basis that the victim was pregnant, and that it was reasonable to conclude that DNA “was extant” in the body of the victim -i.e., had been found therein – since “[t]here is no reason to ignore the universally known and accepted fact that a pregnancy involves a fetus which is made up of bodily substances” (para. 19).

[82] I do not quarrel with the result in *Klasges*. That is not this case, however.

[83] Had Parliament intended the DNA warrant provisions to capture the second-stage comparison of the samples taken from the targets of the warrant in a single-warrant process, it could easily have said: the police may obtain a warrant for the comparative DNA analysis of samples from the bodies of A and B where there are reasonable grounds to believe that the comparison will yield a match. Parliament did not do so. I am not persuaded that s. 487.05(1) authorizes such a comparison.

d) Section 24(2)

[84] It remains to consider whether the results of the DNA testing as between the appellant and Wafi/Prince should be excluded from evidence pursuant to s. 24(2) of the *Charter*. We do not have the benefit of the trial judge's views in this regard, because he did not do such an analysis, although he did conclude that the results of the comparison of the appellant's and Wafi/Prince's samples with that of Wafu should not be excluded if he were wrong in his view that there had been no *Charter* breach. It might be reasonable to think that he would have come to the same conclusion with respect to the less intrusive second-stage comparison.

[85] Applying the analysis called for in *R. v. Grant*, [2009] 2 S.C.R. 353, at paras. 107-111, I would not exclude the evidence.

[86] The first *Grant* inquiry informing the s. 24(2) analysis has to do with the seriousness of the *Charter*-infringing conduct. Here, the police acted in good faith and the blood sample that was taken from the appellant – as I have concluded – was taken by way of a validly authorized DNA warrant. The *Charter* violation was not in the taking of the sample but in

the subsequent use of that sample for a purpose that could not be authorized under s. 487.05(1). The police, though, were not aware of that at the time. They had requested a warrant based, amongst other things, on their reasonable and probable grounds to believe:

That forensic DNA analysis of a bodily substance (blood sample) from B.D. will provide evidence towards proving that the deceased person, Oluwafu D., referred to in paragraph (b) was the product of a sexual relationship between B.D. and her son, [Oluwafi] (D.)

[87] They were granted a broad order authorizing the taking from B.D. of “the number of samples of bodily substances that are *reasonably required for forensic DNA analysis*” on the basis of that ITO. Thus, there was no deliberate or egregious police conduct disregarding the rights of the accused that might lead the public to conclude the court implicitly condones such conduct, undermining the respect for the administration of justice. The breach was committed in good faith and the admission of the evidence, in my view, will have little adverse effect on the repute of the court process. See *Grant*, para. 108.

[88] The second inquiry concerns the seriousness of the breach on the accused’s protected interests. In this respect, the court looks at the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused: *Grant*, para. 109. Here, for the reasons outlined in the preceding paragraphs, there was very little such impact because the sample was taken in accordance with an authorized DNA warrant. It is the use to which the sample was put that constitutes the breach.

[89] I note, too, with respect to both the first and second *Grant* inquiries – as mentioned earlier in these reasons – that once the sample of Wafi/Prince’s blood had been obtained under the first set of warrants, that a further warrant could then have been obtained to authorize a comparison for DNA purposes between his blood sample and that of the appellant. At that point, a sample of Wafi/Prince’s blood would have been obtained within the meaning of s. 487.05(1)(b)(iv) and, if necessary, the new warrant could authorize the taking of a second sample of the appellant’s blood to comply strictly with the requirements of the section. Thus, although a more cumbersome process, the police could have accomplished in two steps that which they mistakenly attempted to accomplish in one.

[90] Finally, the third *Grant* inquiry involves the effect of admitting the evidence on the public interest in having a case adjudicated on its merits: para. 110. As the Supreme Court of Canada noted, this line of inquiry will usually favour admission in cases involving bodily samples because such evidence is generally reliable and the risk of error in depriving the trier of fact of the evidence may well tip the balance in favour of admission. That is the case with the DNA analysis evidence here: the results obtained are reliable; they point clearly to the appellant being the mother of Wafi/Prince; and depriving the jury of that evidence would risk an error that might compromise the public’s interest in having the case adjudicated on the merits.

[91] In the end, then, while I agree with counsel for the appellant that the comparison of her blood sample, taken pursuant to the warrant, with the blood sample of Wafi/Prince, also taken in accordance with the warrant, was in breach of her s. 8 *Charter* rights, I do not agree

that the evidence should have been excluded pursuant to s. 24(2). The evidence was properly before the jury.

e) The Voir Dire Issue

[92] I have dealt with the argument respecting any discussions that the police may or may not have had with differing Crown Attorneys about resort to s. 487.05 in the section above dealing with the fresh evidence. There is no need to repeat what I said here. The trial judge did not err, in my opinion, in declining to permit defence counsel to ask police witnesses questions about this during the *voir dire* respecting the DNA evidence. Legal advice is privileged.

[93] I turn now to the ground of appeal concerning the trial judge's charge to the jury.

The Charge to the Jury

[94] The second substantive ground of appeal raised by the appellant concerns the trial judge's failure to charge the jury on the interconnection between findings of credibility and the doctrine of reasonable doubt. She submits the trial judge erred by failing to give a modified *W.(D.)*⁶ charge to the jury in view of conflicting testimony between the defence and Crown witnesses, i.e., by failing to relate the burden of proof to exculpatory evidence led on behalf of the appellant – in particular, the evidence of the appellant's son, Olaseni, who testified that the appellant's co-accused was his step-father, Prince, and not his brother, Wafi.

⁶ See *R v. W.(D.)*, [1991] 1 S.C.R. 742.

[95] Through his general charge on reasonable doubt and his countless references to the concept, the trial judge made it abundantly clear to the jurors that they could only convict the appellant if the Crown had satisfied them beyond a reasonable doubt that the appellant's co-accused was her son, Wafi, and not the separate individual called Prince Dz., whom she contended he was. In addition, he carefully and fully reviewed the relevant testimony of the numerous witnesses and other evidence bearing on this issue. Indeed, he spent more time reviewing the evidence of Olaseni than he did with respect to any other witness except the DNA expert. Olaseni's evidence – such as it was – directly conflicted with the Crown's evidence.

[96] As a general rule, the standard of proof beyond a reasonable doubt is not to be applied piecemeal to individual items or categories of evidence. The Crown is not required to prove or disprove beyond a reasonable doubt any single fact, or any item of evidence, unless that fact or item is an element of the offence or an element of a defence. Different considerations arise, however, when conflicting evidence is presented to the jury on an essential element and the jury is required to make credibility findings with respect to that conflicting evidence.

[97] The principal frailty in the trial judge's charge is that he set up the juror's primary task as that of deciding whether the appellant's co-accused was her son, Wafi, or whether he was Prince Dz., without explaining to them that they were not required to make this either/or choice, but that there was a third alternative: they were required to acquit if they had a reasonable doubt whether the co-accused was Wafi. He did not instruct the jurors

that, even if they did not accept the evidence favourable to the defence – particularly the evidence of Olaseni – they must consider whether that evidence raised a reasonable doubt in their minds as to the identity of the co-accused, and, if it did, that they were required to acquit the appellant.

[98] The trial judge began this part of the charge by telling the jury the following about the Wafi/Prince divide:

I want to start it this way. Before you can find that either of these accused persons is guilty of incest, you must be satisfied that the Crown has proven beyond a reasonable doubt that that man in the box is B.D.'s son, Oluwafi D., sometimes called Wafi, and not some entirely different person with different parentage and a different birth date named Prince Wafi R. Dz..

You have to first come to grips with that. Who is he? That is your starting point.

[99] Later, after completing his review of Olaseni's evidence and of that of the DNA expert, he explained:

So that is the first question you have to ask yourself. Before we get to an analysis of the offences, ask yourself who is that man? Is it Wafi D. ... or is it Prince Wafi R. Dz., a distinctly different person? If you conclude that he is not Wafi D., that he is Prince Wafi R. Dz., you may have an easy time of the discussion about incest.

[100] Shortly thereafter, while discussing the essential elements of the charge of incest under the *Criminal Code*, he added:

The evidence of the relationship first has to establish who this man is. Is he Wafi D.?

[101] While it was correct to tell the jurors that they could only find the appellant and her co-accused guilty of incest if they were satisfied beyond a reasonable doubt that “the man in the box [was] B.D.’s son, Wafi,” it was an error to leave them with the impression that they had to choose between whether the man was Wafi or Prince – based essentially on a contest between the Crown and defence evidence – when all that was required was a reasonable doubt about whether he was Wafi. For example, if in the last sentence of the passage cited in para. 99 above, the trial judge had inserted the instruction “or had a reasonable doubt about whether he is Wafi,” the instruction would have been complete. He did not do that, however. Nor did he do so at any other point in the trial.

[102] In *R. v. W.(D.)*, Cory J. outlined what has now become the classic jury instruction with respect to reasonable doubt in cases. Although familiar, it bears repeating (at pp. 757-58);

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. ...

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

- First, if you believe the evidence of the accused, obviously you must acquit.

- Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
- Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused. [Citations omitted.] [Emphasis in original.]

[103] *W.(D.)* itself, and subsequent authorities, make it clear, however, that *W.(D.)* does not set out a slavish formula; what is important is that the jury understand the burden and standard of proof and their application. As Cory J. said in *W.(D.)*, at p. 758 :

[T]he failure to use such language is not fatal if the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply.

[104] In *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, Cory J. reiterated this caveat, emphasizing, at p. 533 that the *W.(D.)* procedure was not meant to be followed “word for word as some magic incantation”. As Abella J. said in *R. v. C.L.Y.*, [2008] 1 S.C.R. 5, at para. 7, “the key is whether the correct burden and standard of proof were applied, not what words were used in applying them.” This principle has been repeated in other subsequent authorities: see, for example, *R. v. Do* (2003), 175 C.C.C. (3d) 176 (Ont. C.A.) and *R. v. Edgar* (2010), 101 O.R. (3d) 161 (C.A.), at para. 85.

[105] There is some uncertainty in the jurisprudence, however, about whether the *W.(D.)* requirement extends beyond cases where the accused testifies to those where the accused does not but there is other defence evidence called contradicting the Crown’s case and/or conflicting evidence favourable to the defence in the Crown’s case (for example, an

exculpatory remark in a statement put in by the Crown), and the jury must make credibility findings in that context. This Court has not yet squarely decided that issue. For the reasons that follow, I am satisfied that the principles underlying *W.(D.)* do extend to such circumstances.

[106] First, the underlying principles later gathered together and enunciated by Cory J. in *W.(D.)* were rooted in earlier jurisprudence, and they were not confined to the classic “he said/she said” situations where the accused testified. In *R. v. Challice* (1979), 45 C.C.C. (2d) 546, this Court held that it is incorrect for a trial judge to instruct a jury to decide whether they believed Crown evidence or defence evidence because such an instruction could lead to the jury understanding the case as a credibility contest. In that case, the testimony of numerous defence witnesses (including the accused) conflicted with that of several Crown witnesses. Concerning the appropriate instruction to be given, Morden J.A. said, at p. 557:

Understandably, a jury have to give careful consideration to issues of credibility when deliberating upon their verdict, and with respect to various pieces of evidence they may have differing views: total acceptance, total rejection, or something in between. An effective and desirable way of recognizing this necessary part of the process, and putting it to the jury in a way that accurately comports with their duty respecting the burden and standard of proof, is *to instruct the jury that it is not necessary for them to believe the defence evidence on a vital issue – but that it is sufficient if it, viewed in the context of all the evidence, leaves them in a state of reasonable doubt as to the accused’s guilt.* The failure to use such language is not fatal if the charge, read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden

and standard of proof to apply. [Citations omitted.] [Emphasis added.]

[107] The Supreme Court of Canada cited the foregoing passage from *Challice* with approval in *R. v. Morin*, [1988] 2 S.C.R. 345, stating that where issues of credibility arise between “the evidence for the prosecution and the defence,” the jury should be charged as suggested by Morden J.A. See also *R. v. Parrington* (1985), 20 C.C.C. (3d) 184 (Ont. C.A.);⁷ *R. v. Chan* (1989), 100 A.R. 133 (C.A.).

[108] I note the Supreme Court in *Morin* did not limit the circumstances to those in which the accused testified, but referred to “the evidence for ... the defence.” I also note that the language of *W.(D.)* closely echoes that of Justice Morden in *Challice*.

[109] Post-*W.(D.)*, the jurisprudential response to extending *W.(D.)* beyond cases in which the accused testifies has been tentative, but has generally leaned in favour of the proposition that jurors should be made aware of the principles underlying the need for that instruction. See, for example, *R. v. Jack* (1992), 70 C.C.C. (3d) 67 (Man. C.A.); *R. v. Nagra* (1993), 26 B.C.A.C. 81 (B.C.C.A.), rev’d on other grounds, [1994] 1 S.C.R. 355; *R. v. Campbell* (1995), 24 O.R. (3d) 537 (C.A.); *R. v. S. (C.)* (1999), 172 Nfld. & P.E.I.R. 175 (Nfld. C.A.); *R. v. Haroun*, [1997] 1 S.C.R. 593, per Sopinka J. (dissenting but not on this point); *R. c. P. (C.)*, 2003 CarswellQue 2238 (C.A.); *R. v. Boyer*, 2000 CarswellOnt 626 (C.A.). See also, Patrick Healy, “Credibility and the Presumption of Innocence” (2007) 11 Can. Crim. L. Rev. 217, at pp. 220-221.

⁷ It was in *Parrington* that Cory J.A., as a member of this Court, first articulated what was to become the *W.(D.)* formula (at p. 187).

[110] Writing in dissent (but not on this point) in *Nagra*, Wood J.A. said with respect to *W.(D.)*, at paras. 54-55:

The essence of [the *W.(D.)*] principle ... is that where credibility is raised as an important issue in a case, the jury must be made to understand clearly that an adverse finding as to the credibility of the accused, *or the evidence offered on his behalf*, does not lead inescapably to a finding of guilt, nor does it in any way relieve the Crown of the burden of proving the case against the accused beyond a reasonable doubt. [...]

Although the problem commonly arises in such cases, the application of this principle is not limited to cases of sexual assault in which the evidence consists of a one on one conflict between the evidence of the complainant and that of the accused. [Emphasis added.]

[111] The Newfoundland Court of Appeal adopted the same view in *S. (C.)*, and the Quebec Court of Appeal expressly followed *S. (C.)* in *R. v. P. (C.)*. More recently, in *R. v. C.L.Y.*, at para. 8, the Supreme Court of Canada reinforced the notion that “what *W.(D.)* offered was a helpful map, not the only route. Its purpose was to ensure that triers of fact -- judges or juries -- understand that the verdict should not be based on a choice between the accused's and 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.” In doing so, the Court cited *Challice*.

[112] This Court considered the issue in *Boyer*. An accused, convicted of breaking and entering and aggravated assault, did not testify at trial. He appealed on the ground that the trial judge did not give a *W.(D.)*-like charge. The Court observed that “it would have been preferable” if the trial judge had given the *W.(D.)* instruction, but that in the circumstances

the jury could not have been under any misapprehension as to the proper burden of proof, having regard to the charge as a whole. More recently, in *R. v. Edgar*, this Court expressed some surprise that the trial judge had refused defence counsel's request for a *W.(D.)* instruction, particularly with respect to the issue of self-defence in a manslaughter case. However, in reviewing the charge, the Court was satisfied that it adequately canvassed each of the three elements of the *W.(D.)* instruction. Speaking for the Court, Sharpe J.A. said, at para. 94:

I am satisfied that this charge, when read as a whole, properly explained to the jury the burden and standard of proof and that, while the specific wording of the *W.(D.)* formulation was not reproduced, in substance, all three elements of the analysis mandated by *W.(D.)* were clearly explained to the jury.

[113] Finally, in *R. v. L.(T.)*, 2008 ONCA 763, this Court held that a *W.(D.)*-like instruction should have been given with respect to exculpatory defence evidence, and quashed the conviction. In that case, the accused had testified and a *W.(D.)* charge had been given in relation to his testimony. However, the trial judge did not apply the *W.(D.)* instruction to certain other exculpatory identification evidence. The Court said, at para. 7:

The trial judge in dealing with the defence position did not allude to the possibility that the jury could have a reasonable doubt based on the exculpatory evidence, even if they did not accept the exculpatory identification evidence as accurate. The trial judge, in summarizing the position of the defence, left it solely on the basis that the jury should accept that identification evidence as accurate. This is the way it was put to the jury by defence counsel. However, we think the trial judge should have made it clear to the jury that it was required to acquit even if it didn't believe the exculpatory identification evidence as long as that evidence left the jury with a reasonable doubt.

[114] What I take from a review of all of these authorities is that the principles underlying *W.(D.)* are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if – viewed in the context of all of the evidence – the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt: *Chalice*. In that event, they must acquit.

[115] Here, the trial judge did not do that.

[116] I have reviewed the charge to the jury. Unlike Sharpe J.A. in *Edgar*, I am not able to say that the charge, when read as a whole, properly explained to the jury the appropriate burden and standard of proof in connection with the central credibility finding the jurors were required to make, namely, whether the appellant's co-accused, Wafi/Prince, was her son, Wafi. It was therefore flawed.

The Curative Proviso

[117] The trial judge having erred in law in his instructions to the jury, the question remains whether the Crown may rely upon the curative provisions of s. 686(1)(b)(iii) of the *Criminal Code*. It may do so if the court is of the opinion that, in spite of the error, “no

substantial wrong or miscarriage of justice has occurred.” The burden is on the Crown to show this.

[118] The test is well-established. In *R v. Khan*, [2001] 3 S.C.R. 823, at para. 28, Arbour J. described the proviso as applying “where there is no ‘reasonable possibility that the verdict would have been different had the error ... not been made’ ”, citing *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617. Other authorities have adopted language calling for “overwhelming evidence” of guilt. Most recently, for example, in *R. v. Pickton* (2010), 257 C.C.C. (3d) 296 (S.C.C.), at para. 85, LeBel J. stated that:

Other errors may be more serious, but the proviso will also apply because there is overwhelming evidence of the guilt of the accused and, on that evidence, a properly instructed jury would necessarily return a verdict of guilty.

See also *R. v. Illes*, [2008] 3 S.C.R. 134, at para. 21; *R. v. Trochym*, [2007] 1 S.C.R. 239; and *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 916 (where Sopinka J. used the expression “would inevitably convict”).

[119] There is some concern, however, about resort to the curative proviso in cases where a trial judge has made an error in law in his or her charge with respect to the application of reasonable doubt. In *R v. Brydon*, [1995] 4 S.C.R. 253, for example, at para. 6, Lamer C.J. observed that he “[had] some reservations as to whether s. 686(1)(b)(iii) would ever be available to cure an erroneous instruction which may have misled a jury into improperly applying the burden of proof or reasonable doubt standard.” Other cases have echoed this same reservation. See *R. v. Lifchus*, [1997] 3 S.C.R. 320, at paras. 45-46; *R. v. Starr*, [2000]

2 S.C.R. 144, at para. 244; *R. v. Austin* (2006), 214 C.C.C. (3d) 38 (Ont. C.A.), at para. 20. In *R. v. Taylor* (2001), 54 O.R. (3d) 314 (C.A.), at para. 20, this Court noted that in theory the curative proviso can be applied to any error in law, but concluded on the facts that *Taylor* “was certainly not a case in which *the force of the Crown’s case* [was] such that the curative proviso could appropriately be applied to an error which is as fundamental as the failure to properly define reasonable doubt” (emphasis added).

[120] I do not take the foregoing authorities to foreclose categorically resort to the curative proviso in all cases where there has been an error relating to the application of the standard of reasonable doubt – particularly in view of the comment in *Taylor*. I recognize, however, that in such cases it will be very rare that “the force of the Crown’s case” will be such that the evidence will be so overwhelming that on that evidence a properly instructed jury would necessarily return a verdict of guilty absent the error: *Pickton*, para. 85.

[121] But these are very unusual circumstances, and this is one of those rare cases, in my view. A review of the evidence outlined earlier in these reasons confirms this. I will not repeat the details here. But consider the following, for example:

- a) The DNA evidence establishing that the appellant is the mother of Wafi/Prince is described by the forensic expert as “very strong”. Even apart from the DNA evidence, though, the following evidence is compelling in establishing that relationship.
- b) Wafi’s high school principal identified Wafi/Prince as Wafi.

- c) Wafi's high school teacher – who had spent more than 120 hours working with him – identified Wafi/Prince as Wafi.
- d) When Wafi/Prince first attended the hospital with the dead Wafu, he said he was not the child's father but her brother (i.e., Wafi/Prince at one time identified himself as Wafi).
- e) When the appellant first attended the hospital at the time of Wafu's death, she at first said she didn't know whether it was her 20-year old son or her husband who had brought the child in.
- f) There was evidence from various sources that the appellant and the man she calls Prince were married and had children together. Olaseni testified that they slept together in the same room and that they had children together, and there is evidence from the appellant herself that Wafi/Prince is the father of at least three of her children.
- g) There appears to have been an elaborate attempt in the Orangeville court proceedings to pass Wafi off as Prince and to pass Olaseni off as Wafi.
- h) The evidence of R.B. of the Ministry of Transportation establishes a further attempt to substitute Prince for Wafi's identity by replacing Prince and Prince's date of birth for those of Wafi on *Wafi's* driver's licence. This was compounded by the forging of a letter in

R.B.'s name in order to hold out to others (the CAS) that the mistake had been the Ministry's all along.

- i) The appellant was convicted of submitting forged and false documents to the ORG in support of applications for birth certificates. While the stated affidavits of Mrs. S. and Dr. L. regarding the purported birth of Prince in unusual circumstances on August 10, 1976, were not included in that lot, it is significant that a police investigation was unable to locate either of those people and that the forensic writing expert found that the paper used for the various affidavits was non-differential with respect to colour, surface appearance, thickness and response to ultra-violet light, and that there were indentations of signatures or other handwriting on some affidavits from another affidavit or affidavits.
- j) When the appellant was arrested, she had in her possession the "Prayer of Agreement Campaign" card, on which she had written "I want Wafi to stay home ... I want one hundred percent love from him."
- k) While there were a number of difficulties with the believability of the defence story, the inconsistencies between the evidence of the appellant and of Olaseni with respect to the whereabouts and death of Wafi stand out. According to Olaseni, Wafi left to go to the

United States to live with his girlfriend. According to the appellant, he was living in Rwanda with his girlfriend and a roommate and had died in a volcano incident in the Congo – although she was able to provide no names or contact information with respect to anybody in Rwanda or the Congo, including those of the roommate who purportedly called her to advise her of her son's death. Significantly, also, neither Olaseni nor anybody else remembered attending any funeral or service of mourning for Wafi.

- l) Taken together, a number of the foregoing incidents strongly suggest a pattern on the part of the appellant and Wafi/Prince of taking suspicious and overt steps to attempt to establish in public that Wafi was in fact Prince – the attendance to see Wafi's high school principal, two years after he was no longer in school, in an attempt to establish that the appellant's co-accused was not Wafi, but "her husband"; the driver's licence incident and the forged letter in support of that attempt; the questionable birth story with respect to Prince and the documentation (purportedly sworn in 1996 in relation to a 1976 birth) designed to support it; the story about Wafi's purported death in the Congo, volunteered to the CAS worker and by way of attendance at the police station in January 2002; and the Orangeville court incident.

[122] Yes, Olaseni denied participating in the Orangeville court incident. And, yes, Olaseni testified that the appellant's co-accused was his step-father, Prince, and not his brother, Wafi. There were difficulties with Olaseni's evidence, however. It is inconceivable that any jury, having disbelieved Olaseni's testimony and having been properly instructed on the application of the doctrine of reasonable doubt to their findings of credibility, and faced with the overwhelming nature of the foregoing evidence, would have found that Olaseni's testimony and the other defence evidence nonetheless raised a reasonable doubt in their minds as to the appellant's guilt.

[123] In these unusual circumstances, the curative proviso applies. The appellant's conviction for incest must stand.

DISPOSITION

[124] For all of the foregoing reasons, then, I would dismiss the appeal.

"R.A. Blair J.A."

"I agree E.E. Gillese J.A."

"I agree J.M. Simmons J.A."

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