



SUPREME COURT OF CANADA

CITATION: R. v. George, 2017 SCC 38

APPEAL HEARD AND JUDGMENT RENDERED:

April 28, 2017

REASONS DELIVERED: July 7, 2017

DOCKET: 37372

BETWEEN:

Barbara George

Appellant

and

Her Majesty the Queen

Respondent

CORAM: Abella, Moldaver, Karakatsanis, Gascon, and Côté JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 29)

Gascon J. (Abella, Moldaver, Karakatsanis and Côté
concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

R. v. GEORGE

Barbara George

Appellant

v.

Her Majesty the Queen

Respondent

Indexed as: R. v. George

2017 SCC 38

File No.: 37372.

Hearing and judgment: April 28, 2017.

Reasons delivered: July 7, 2017.

Present: Abella, Moldaver, Karakatsanis, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Defences — Mistake of age — Appeals — Jurisdiction of Court of Appeal — Verdict of acquittal — Accused charged with sexual offences against youth — Availability of mistake of age defence limited by requirement that accused took all reasonable steps to ascertain complainant's age — Whether trial judge made legal errors in reasonable steps analysis — If so, whether errors were

sufficiently material to justify appellate intervention — Criminal Code, R.S.C. 1985, c. C-46, s. 150.1(4).

When G was 35 years old, she had sex with C.D., a male youth who was approximately 14 and a half. At the time, she presumed that C.D. was around 17. G was charged with the offences of sexual interference and sexual assault. Her only available defence was mistake of age. Section 150.1(4) of the *Criminal Code* limits the availability of the mistake of age defence by requiring that the accused took all reasonable steps to ascertain the age of the complainant. The trial judge acquitted G of both offences based on a reasonable doubt about whether the Crown proved that she had failed to take all reasonable steps to determine C.D.'s age. The majority of the Court of Appeal allowed an appeal, quashed the acquittals and ordered a new trial.

Held: The appeal should be allowed and the acquittals restored.

Crown appeals against acquittals in proceedings by indictment are limited to questions of law alone. The trial judgment concerned indictable offences and contained no errors of law. As a result, the Court of Appeal lacked jurisdiction to interfere.

To convict an accused person who demonstrates an air of reality to the mistake of age defence, the Crown must prove beyond a reasonable doubt either that the accused person did not honestly believe the complainant was at least 16 or did not

take all reasonable steps to ascertain the complainant's age. Determining what raises a reasonable doubt is a highly contextual, fact-specific exercise. The more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them. In this case, the trial judge considered various factors, including C.D.'s physical appearance, behaviour and activities, the age and appearance of C.D.'s social group, and the circumstances in which G had observed C.D.

Whether an error is legal generally turns on its character, not its severity. The majority of the Court of Appeal erred by translating strong opposition to the trial judge's factual inferences into supposed legal errors. The trial judge did not rely on C.D.'s level of sexual experience as revealed by the sexual encounter itself. Rather, the trial judge considered information known to G before sexual contact, such as how C.D. came to her bedroom uninvited and spoke with her for several hours about various topics, many reflecting maturity, others suggestive in nature. No legal error arises from this. This was a reference to C.D.'s conduct in the hours before the sexual contact, a factor reasonably informing G's perception of C.D.'s age before sexual contact. The trial judge also did not err by considering evidence that did not precede the sexual encounter. Reasonable steps must precede the sexual activity but requiring that the evidence to prove reasonable steps must also precede the sexual activity conflates the fact to be proven with the evidence that may be used to prove it. When determining the relevance of evidence, both its purpose and its timing must be considered. Evidence properly informing the credibility or reliability of any witness, even if that evidence arose after the sexual activity in question, may be considered by

the trial judge. Similarly, evidence demonstrating the reasonableness of the accused person's perception of the complainant's age before sexual contact is relevant, even if that evidence happens to arise after the sexual activity or was not known to the accused before the sexual activity.

Even if the trial judge had made legal errors, they would not have justified the intervention of the Court of Appeal. The threshold of materiality required to justify appellate intervention in a Crown appeal from an acquittal is an error about which there is a reasonable degree of certainty of its materiality. That threshold is not met in this case. There was no reasonable degree of certainty that the alleged errors were material to the trial judge's verdict.

Cases Cited

Referred to: *R. v. Duran*, 2013 ONCA 343, 3 C.R. (7th) 274; *R. v. P. (L.T.)* (1997), 113 C.C.C. (3d) 42; *R. v. K. (R.A.)* (1996), 106 C.C.C. (3d) 93; *R. v. Tannas*, 2015 SKCA 61, 21 C.R. (7th) 166; *R. v. Gashikanyi*, 2015 ABCA 1, 588 A.R. 386; *R. v. Dragos*, 2012 ONCA 538, 111 O.R. (3d) 481; *R. v. Osborne* (1992), 17 C.R. (4th) 350; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193; *R. v. Mastel*, 2011 SKCA 16, 84 C.R. (6th) 405; *R. v. Morin*, [1988] 2 S.C.R. 345.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 150.1(1), 150.1(2.1), 150.1(4), 151, 153, 271, 273.1(2)(c), 676(1)(a).

Authors Cited

Benedet, Janine. Annotation to *R. v. Mastel* (2011), 84 C.R. (6th) 405.

Benedet, Janine. Comment on *R. v. Tannas* (2015), 21 C.R. (7th) 166.

Maleszyk, Anna. *Crimes Against Children: Prosecution and Defence*, vol. 1. Aurora, Ont.: Canada Law Book, 2001 (loose-leaf updated April 2017, release 32).

Manning, Mewett & Sankoff: Criminal Law, 5th ed., by Morris Manning and Peter Sankoff. Markham, Ont.: LexisNexis, 2015.

Stewart, Hamish C. *Sexual Offences in Canadian Law*. Aurora, Ont.: Canada Law Book, 2004 (loose-leaf updated March 2017, release 25).

Vandervort, Lucinda. “‘Too Young to Sell Me Sex?!’ *Mens Rea*, Mistake of Fact, Reckless Exploitation, and the Underage Sex Worker” (2012), 58 *Crim. L.Q.* 355.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Richards C.J. and Jackson and Whitmore JJ.A), 2016 SKCA 155, 344 C.C.C. (3d) 543, [2016] S.J. No. 637 (QL), 2016 CarswellSask 754 (WL Can.), setting aside the accused’s acquittals for sexual interference and sexual assault entered by Kovach J. and ordering a new trial. Appeal allowed.

Ross Macnab and Thomas Hynes, for the appellant.

Erin Bartsch, for the respondent.

The judgment of the Court was delivered by

GASCON J. —

[1] At the hearing, the Court allowed the appeal and restored Ms. George’s acquittals, with reasons to follow. These are those reasons.

I. Overview

[2] Sexual crimes are disproportionately committed against vulnerable populations, including youth. The “reasonable steps” requirement in s. 150.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46 — which requires an accused person who is five or more years older than a complainant who is 14 years of age or more but under the age of 16, to take “all reasonable steps to ascertain the age of the complainant” before sexual contact — seeks to protect young people from such crimes. It does so by placing the responsibility for preventing adult/youth sexual activity where it belongs: with adults. Parliament’s allocation of responsibility to adults is crucial for protecting young people from sexual crimes. However, through s. 676(1)(a) of the *Criminal Code*, Parliament limits Crown appeals against acquittals in proceedings by indictment to “question[s] of law alone.” As a result, Parliament has accepted that an acquittal at trial on an indictable offence cannot be overturned unless an error of law was made. As the trial judgment below concerned indictable offences and contained no errors of law, Ms. George’s acquittals were sustained and her appeal was allowed.

II. Context

[3] Ms. George had sex with an adolescent boy, C.D. When the sexual activity took place, Ms. George was 35 years old; C.D. was approximately 14 and a half. The sexual activity was found to be apparently consensual, meaning that both partners willingly participated. In fact, C.D. instigated the sexual encounter, despite Ms. George's genuine protestations. Still, C.D. was incapable of legally consenting because of the combination of his young age and his age disparity with Ms. George.

[4] The sexual activity happened after Ms. George's son — who was 17 at the time — hosted a party at their apartment. Ms. George did not foresee sexual activity with C.D. For most of the party, she remained in her bedroom. However, after the party ended, C.D. came to the bedroom. They spoke for several hours about music, custody issues, C.D.'s relationships, and his difficulties meeting mature girlfriends.

[5] Ultimately, C.D. initiated sexual contact. He asked Ms. George if it "would be weird" if he kissed her. Almost simultaneously, C.D. leaned forward to kiss Ms. George. She backed away, but C.D. again moved towards her, and she let him complete a brief kiss. C.D. then "immediately" moved on top of Ms. George, removed the blankets which were covering her body, lowered his pants, and moved her underwear to the side. She asked him what he was doing. She also asked him to stop several times. But he ignored these requests and persisted. In the end, Ms. George "simply let him finish." She described the sexual encounter as "weird,

awkward, and quick.” Despite these facts, there was “no dispute that, although reluctant at first, Ms. George was a willing participant.” Further, before the Court, neither party contested Ms. George’s consent to the sexual activity.

[6] C.D. did not complain to any authorities about his sexual activity with Ms. George; he even proposed that they continue having sex once a week. Rather, the RCMP learned about Ms. George’s sexual activity with C.D. by happenstance. Ms. George applied to join the RCMP, and part of the screening process involved a questionnaire which asked if she had “ever engaged in sexual activity with someone who was under the age of 16”. At the time of the sexual activity, Ms. George had presumed that C.D. was around 17 because, in the several months she had known C.D., he looked that age, shaved, openly smoked cigarettes, easily bought cigarettes, and was a friend of her son (who was himself seventeen, typically socialized with older peers, and displayed less emotional maturity than C.D.). But the questionnaire prompted her to inquire as to C.D.’s exact age. When she learned that C.D. had actually been 14 and a half at the time of their sexual activity, she “felt panic.” She nevertheless submitted the questionnaire and admitted to the RCMP that she had engaged in sexual activity with a minor. Consequently, she was charged with two *Criminal Code* offences: (1) sexual interference (s. 151); and (2) sexual assault (s. 271).

[7] For both offences, the *Criminal Code* barred Ms. George from relying on C.D.’s consent as a defence, because C.D. was younger than 16 (s. 150.1(1)) and Ms.

George was more than five years his senior (s. 150.1(2.1)). Accordingly, her only available defence — or, more accurately, her only available means of negating her criminal intent (*mens rea*) to have sex with a minor (H. C. Stewart, *Sexual Offences in Canadian Law* (loose-leaf), at p. 4-24) — was “mistake of age”, i.e. Ms. George believing that C.D. was at least 16. However, the *Criminal Code* limits the availability of the mistake of age defence by requiring that “all reasonable steps” be taken to ascertain the complainant’s age:

150.1 . . .

Mistake of age

(4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

Inadmissibilité de l’erreur

(4) Le fait que l’accusé croyait que le plaignant était âgé de seize ans au moins au moment de la perpétration de l’infraction reprochée ne constitue un moyen de défense contre une accusation portée en vertu des articles 151 ou 152, des paragraphes 160(3) ou 173(2) ou des articles 271, 272 ou 273 que si l’accusé a pris toutes les mesures raisonnables pour s’assurer de l’âge du plaignant.

[8] At common law, “true crimes” — like those at issue here — would have a purely subjective fault element. However, through statutory intervention, Parliament has imported an objective element into the fault analysis to enhance protections for youth (Stewart, at pp. 4-23 to 4-24). As a result, to convict an accused person who demonstrates an “air of reality” to the mistake of age defence, the Crown must prove,

beyond a reasonable doubt, either that the accused person (1) did not honestly believe the complainant was at least 16 (the subjective element); or (2) did not take “all reasonable steps” to ascertain the complainant’s age (the objective element) (Stewart, at p. 4-24; M. Manning, Q.C. and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (5th ed. 2015), at p. 1113 (“*Manning, Mewett & Sankoff*”)).

[9] Determining what raises a reasonable doubt in respect of the objective element is a highly contextual, fact-specific exercise (*R. v. Duran*, 2013 ONCA 343, 3 C.R. (7th) 274, at para. 52; *R. v. P. (L.T.)* (1997), 113 C.C.C. (3d) 42 (B.C.C.A.), at para. 20; *R. v. K. (R.A.)* (1996), 106 C.C.C. (3d) 93 (N.B.C.A.), at p. 96; Stewart, at p. 4-25; A. Maleszyk, *Crimes Against Children: Prosecution and Defence* (loose-leaf), vol. 1, at p. 11-4). In some cases, it may be reasonable to ask a partner’s age. It would be an error, however, to insist that a reasonable person would ask a partner’s age in every case (see e.g. *R. v. Tannas*, 2015 SKCA 61, 21 C.R. (7th) 166, at para. 27; *R. v. Gashikanyi*, 2015 ABCA 1, 588 A.R. 386, at para. 17). Conversely, it would be an error to assert that a reasonable person would do no more than ask a partner’s age in every case, given the commonly recognized motivation for young people to misrepresent their age (*R. v. Dragos*, 2012 ONCA 538, 111 O.R. (3d) 481, at paras. 17, 26, 45 and 51 (“*Dragos*”); L. Vandervort, “‘Too Young to Sell Me Sex?!’ *Mens Rea*, Mistake of Fact, Reckless Exploitation, and the Underage Sex Worker” (2012) 58 *Crim. L.Q.*, 355 at pp. 360 and 375; J. Benedet, 21 C.R. (7th) 166, at p. 168 (“*Benedet*”); Stewart, at p. 4-26.1). Such narrow approaches would contradict the open-ended language of the reasonable steps provision. That said, at least one general

rule may be recognized: the more reasonable an accused's perception of the complainant's age, the fewer steps reasonably required of them. This follows inevitably from the phrasing of the provision ("all *reasonable* steps") and reflects the jurisprudence (*R. v. Osborne* (1992), 17 C.R. (4th) 350 (Nfld. C.A.) at para. 64 ("Osborne")), and academic commentary (*Manning, Mewett & Sankoff*, at p. 1113).

III. Judicial History

[10] At trial, Kovach J. acquitted Ms. George of both offences. He noted that the reasonable steps inquiry is contextual, and he considered various factors, including C.D.'s physical appearance, behaviour and activities, the age and appearance of C.D.'s social group, and the circumstances in which Ms. George had observed C.D. After a detailed review of these factors, Kovach J. ruled that there remained a reasonable doubt about whether the Crown proved that she had failed to take all reasonable steps to determine C.D.'s age.

[11] The Court of Appeal's judgment included majority and dissenting opinions. They were divided on two points: (1) whether Kovach J. had made any legal errors, a statutory requirement for Crown appeals from acquittals for indictable offences (*Criminal Code*, s. 676(1)(a); *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 24 ("*J.M.H.*")); and (2) whether those errors were sufficiently material to the verdict, a jurisprudential requirement for such appeals (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14).

[12] Richards C.J.S., writing for the majority, allowed the appeal, quashed the acquittals and ordered a new trial (2016 SKCA 155, 344 C.C.C. (3d) 544, at paras. 50-51). He held that Kovach J. had erred in law in two ways: (1) by considering evidence from during or after the sexual encounter in assessing the reasonableness of the steps taken by Ms. George before the encounter; and (2) by relying on questionable factual inferences regarding whether C.D. may have looked mature for his age at the time of the sexual activity (paras. 41-46). He also ruled that those legal errors were “central” to Kovach J.’s analysis, thus demonstrating their materiality to the verdict and justifying appellate intervention (paras. 48-49).

[13] In contrast, Jackson J.A., dissenting, would have dismissed the appeal and upheld the acquittals (para. 100). In her view, Kovach J. had made no legal errors (para. 89). Specifically, the errors which Richards C.J.S. alleged to be legal related instead to disagreement over factual inferences drawn by the trial judge (paras. 77-80, 85-88 and 92). In the alternative, Jackson J.A. held that the errors which Richard C.J.S. identified, if legal, were insufficiently material to justify appellate intervention because she was not satisfied that the verdict would not “necessarily” have been the same without those errors (paras. 73, 94 and 99). At multiple points in her reasons, Jackson J.A. also felt it necessary to remark that this case lacked the hallmarks of sex crimes involving children, such as grooming and deliberate exploitation of vulnerability (paras. 65-67, 96(d) to (f) and 97).

IV. Issues

[14] This case raises two issues: (1) whether the trial judge made any legal errors in his reasonable steps analysis; and (2) if he did, whether those errors were sufficiently material to justify appellate intervention.

V. Analysis

[15] A careful review of the trial judge's reasons reveals no legal errors. As a result, the Court of Appeal lacked jurisdiction to interfere with the trial judgment.

[16] I note, at the outset, that the trial judge correctly articulated the governing legal principles and cited multiple leading authorities. Of course, simply stating the correct legal test does not exhaust our inquiry and cannot insulate a trial judge from legal errors. But it helpfully orients our remaining analysis to whether the trial judge's application of those principles reveals any legal errors.

[17] Whether an error is "legal" generally turns on its character, not its severity (*J.M.H.*, at paras. 24-39). In this case, the majority confused these two concepts; it translated its strong opposition to the trial judge's factual inferences (severity) into supposed legal errors (character). Here, that was an improper approach, and it disregarded the restraint required by Parliament's choice to limit Crown appeals from acquittals in proceedings by indictment to "question[s] of law alone" (*Criminal Code*, s. 676(1)(a)).

[18] First of all, it goes without saying that an accused person cannot rely on the impugned sexual activity itself as a reasonable step in ascertaining the complainant's age before the sexual activity. With this in mind, the majority claimed that the trial judge had improperly relied on "C.D.'s level of sexual experience as revealed by the sexual encounter itself" in determining whether Ms. George had taken all reasonable steps before the sexual activity (para. 47). However, this misconstrues the trial judge's reasons when they are read as a whole and in context, as required (*R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, at pp. 203-204). The trial judge explained:

The most compelling activity engaged in by [C.D.] suggestive of a level of maturity beyond his years, was the sexual encounter itself. Not the mere fact of sexual intercourse with a significantly older female partner, but, rather, the obvious level of comfort with which he approached the encounter. [Emphasis added.]

(Trial Transcript, A.R., at p. 11)

[19] Considered in conjunction with the trial judge's unambiguous recognition that all reasonable steps must precede sexual contact, C.D.'s "obvious level of comfort" with how he "approached" the encounter must refer to how C.D. came to Ms. George's bedroom uninvited and spoke with her for several hours about various topics, many reflecting maturity, and others suggestive in nature. All of this information was known to Ms. George before the sexual contact. According to the trial judge, this was one of many factors reasonably informing her perception of C.D.'s age before sexual contact. No legal error arises from this.

[20] Admittedly, the trial judge considered other evidence that did not precede the sexual encounter. The majority considered this to be a further legal error. But it is not. As noted, Ms. George's reasonable steps must precede her sexual activity with C.D.; the trial judge expressly recognized this. But it does not follow that the evidence she tenders must also precede her sexual activity with C.D. Such an interpretation conflates the fact to be proven with the evidence that may be used to prove it.

[21] When determining the relevance of evidence in this context, both its purpose and its timing must be considered. Evidence demonstrating steps taken after the sexual activity to ascertain a complainant's age — for example, the accused person checking the complainant's photographic identification immediately after the sexual activity — is irrelevant to the reasonable steps inquiry. As a result, considering such evidence would amount to a legal error, as it reveals a "misapprehension of . . . legal principle" (*J.M.H.*, at para. 29). However, evidence properly informing the credibility or reliability of any witness, even if that evidence arose after the sexual activity in question, may be considered by the trial judge. Similarly, evidence demonstrating the reasonableness of the accused person's perception of the complainant's age before sexual contact is relevant to adjudicating the reasonableness of the steps taken by the accused person (*Duran*, at paras. 51-54), even if that evidence happens to arise after the sexual activity or was not known to the accused before the sexual activity (see e.g. *Osborne*, at paras. 22(4) to (5)).

[22] For example, consider a photograph of an underage complainant taken a week after impugned sexual activity, in which the complainant looks as old as 21. The adult charged with assaulting the complainant could not have relied on viewing the photograph itself as one of their reasonable steps, because it was taken after the sexual activity occurred. But that is not the purpose for which the photograph would be tendered as evidence. Rather, the photograph would be tendered as evidence for the purpose of proving the complainant's physical appearance around the time of the sexual activity, which could, depending on the circumstances, be relevant to the reasonableness of the accused person's perception of the complainant's age.

[23] The evidence arising after the sexual activity considered by the trial judge in this case, to which the majority objected (at para. 34), did not detract from and was consistent with Ms. George's testimony as to how C.D. appeared to her and acted in her presence during the several months they knew each other before the sexual encounter. To that extent, it was admissible for the purpose of assessing her credibility at large, which included her testimony as to how the complainant appeared to her in the months preceding the sexual activity.

[24] While one may disagree with the weight the trial judge gave this evidence, no legal error arises from mere disagreements over factual inferences or the weight of evidence (*J.M.H.*, at para. 28). Indeed, many of the majority's comments reveal that its discomfort with this evidence was not because it was irrelevant (which would have illustrated a misconception of principle, a legal issue: *ibid.*, at para. 29),

but because its relevance was marginal (a factual issue). The trier of fact is best situated to assign weight to evidence. In any event, if the Crown objects to inferences about a complainant's physical appearance at a younger age, it is permitted to tender direct evidence of that physical appearance (for example, a photograph). The majority's view that the trial judge could not draw such an inference because Ms. George had failed to tender evidence proving that C.D.'s appearance "had not changed" between ages 14 and 17 (para. 46) suggests that the trier of fact is prohibited from drawing factual inferences. To the contrary, factual inferences are a necessary means through which triers of fact consider all of the evidence (direct and indirect) before them.

[25] Given the above, the Court of Appeal lacked jurisdiction to review the trial judge's decision. On that basis, the Court allowed the appeal. That said, two final points arising from the dissent merit brief consideration.

[26] First, the dissenting judge felt it necessary to comment on how this case lacks the hallmarks of sex crimes against children, including grooming and exploitation of vulnerability (paras. 65-67, 96(d) to (f) and 97). But no such hallmarks are required for the offences at issue. It is a criminal offence to sexually touch a child who is 14 years of age or more but younger than 16 when you are five or more years their senior, even if you honestly believe they are older than 16, unless you have taken "all reasonable steps" to ascertain their age; nothing more is required (Benedet, at p. 167). Indeed, to suggest that exploitation is a requirement for the offence belies

(1) the scheme of the *Criminal Code*, which already prohibits sexual exploitation (s. 153) and sexual activity where “consent” is procured through abuse of trust, power or authority (s. 273.1(2)(c)); and (2) Parliament’s recognition that adult/youth sexual relationships are inherently exploitative. To the extent that the dissent was suggesting that such ancillary considerations are necessary in proving all sex crimes against children, I reject that proposition. To be clear, overt indicia of exploitation may diminish the credibility of an accused person’s purported mistaken belief in the complainant’s age, or the reasonableness of the steps taken by that accused person (see e.g. *Dragos*, at para. 52; *R. v. Mastel*, 2011 SKCA 16, 84 C.R. (6th) 405, at para. 18; J. Benedet, Annotation to *R. v. Mastel* (2015), 84 C.R. (6th) 405, at p. 406), but they are not required for the offence itself to be made out.

[27] Second, the dissent stated that, to overturn an acquittal, an appellate court must be satisfied that the verdict would “not necessarily have been the same” without the trial judge’s legal errors (paras. 74 and 99, see also paras. 73 and 94). If the dissent was implying that an appellate court can overturn an acquittal where it is merely possible that the verdict would have changed, that is too low a threshold. This Court has used various phrasings to articulate the threshold of materiality required to justify appellate intervention in a Crown appeal from an acquittal. An “abstract or purely hypothetical possibility” of materiality is below the threshold (*Graveline*, at para. 14). An error that “would necessarily” have been material is above the threshold (*ibid.*, at paras. 14-15; *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 374 (“*Morin*”). And an

error about which there is a “reasonable degree of certainty” of its materiality is at the required threshold (*Graveline*, at paras. 14-15; *Morin*, at p. 374).

[28] That threshold is not met here. The allegations of errors on the trial judge’s part that have arguable merit relate to two pieces of corroborative evidence. Further, that evidence was surrounded by alternate evidence — including C.D.’s physical appearance, behaviour and activities, the age and appearance of C.D.’s social group, and the circumstances in which Ms. George had observed C.D. — all of which supported the trial judge’s view that reasonable doubt remained in respect of whether the Crown had proven that Ms. George failed to meet the reasonable steps requirement. In my view, there was no reasonable degree of certainty that the trial judge’s controversial inferences were material to his verdict. It follows that, even if these inferences had amounted to legal errors, they would not have justified appellate intervention in any event.

VI. Conclusion

[29] As explained in these reasons, the trial judge’s factual inferences did not amount to legal errors conferring appellate jurisdiction in this case. This is why, at the hearing, the Court allowed the appeal, and restored Ms. George’s acquittals.

Appeal allowed.

Solicitors for the appellant: Gerrand Rath Johnson, Regina.

Solicitor for the respondent: Attorney General of Saskatchewan, Regina.