

## **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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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.

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COURT OF APPEAL FOR ONTARIO

Laskin, Moldaver and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

V. Y.

Appellant

Michael Engel, for the appellant

Lisa Joyal, for the respondent

Heard: April 16, 2010

On appeal from the judgment of Justice Bruce E. MacPhee of the Ontario Court of Justice, dated January 17, 2008.

**H. S. LaForme J.A.:**

**INTRODUCTION**

[1] The appellant was convicted of sexual assault and unlawful confinement in relation to an incident involving the complainant, his 13 year old neighbour. Both the

appellant and the complainant testified at trial. They gave different versions of the relevant events. The trial judge ultimately accepted most of the complainant's evidence, and said that he was satisfied on the totality of the evidence that the Crown had proved its case with respect to the sexual assault and the unlawful confinement charges.

[2] The appellant anchors his appeal to this court by asserting that the trial judge committed reviewable error, particularly in light of the Supreme Court of Canada decisions in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 and *R. v. C.L.Y.* [2008] 1 S.C.R. 5. I agree with the appellant.

[3] I read the trial judge's reasons as committing two errors: First, in order to establish the credibility of the complainant, the trial judge assumed the appellant's guilt. Second, the trial judge does not appear to have given sufficient consideration to the third branch of the *W.(D.)* analysis – that despite disbelieving the evidence of the accused, the Crown evidence did not establish guilt beyond a reasonable doubt.

## **BACKGROUND**

[4] The 13 year old complainant testified that he was playing hockey alone on his driveway for about half an hour when his next door neighbour, the appellant, called him over. The complainant had never talked to the appellant before, but he dropped his hockey stick and walked over to the front door of the appellant's home to speak with the man. He thought the appellant had wanted to ask him a question.

[5] As soon as the complainant got there, he says that the appellant forced him inside the home, took him to a bedroom and “humped” him for a couple of minutes. The complainant described the appellant as forcing him to lie down on his back and, without removing either his or the complainant’s clothes, standing at the foot of the bed and rotating his hips back and forth toward him. The appellant then lay on top of the complainant and made the same motion while kissing his neck and asking him three times if he loved him. The appellant then stood the complainant up and hugged him several times, again kissing his neck and asking him if he loved him. In an interview with police, the complainant claimed that the appellant then walked the complainant out to the front door and told him to, “[g]o tell your parents. Go get your parents and come back to me.” He later changed this element of the story, saying that the appellant told him to, “[t]ell your parents to stop bugging us.”

[6] The appellant categorically denied the allegations. His position on the evidence was that malice on the part of the complainant’s family had prompted the false complaint. Other members of the appellant’s family also testified to various disputes that had occurred between the respective families over the years. In particular, there was evidence that the complainant’s parents had used racial epithets to address and describe the appellant and his family, and that his father had threatened to do whatever necessary to get them out of the neighbourhood.

[7] The appellant was convicted of sexual assault and unlawful confinement. On the charge of sexual assault, he was sentenced to 90 days custody to be served intermittently. On the unlawful confinement charge, he was sentenced to three months, which was to be served concurrently and in the community.

### **ANALYSIS**

[8] The Supreme Court Canada decision in *W.(D.)* is the seminal authority on defining the burden of proof in criminal trials. It sets out a three stage analysis to be included in jury instructions, and while the steps are familiar and often recited in decisions, they are worth restating as it would, in my view, have been helpful to apply them in the circumstances of this case:

First, if the trial judge believed the evidence of the appellant, he must be acquitted.

Second, if the trial judge did not believe the evidence of the appellant, but was left in reasonable doubt by it, then again, he must be acquitted.

Third, even if the trial judge was not left in doubt by the evidence of the appellant, he was then required to decide whether, on the basis of the evidence he did accept, he was convinced beyond a reasonable doubt by that evidence of the guilt of the appellant.

[9] The three stage analysis in *W.(D.)* is frequently cited for the proposition that a criminal trial is not a contest of credibility between the accused and the complainant; that disbelieving the accused does not lead necessarily to conviction. As Fish J. describes it at para. 25 of *C.L.Y.*, “[t]he *very purpose* of adhering to the procedure set out in *W.(D.)* is to

foreclose an inadvertent shifting of the burden of proof where the complainant and the accused have both testified and the outcome of the trial turns on their credibility as witnesses.” (emphasis in the original)

[10] In *C.L.Y.*, the Supreme Court revisited the *W.(D.)* analysis, and was divided on how strictly it should be applied. In that case, the trial judge had reviewed the evidence of the complainant and concluded that she believed it before considering the evidence of the accused.

[11] Writing in dissent, Fish J. found that the trial judge had committed a reviewable error. In his view, the trial judge had found the accused guilty before even evaluating his evidence, and thus shifted the burden to the accused. As he stated at para. 30 of his reasons:

Unfortunately, the appellant’s presumption of innocence had by that point been displaced by a presumption – indeed, a *finding* – of guilt. The trial judge could hardly believe *both* the appellant *and* the complainant. Before even considering the appellant’s evidence, she had already concluded that she believed the complainant. In effect, the trial judge had thus decided to convict the appellant unless his evidence persuaded her to do otherwise. (Emphasis in the original)

[12] In contrast, the majority stressed that *W.(D.)* need not be “religiously followed” and saw, “no blue print for error in the trial judge’s failure to observe *W.(D.)* as a catechism”: paras. 7 and 11. Central to the majority’s reasoning was Abella J.’s conclusion at para. 12 that the mere order in which the trial judge had reviewed the

evidence and stated her conclusions did not, of necessity, create a shift in the burden of proof:

The trial judge's reasons reveal that she understood that a finding that the [complainant] was credible did not mean that the onus shifted to the accused to show that he was not guilty. I find it difficult to see how the sequence in which the trial judge set out her findings of credibility can be said to undermine her articulated and correct statement of the law, or demonstrate that she lost sight of a paramount legal principle like reasonable doubt.

[13] Significantly both the majority and dissent agreed that it would be an error for a trial judge to find that because a complainant was credible, the onus shifts to the accused to disprove his guilt. What separated the majority and dissent was the majority's finding that there was nothing to suggest that this error had been committed, while the dissent found that it had been and that following the structure of *W.(D.)* would have guarded against such error: per Fish J. at para. 31.

[14] In considering issues around the *W.(D.)* analysis, trial judges are presumed to know the law regarding the presumption of innocence and the burden of proof. They are not required to explain in detail the process they followed to reach a verdict; they only need to give reasons that the parties can understand and that permit appellate review: *R. v. Sheppard*, [2002] 1 S.C.R. 869.

[15] I would add that it is also essential to keep in mind the comments of Fish J. at para. 33 in *C.L.Y.*: “[J]udges may know the law, yet err in its application; they may know

the facts, yet make findings of credibility unsupported by the record. What matters in either instance is the substance and not the form of the decision.”

### **The Trial Judge’s Reasons**

[16] In the present case, the trial judge’s reasons are quite similar to those that were under review in *C.L.Y.* The trial judge in the present case reviewed the testimony of the complainant and found him to be “a compelling and credible witness.” He next reviewed the testimony of the appellant, which he rejected as fabricated. Finally, based on these conclusions, but primarily on the credibility of the complainant, he found the appellant guilty.

[17] I fully appreciate that pursuant to *C.L.Y.*, the mere order in which he stated these conclusions is not sufficient to ground a finding that he shifted the burden from the Crown to the defence.

[18] Nevertheless, I find that a shift in the burden of proof from the Crown to the defence did occur in this case. My reasons for so finding go beyond the mere sequence of the conclusions. Furthermore, as I noted earlier, I read the trial judge’s reasoning as giving insufficient consideration to the third prong of the *W.(D.)* analysis – the possibility that the trial judge would disbelieve the defence but still find that the Crown had not proved guilt beyond a reasonable doubt.

***Presumption of Innocence***

[19] In my view, the trial judge shifted the burden to the accused in two respects. First, in discussing the complainant's credibility, the trial judge appears to have reversed the presumption of innocence, and dismissed one of the key challenges to the complainant's credibility by presuming the guilt of the appellant. Second, the trial judge's reasons appear to suggest that, having found the complainant credible, he then shifted the burden to the appellant to disprove the allegations.

[20] As noted above, the complainant had testified that the appellant, after molesting him, had said either, "Go tell your parents. Go get your parents and come back to me" or "Tell your parents to stop bugging us." The defence argued that such statements were simply too bizarre to be believable. In evaluating this argument, the trial judge stated:

As Miss Paradis correctly pointed out, these comments, singularly or collectively, are odd. Why would a person who has committed an assault of this magnitude tell the complainant to go and tell his parents? Yet, in the face of what allegedly happened itself being at the very least odd, these circumstances and those utterances are understandable. If the events happened as alleged, they are the product of someone who was clearly not behaving rationally.

[21] According to the trial judge's own reasoning, the Crown's case was tied inextricably to the credibility of the appellant. At this stage of his reasoning, the trial judge was addressing one of the defence's key bases for arguing that the complainant was not credible. Yet his dismissal of this argument, as I will illustrate, required assuming that the appellant was guilty.

[22] The trial judge's reasoning in respect of this defence argument seems to be as follows: The statements were bizarre, which raises issues of credibility. However, if the accused did commit such a bizarre crime then he would be the type of person to make such a bizarre statement. This reasoning is circular in that it assumes its own conclusion. Establishing the guilt of the accused required establishing the credibility of the complainant. Yet, in order to establish the credibility of the complainant, the trial judge first assumed that the accused was guilty. That is, in order to find that the statements are odd but understandable (i.e. that they were made and the complainant is telling the truth) the trial judge first had to find that the assault occurred (i.e. that the accused was guilty).

[23] Absent this circular logic, the trial judge's reasons provide no answer to the question he posed to himself: Why would a person who has committed an assault of this magnitude tell the complainant to go and tell his parents?

[24] The way in which the trial judge rejected the evidence of the appellant suggests to me that he committed the error described in *W.(D.)* of finding guilt based on his disbelief of the appellant. The trial judge noted at several points that the defence theory that the complainant, in collusion with his family, had concocted the story in order to force the appellant from the neighbourhood was not credible. In particular, at p. 21 he states:

In reviewing his evidence in its entirety and bearing in mind the discrepancies to which I have alluded, they do not dissuade me from the view I hold that [the complainant] was a compelling and credible witness. With respect, it is simply not plausible that he fabricated this intricate version of events

as part of some family plot to rid them of the neighbours. He is, after all, 13 years of age.

[25] This passage is troubling in that the trial judge appears to rely on the following line of reasoning:

- The complainant is a credible witness.
- The appellant has put forward no credible explanation for his allegations.
- Therefore the allegations are proven.

[26] This line of reasoning necessarily implies that the trial judge, having decided that the complainant was credible, then shifted the burden to the defence to refute his allegations. This is precisely the kind of reasoning that the majority in *C.L.Y.* found at para. 12 would be impermissible: A finding that the complainant was credible did not mean that the onus shifted to the appellant to show that he was not guilty. In other words, the appellant did not have an obligation to put forward a theory that would explain why the complainant would make a false complaint.

[27] This reasoning leads me to conclude that the trial judge shifted the burden of proof from the Crown to the defence. This error, I find, goes beyond the mere sequence of the conclusions of the trial judge.

### ***Reasonable Doubt***

[28] In addition to this shift of the burden of proof, the trial judge did not adequately consider the third step in the *W.(D.)* analysis – that although he completely disbelieved

the accused, the Crown had nonetheless failed to establish guilt beyond a reasonable doubt. There are two excerpts from the trial judge's reasoning which demonstrate this error.

[29] First, the above quoted statements attributed to the appellant were not important simply because they were odd. They also showed evidence of the complainant's story evolving in order to become more believable. The defence noted that in the complainant's first statement to police he reported that the appellant had said, "Go tell your parents. Go get your parents and come back to me." But that in his second statement, this changed to, "Go tell your parents to stop bugging us."

[30] The defence posited that this change was to make the complainant's story more believable and may have been prompted by the investigating officer. In cross examination, the following exchange took place between defence counsel and the complainant:

Q. Well, he didn't say go get your parents did he? You didn't say go get your parents on October 4<sup>th</sup>, you said...

A. Go tell my parents.

Q. ... go tell your parents to stop bugging us, right?

A. Yeah

Q. Do you think that's the same thing?

A. No.

Q. No. Okay. So did that change because the officer didn't think it made much sense?

A. Yeah.

[31] The complainant later changed his position and denied that the change was made in response to the officer's belief that the first statement did not make sense. The Crown has argued that this may have been due to the stress of cross examination or the complainant's not understanding the line of questioning.

[32] The salient point, however, is that the trial judge did not address this exchange or explain why it did not raise any doubts in his mind as to the credibility of the complainant. Again, I would observe that at this stage of the analysis, the trial judge had already stated conclusively that he found the complainant credible and compelling.

[33] In the present case, the trial judge accepted that there was a great deal of animosity between the appellant and the complainant's family. The complainant testified that he and members of his family had referred to the appellant as a "fucking Paki." The complainant's mother admitted that she had accused the appellant of being a "fucking pedophile" in the months before the complainant's allegations. Both testified that they felt that the appellant stared at their family in inappropriate ways. The mother testified that they had enlarged the fence between the properties and the appellant testified that they had piled snow in the appellant's basement windows to prevent this staring.

[34] In these circumstances, it was not necessary to find that there had been a well articulated “plot” to fabricate allegations. The trial judge did not turn his mind to the possibility that the complainant, living in such a strained atmosphere and with such accusations already in the air, may have spontaneously accused the appellant of “humping” him. Such a possibility is especially troubling given two aspects of the allegations. First, as noted by the defence, the action described by the plaintiff, while not only bizarre, do not seem consistent with those of a person seeking sexual gratification. They do, however, seem to reflect a child’s understanding of what a pedophile would do to a young boy. Second, the evidence discussed above with respect to the appellant’s telling the complainant to tell his parents suggests that the complainant’s story appears to have evolved over time in order to become more coherent.

[35] I find that the trial judge erred in not explaining why these factors did not raise a reasonable doubt that the accusations may have been fabricated.

## **DISPOSITION**

[36] For the foregoing reasons, I would allow the appeal, set aside the conviction and order a new trial.

**Signed: “H.S. LaForme J.A.”**

**“I agree J.I. Laskin J.A.”**

**Moldaver J.A. (Dissenting):**

[37] I have had the benefit of reading LaForme J.A.'s reasons for judgment. With respect, I am unable to agree with my colleague's analysis or conclusion.

[38] The trial judge gave comprehensive reasons for judgment. He reviewed the pertinent evidence, addressed the arguments put forward on behalf of the appellant, resolved most of the troubling features of the complainant's evidence, and explained why, on the whole of the evidence, he believed the complainant and disbelieved the appellant.

[39] While it is true that the trial judge came to a conclusion about the complainant's credibility before considering and rejecting the appellant's evidence, that is a matter of form, not substance, and it does not amount to reviewable error. Nor was it wrong for the trial judge to reject the appellant's evidence on the basis that he was satisfied beyond a reasonable doubt that the complainant was telling the truth. In arriving at that conclusion, the trial judge considered the whole of the evidence, he addressed the key issues raised by the defence and in the end, he resolved the contentious issues in favour of the Crown.

[40] In a nutshell, the defence contended that the complainant's evidence was a complete fabrication, that he never set foot in the appellant's home and that his story was the product of a conspiracy, formulated by him and his bigoted parents, to rid the neighbourhood of the appellant and his family. The trial judge summarized the conspiracy theory put forward by the appellant as follows:

Mr. [Y.] categorically denies the assertions that [the complainant] made. It is a principal contention of the defence that the complaint was fabricated not only by [the complainant] but in consort with his parents so as to force the accused and his family from the neighbourhood. It was suggested by the defence that the [complainant's] family was prejudiced against the [Y.'s], their neighbours. They were accused of being frequently abusive and assaultive and it is alleged that they had threatened the accused and his father that they would do whatever they could to get them, being the [Y.'s] and the accused, out of the neighbourhood. Most of the criticism was directed at [the complainant's] father, ... who was not a witness in this proceeding.

[41] The trial judge considered the conspiracy theory and rejected it, at least insofar as it purported to sweep in the complainant. While the trial judge accepted that there was “bad blood emanating” from the complainant’s parents towards the appellant and his family, he found that there was “no evidence that [the] complainant] himself played any role in this phenomena.” In the trial judge’s view, “it was simply not plausible that [the complainant] fabricated this intricate version of events as part of some family plot to rid them of the neighbours. He is, after all, 13 years of age.”

[42] That finding – that the complainant played no role in his parent’s hostility towards the appellant – is amply supported by the evidence and it is central to the trial judge’s overall assessment of the case and his credibility findings in favour of the complainant. If it did not decimate the defence position, it severely weakened it.

[43] With the conspiracy theory off the table, the remaining question for the trial judge was whether the event described by the complainant actually occurred, or whether it was something the complainant conjured up in his mind for some inexplicable reason.

[44] The defence took the position that the complainant's testimony was incredible and unreliable and it should not be believed. The allegations of sexual misconduct attributed to the appellant were bizarre and strained the bounds of credulity. The same held true for the message the complainant says he was told to convey to his parents. In addition, the complainant's evidence suffered from inconsistencies and other failings, such as his inability to more fully describe the interior of the appellant's home and the bedroom in which the sexual misconduct is said to have occurred. Viewed as a whole, the complainant's evidence could not safely be relied upon to support a conviction.

[45] The trial judge was alive to these concerns. He was fully aware that he could only convict the appellant if he was "satisfied beyond a reasonable doubt the complaints are true." In this regard, he recognized that "[R]easonable doubt applies to the assessment of credibility" and he correctly instructed himself on the presumption of innocence and the principles in *R. v. W. (D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.).

[46] The trial judge further appreciated that it was a delicate task assessing credibility in a case "such as this one", "particularly where the critical evidence is found in the competing versions from the complainant and the accused." To that end, he instructed himself as follows:

It is critical to understand that credibility is fashioned from the evidence given. The court presumes nothing about either principal save and except for the presumption of innocence to which the accused is entitled. In assessing credibility, the court has to ask whether the evidence given is internally consistent and logical. Does it accord with common sense? Is it compatible with the other evidence that forms part of the events as described?

[47] Having instructed himself on the applicable legal principles, the trial judge turned to the alleged inconsistencies and failings in the complainant's evidence. In the end, he found that they did not "dissuade [him] from the view ... that [the complainant] was a compelling and credible witness." Most of the inconsistencies were immaterial and the complainant's inability to remember particular details was understandable given his age and the trauma he underwent in the appellant's home.

[48] My colleague takes issue with the trial judge's treatment of the message the complainant says he was told to deliver to his parents. He contends at para. 22 of his reasons that the trial judge engaged in circular reasoning and effectively shifted the burden of proof in his treatment of this evidence:

The trial judge's reasoning in respect of this defence argument seems to be as follows: The statements were bizarre, which raises issues of credibility. However, if the accused did commit such a bizarre crime then he would be the type of person to make such a bizarre statement. This reasoning is circular in that it assumes its own conclusion. Establishing the guilt of the accused required establishing the credibility of the complainant. Yet, in order to defend the credibility of the complainant, the trial judge assumed that the accused was guilty.

[49] With respect, in addressing the defence submission – that no right-thinking person would have told the complainant to go and tell his parents what had happened – the trial judge was merely making the common sense observation that the likelihood of the appellant making such a seemingly bizarre request had to be assessed in the context of the surrounding circumstances, including the nature of the sexual misconduct attributed to him. The trial judge was not engaging in impermissible reasoning. The approach he took to the message did not require him to presume that the appellant had, in fact, sexually assaulted the complainant, nor did he do so. On the contrary, he recognized that that fact would have to be proved independently having regard to the whole of the evidence. His only point was that *if* such proof was made out, it would place the so-called “bizarre” message in a different light and render it more understandable.

[50] I pause here to note that the “bizarre” message may not have been as bizarre as the appellant suggests. Given the strange nature of the alleged sexual assault and the absence of any evidence that the appellant was sexually aroused or that he derived any sexual gratification from it, the whole event, including the proposed message to the complainant’s parents, may have been an ill-conceived act of retribution borne out of anger and frustration, designed to repay the complainant’s parents for the horrible way they had been treating the appellant and his family.

[51] Be that as it may, as indicated, I see no error in the trial judge’s reasoning. In particular, I respectfully disagree with my colleague that the manner in which the trial

judge approached the message resulted in an impermissible shifting of the burden of proof.

[52] My colleague also takes issue with the trial judge's failure to specifically address and rationalize the complainant's inability to recall the precise content of the message and the differing versions he provided in his two statements to the police. My colleague sees this as a failure on the part of the trial judge to "adequately consider the third step in the *W.(D.)* analysis."

[53] With respect, I do not agree. The trial judge was not required to rationalize every aspect of the complainant's evidence. In any event, it is hardly surprising that a frightened 13 year old boy would not commit to memory the exact words spoken by the appellant in circumstances of extreme anguish. Rather, what counted was the trial judge's impression of the complainant's evidence as a whole. In this regard, the trial judge made the following observations:

I had the opportunity to observe [the complainant] over the course of better than a full day of testimony before us. Here are my observations which impact upon credibility: Firstly, he was responsive. His testimony flowed in an orderly fashion and it was descriptive and detailed. His evidence flowed in a logical fashion and the events he outlined were told consistently. I do not feel that he overstated his evidence and, indeed, he did allow that there were bad feelings towards the accused and his family, and he did at times allow for petty behaviour of the adults in his family towards the [Ys] and the accused.

In reviewing his evidence in its entirety and bearing in mind the discrepancies to which I have alluded, they do not dissuade me from the view I hold that [the complainant] was a compelling and credible witness. With respect, it is simply not plausible that he fabricated this intricate version of events as part of some family plot to rid them of the neighbours. He is, after all, 13 years of age. His leaving the neighbour's house in part is corroborated by [JL] whose testimony was believable.

[54] My colleague points out, quite properly, that these positive credibility findings precede the trial judge's assessment of the appellant's evidence. From that, he concludes that having made positive credibility findings in favour of the complainant, the trial judge must thereafter have shifted the burden of proof to the appellant to refute the complainant's allegations.

[55] Manifestly, it would be reversible error if the trial judge did what my colleague suggests. I see no basis however for drawing that conclusion. Apart from the fact that it flies in the face of the trial judge's repeated self-instruction on the correct legal principles, it again focuses on the form rather than the substance of his reasons.

[56] In determining that the complainant was credible and that his evidence could safely be relied upon to convict the appellant, the trial judge considered the whole of the evidence. In this regard, he found support for the complainant's evidence in several items of confirmatory evidence. These included the complainant's knowledge that the room at the back of the appellant's home was a bedroom, the evidence of his friend Jamie who saw the complainant coming from the direction of the appellant's home after he was

unable to locate the complainant, and the observations of Jamie and the complainant's mother as to the complainant's distressed emotional state when he came towards them from the appellant's property.

[57] Given that there was no way of reconciling the complainant's version of the events with the appellant's version, this was a case where acceptance of the complainant's evidence meant that the appellant's evidence could not be true – and the trial judge said as much:

The crux of my rejection of [the appellant's] evidence lies in the overriding calibre and credibility of what we have heard from [the complainant]. In these circumstances, in the face of that evidence from [the complainant], the denial is simply not believable and, therefore, the defence must be rejected.

[58] The trial judge was entitled to approach the matter that way. His reasoning process accords with the approach endorsed by this court in *R. v. J.J.R.D.* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.).

[59] In sum, the trial judge applied the correct principles of law and he addressed the two main arguments put forward by the defence. He considered most of the difficulties in the complainant's evidence and concluded on the whole of the evidence, including the confirmatory evidence, that the complainant was telling the truth and the appellant was not. He provided considered reasons for believing the complainant, reasons which in turn, caused him to disbelieve the appellant. In short, he did what he was required to do as a trial judge.

[60] I see no basis for interfering with the trial judge's credibility findings; nor am I persuaded that he erred in the application of the governing legal principles. His reasons conform with the principles that the Supreme Court has endorsed time and again, in cases such as *R. v. C.L.Y.*, [2008] 1 S.C.R. 5; *R. v. R.E.M.*, [2008] 1 S.C.R. 381; *R. v. Walker*, [2008] S.C.C. 34; and more recently, *R. v. Szerbaniwicz*, [2010] S.C.C. 15. Accordingly, I would dismiss the appeal from conviction.

[61] In light of the conclusion reached by my colleagues that there must be a new trial, I see no need to address the appellant's appeal from sentence.

Signed: "M. J. Moldaver J.A."

RELEASED: "HSF" August 5, 2010