File No. 38220

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

BETWEEN:

HER MAJESTY THE QUEEN,

APPELLANT,

- and -

C.J. (A YOUNG PERSON WITHIN THE MEANING OF THE YOUTH CRIMINAL JUSTICE ACT),

RESPONDENT.

FACTUM OF THE APPELLANT
MANITOBA PROSECUTION SERVICE

MANITOBA JUSTICE
Prosecution Service
510 – 405 Broadway
Winnipeg, Manitoba R3C 3L6
Tel: 204-945-2852
Fax: 204-945-1260

CRAIG SAVAGE
Tel: 204-299-6180
Fax: 204-945-1260
Email: Craig.Savage2@gov.mb.ca

Counsel for the Appellant

GOWLING WLG (Canada LLP)
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email**:** lynne.watt@gowlingwlg.com

Ottawa Agent for the Appellant

JONES LAW OFFICE
Barrister and Solicitor
1150 – 444 St. Mary Avenue
Winnipeg, Manitoba R3C 1T4

ZILLA JONES
Tel: 204-415-5655
Fax: 888-875-5006
Email: joneslawofficewpg@gmail.com

Counsel for the Respondent

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario K2P 0R3

THOMAS SLADE
Tel: 613-695-8855
Fax: 613-695-8580
Email: tslade@supremeadvocacy.ca

Ottawa Agent for the Respondent

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Part I – Overview and Statement of Facts

A. Overview

1. The Crown appeals as of right the Manitoba Court of Appeal's decision overturning the Respondent's conviction on one count of sexual interference and one count of invitation to sexual touching. With respect, the Court unduly interfered with credibility assessments made by the Learned Trial Judge and wrongly held that he had misapprehended the evidence.

2. The Respondent was babysitting six-year old B.W. They were at a park with L.O., B.W.'s two-year old sister. Shortly after returning from the park, B.W. revealed to her mother that the Respondent had sexually assaulted her by touching and licking her vagina and had exposed his penis and asked her to touch it.

3. The Respondent denied the allegations. He testified that while at the park, B.W. had made a pile of sand six inches high and three inches wide and told him that it looked and felt like "a wiener." He testified that he broke the sand pile, and that B.W. seemed mad that he had done so.

4. The Learned Trial Judge did not accept the Respondent's evidence. He noted that the Respondent had provided no indication as to how he would have known B.W. was angry with him. More importantly, he found that (i) it was unlikely that B.W. could have moulded the sand in the way the Respondent had described; and (ii) had she done so, she would have had sand in her clothes and on her skin, none of which her mother had observed. Turning to B.W.'s evidence, he found that she was candid, straight-forward and un-coached. Her evidence, led pursuant to *Criminal Code* s. 715.1, was detailed and convincing.

5. The majority of the Manitoba Court of Appeal ordered a new trial on the basis that the Learned Trial Judge had "unfairly" required the Respondent to explain how he knew B.W. was angry with him, since no one had asked him to do so. Moreover, it held that the Learned Trial Judge had misapprehended the evidence by making findings about the sand that were not

supported by evidence. Pfuetzner J.A., dissenting, was of the view that the majority had usurped the role of the Learned Trial Judge to assess credibility and mistakenly characterized his interpretation of the evidence as a misapprehension.

6. The Crown respectfully submits that Pfuetzner J.A. was correct. While there was no obligation on the part of the Respondent to explain why he concluded that B.W. was angry with him, the lack of any detail or evidence substantiating his assertion was a factor the Learned Trial Judge was entitled to take into account in assessing his version of events. No misapprehension existed and there was evidence supporting the Learned Trial Judge's conclusions. That the majority would have come to a different conclusion was not a basis upon which to order a new trial.

B. Statement of Facts

7. On August 17, 2015, six-year old B.W. and her two-year old sister L.O. were with their mother and her partner. They were visiting their mother's friend, S.J., at S.J.'s residence in The Pas, Manitoba. S.J. was doing respite care and taking care of the Respondent who was 17 years old at the time.

Transcript of Proceedings, Appellant's Record, Tab 7, pp. 64-66.

8. The Respondent took B.W. and L.O. to a nearby park. They were gone for approximately 45 minutes. After they returned from the park, the Respondent went to shower. L.O. told her mother that "[The Respondent] touched the perogy" and used her hand to motion down near her genitals. She did not specify whose "perogy" the Respondent had touched. According to her mother, L.O. used the term "perogy" to refer to her private area. Shortly thereafter, B.W. told her mother that, while at the park, the Respondent had touched and licked

B.W.'s "perogy," showed her his "wiener," and asked her to touch it.[1] When telling her mother, B.W. was crying and initially reluctant to disclose, as the Respondent had told her it was a secret.

Transcript of Proceedings, Appellant's Record, Tab 7, pp. 68-72, 86.

9. On September 1, 2015, B.W. provided a videotaped statement to police re-affirming what had occurred. She stated that the incident had occurred on the sand "by the monkey bars," and that L.O. had been "by the slides" at the time. She said that she had tried to get up but that the Respondent had told her to lay down. With the consent of the Respondent, B.W.'s statement was admitted into evidence at trial pursuant to section 715.1 of the *Criminal Code*.

B.W.'s Statement, Appellant's Record, Tab 8, pp. 240-247; Transcript of Proceedings, Appellant's Record, Tab 7, pp. 110, 134-135.

10. B.W.'s mother testified that after the girls returned from the park, B.W. seemed mostly normal, but was "clingy" to her. After B.W. disclosed what had happened at the park, she returned to S.J.'s residence and angrily confronted the Respondent. S.J. witnessed the confrontation and described B.W.'s mother as "very worked up." S.J. had to intervene to defuse the situation.

Transcript of Proceedings, Appellant's Record, Tab 7, pp. 73, 79, 88-89.

11. Later that day, B.W.'s mother bathed her and testified there was no indication that anything had happened to her.

Transcript of Proceedings, Appellant's Record, Tab 7, p. 79.

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[1] Both B.W.'s and L.O.'s comments were admitted for their truth pursuant to *R. v. Khan,* [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81. [Transcript of Proceedings, Appellant's Record, Tab 7, pp. 86, 90.]

12. The Respondent testified and denied that anything sexual had taken place at the park. He said that he had initially pushed the two girls on the swings, and that as he was taking L.O. out, he "almost dropped her" but "caught her by the bum." He agreed that he had been alone with B.W. at the monkey bars (although L.O. could have seen them by turning her head), and that both B.W. and L.O. had played in the sand at the park. He testified that B.W. had made a "tail" in the sand, and that he had broken it and cautioned her not to speak inappropriately:

> Well she made a tail and she said [C.J.] look, it looks like a wiener. So I said [B.W.] don't talk like that. That's not right…And she said it feels like one too…So, I went over, broke the pile of sand. And lifted her up out of the sand box.

Transcript of Proceedings, Appellant's Record, Tab 7, pp. 143-144.

13. He added that they played on the teeter-totter for a few minutes before walking back to the house.

Transcript of Proceedings, Appellant's Record, Tab 7, p. 144.

14. The Respondent agreed that, when he was confronted by B.W.'s mother, he did not say anything about B.W. having made a "tail" in the sand or having made inappropriate comments. He said this was because he did not want to get B.W. into trouble. The first time he mentioned it was when he was interviewed by the police "a couple of weeks" after the incident.

Transcript of Proceedings, Appellant's Record, Tab 7, pp. 145-146, 168.

15. When pressed for more detail, the Respondent backed away from his initial description of the sand formation as "a tail" and said instead that "it just looked like a big pile of sand." The Learned Trial Judge asked him for more detail. He described it as being approximately six inches high and three inches wide. When asked whether the sand under the play structure was wet and malleable enough to allow her to build a structure that high, he responded that B.W. "kinda dug a bit" to get at that sand. He elaborated:

> Q: Okay. Do you remember if [the sand] was wet or dry? Or if it had gravel in it or stones in it or anything like that?
>
> A: . . . [L]ike I know the top layer's dry. (Inaudible) dig a little deeper, it'd turn wet and you'd get, like, rocks and all that.

Transcript of Proceedings, Appellant's Record, Tab 7, pp. 152, 166-168.

16. The Learned Trial Judge asked the Respondent whether B.W. was dirty from digging that deep into the sand. He responded that he had told her to wipe her hands on the grass.

Transcript of Proceedings, Appellant's Record, Tab 7, p. 168.

17. He also added in cross-examination that "[B.W.] seemed kind of mad that I broke [the sand pile]," which he had never mentioned until then.

Transcript of Proceedings, Appellant's Record, Tab 7, p. 153.

C. The Learned Trial Judge's Decision

18. The Learned Trial Judge provided oral reasons considering the evidence in the context of *R. v. W.(D.).*[2] He rejected the Respondent's evidence, noting several concerns. The Respondent had not mentioned the sand formation until he was interviewed by police, even after being angrily accused by B.W.'s mother. Moreover, his claim that B.W. was angry with him for breaking the sand formation was not substantiated – that is, he had said nothing about how he knew she was angry with him.

19. The Learned Trial Judge also found it implausible that the sand formation would have been described as a penis. The dry sand under the play structure would not have been conducive to moulding a sand formation of the size described by the Respondent. Had B.W. dug down into the wet, rocky sand below, it would have stuck to her nails, skin and/or clothes. When her

[2] *R. v. W.(D.)*, [1991] 1 SCR 742, 1991 CanLII 93.

mother testified that she had bathed B.W. that evening, however, there was no evidence that B.W. was unusually unclean or that sand was on or about her body.

20. Turning to the Crown's evidence, the Learned Trial Judge observed that both B.W. and L.O. had made comments shortly after returning from the park about the Respondent touching "the perogy." Describing B.W. as an "unsophisticated" witness, he concluded that it was unlikely that she had been coached. Her police statement was detailed and forthright, and she answered questions readily. He accepted her evidence and convicted the Respondent of invitation to sexual touching and sexual interference.

> Reasons for Judgment, Appellant's Record, Tab 1, pp. 8, 10-11.

D. The Manitoba Court of Appeal's Decision

21. The Respondent appealed the convictions to the Manitoba Court of Appeal. On June 4, 2018, the Manitoba Court of Appeal allowed the appeal and ordered a new trial (Pfuetzner J.A. dissenting). Beard and Monnin JJ.A. held that the Learned Trial Judge had misapprehended the evidence in drawing inferences about the consistency of the sand:

> The problem with the trial judge's conclusion regarding the sand mound is that the other evidence did not support the conclusion that a pile of sand could not be created in the manner described by the accused. <u>There was simply no evidence before the Court that the sand lacked the required consistency to form a simple mound</u> and, in coming to that conclusion, the trial judge was engaging in impermissible speculation.
>
> Reasons of the Manitoba Court of Appeal, para. 45. (Emphasis added.) Appellant's Record, Tab 2, p. 31.

22. The majority also took issue with the Learned Trial Judge's inference that B.W. was not unusually dirty after returning from the park:

> [T]he trial judge's finding that [B.W.] "would have been so covered in dirt and mud" was based on his finding that "there's probably clay down there", that is,

> under the sand. That finding, however, was purely speculative as there was no evidence that there was any clay, dirt or mud where [B.W.] was digging… [B.W.]'s mother was not asked either by the Crown or the trial judge about [B.W.]'s condition of cleanliness or whether there was evidence of sand, dirt, mud or clay on her. There was simply no evidence in that regard.
>
> Reasons of the Manitoba Court of Appeal, paras. 47-49. (Emphasis added.) Appellant's Record, Tab 2, pp. 31-32.

23. The majority also found that there was no obligation on the Respondent to provide the basis upon which he reached a conclusion that B.W. was angry with him, and noted that the Respondent had not been asked to provide this information. As such, it was "unfair" to consider this in assessing his version of events.

> Reasons of the Manitoba Court of Appeal, paras. 33-34. Appellant's Record, Tab 2, pp. 26-27.

24. Pfuetzner J.A. held that the majority was unduly interfering with the Learned Trial Judge's credibility assessments, and that in the absence of palpable and overriding error, no appellate intervention was justified:

> This case turned on credibility. The trial judge's reasons show that he simply did not find the accused's story compelling because he did not offer any detail as to how he knew [B.W.] was angry with him and he did not tell anyone this story until some time after the events. The trial judge made no palpable and overriding error in making this negative credibility assessment and there was no unfairness to the accused in him doing so. There is no basis to intervene in the trial judge's assessment.
>
> Reasons of the Manitoba Court of Appeal, para. 61. Appellant's Record, Tab 2, pp. 36.

25. Moreover, she observed that the Learned Trial Judge's inference that there was clay, dirt or mud where B.W. was allegedly digging was "entirely reasonable" given the Respondent's evidence and was "informed by common sense and experience."

> Reasons of the Manitoba Court of Appeal, paras. 66-67. Appellant's Record, Tab 2, p. 38.

26. She held that the majority had thus effectively retried the case under the guise of identifying a misapprehension of evidence:

> [T]he majority has merely come to a different interpretation of the evidence and is mistakenly characterizing the trial judge's interpretation as a misapprehension of the evidence.
>
> Reasons of the Manitoba Court of Appeal, para. 68. Appellant's Record, Tab 2, pp. 38-39.

Part II – Issues

1. Did the Manitoba Court of Appeal err in holding that the Learned Trial Judge unfairly required the Respondent to support his conclusion that B.W. was angry with him?

2. Did the Manitoba Court of Appeal err in unduly interfering in the Learned Trial Judge's credibility assessment by re-weighing the evidence and wrongly holding that he had misapprehended the evidence?

The Attorney General of Manitoba appeals to this Honourable Court as of right pursuant to s. 693(l)(a) of the *Criminal Code*.

Part III – Argument

A. Did the Manitoba Court of Appeal err in holding that the Learned Trial Judge unfairly required the Respondent to support his conclusion that B.W. was angry with him?

27. During cross-examination, the Respondent testified that "[B.W.] seemed kind of mad that I broke [the sand pile]." He provided no basis for this observation and did not elaborate, although later he added that "after awhile she didn't seem like overly angry. But she seemed, like, a little annoyed."

> Transcript of Proceedings, Appellant's Record, Tab 7, pp. 153, 156.

28. In addressing this aspect of the Respondent's testimony, the Learned Trial Judge stated:

> I'm also concerned by the fact that he says he knows she was angry but there was no collateral evidence as to how he knew that. And that disturbs me as well. And in my mind impacted on his credibility.
>
> Reasons for Judgment, Appellant's Record, Tab 1, p. 8.

29. The majority of the Manitoba Court of Appeal held that it was unfair to criticize the Respondent for not providing evidence that was not asked for either in direct-examination or cross-examination.

> Reasons of the Manitoba Court of Appeal, para. 27. Appellant's Record, Tab 2, p. 25.

30. With respect, this is problematic for a number of reasons. As an initial matter, the Respondent was purporting to make a claim about B.W.'s state of mind, a matter he could only have known by way of reference to her words or actions. His bare assertion, with no such substantiating information, carried little if any evidentiary weight.

R. v. Ewanchuk, [1999] 1 S.C.R. 330, 1999 CanLII 711, para. 46.

31. The Respondent was effectively giving opinion evidence: in his view, B.W. was angry.[3] While this kind of evidence is certainly admissible, the weight it receives is a matter for the trier of fact, who is entitled to consider, *inter alia*, the degree of detail substantiating and supporting the opinion. What made him say she was angry? What, if anything, did she say or do that gave him that impression? As Charron J.A. (as she then was) observed in *R. v. Cuming*:

> Non-expert opinion evidence can be given on such matters as identification, but as with any opinion evidence, there must be some basis for the opinion before it can be given any weight, and the jury should be given some assistance in assessing the basis for the opinion. (Emphasis added.)

R. v. Cuming (2001), 158 C.C.C. (3d) 433, 51 W.C.B. (2d) 211 (Ont. C.A.), para. 21.
See also *R. v. Graat*, pp. 835, 838.

32. An example of the importance of this kind of analysis is provided in *R. v. Decuzzi*. The accused was charged with driving while holding a cell phone. The only evidence identifying the object in question as a cell phone was that of the ticketing officer, who testified that "it was a phone, like, we all know what phones look like, we all have phones ourselves." In acquitting the accused, the Court observed that while "the subject non-expert opinion evidence is clearly admissible," the officer's evidence "lacked sufficient detail to establish a cogent factual basis for his opinion that the object was a cell phone." Accordingly, it was only able to afford "a minimal amount of weight" to the opinion.

R. v. Decuzzi, 2018 ONCJ 254, 146 W.C.B. (2d) 598, paras. 23, 40.

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[3] See, *e.g.*, *R. v. Graat*, [1982] 2 S.C.R. 819, 2 C.C.C. (3d) 365, p. 835: "The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one . . .: (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person; (iv) the emotional state of a person – e.g., whether distressed, angry, aggressive, affectionate or depressed[.]" (Emphasis added.)

33. This is particularly relevant where, as here, a witness purports to provide an opinion on another person's state of mind. Generally speaking, the only way to tell what someone is thinking is through their expressions, words or actions. The manner in which those expressions, words or actions are interpreted often depends on the nature of the relationship between the parties. For example, a child's subtle facial expression may convey nothing to a stranger but a lot to the child's parent. The Respondent had no such intuition. B.W.'s mother testified that the Respondent had "been around" B.W. but had not previously supervised her.

Transcript of Proceedings, Appellant's Record, Tab 7, p. 67.

34. It was thus incumbent on the Learned Trial Judge, in assessing the weight to place on the Respondent's version of events, to consider the degree to which his claim about B.W.'s state of mind was substantiated by his observations about what, if anything, she said or did. As Pfuetzner J.A. observed, this was not unfair. On the contrary, it was a straight-forward and important application of the principles underlying the use of opinion evidence. It was the Learned Trial Judge's role to determine what, if any, weight to attach to this evidence.

35. This is not simply a principle applicable to lay evidence. As this Honourable Court has repeatedly held, the value of <u>any</u> opinion evidence rests on the degree to which it is supported by facts independently established by the record. A bare opinion, unsupported by any such facts, generally has little value and carries little weight: "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist."

R. v. Abbey, [1982] 2 S.C.R. 24, 29 C.R. (3d) 193, p. 46.

36. In *R.v. Hilton*, the case cited by the majority of the Manitoba Court of Appeal, the trial judge had made an adverse credibility finding because, *inter alia*, the accused, who was testifying about events that had occurred some 15 years earlier, had "fail[ed] to explain certain things and fail[ed] to provide details of . . . collateral events." These included narrative matters such as: (i) why one of the complainants was living with him; and (ii) how common it was to watch television before bed. As the Alberta Court of Appeal noted, these were "collateral points

of questionable relevance" and the trial judge had gone so far in this regard that his treatment of the evidence raised concerns about shifting the burden of proof.

R. v. Hilton, 2016 ABCA 397, [2017] A.W.L.D. 1219, paras. 20, 23-24.

37. In the case at bar, the timing and nature of the Respondent's opinion was a very appropriate consideration for the Learned Trial Judge. The Respondent had offered an opinion about B.W.'s emotional state but left it entirely unsubstantiated. As noted above, opinion evidence derives its weight from the presence of such supporting details. The Learned Trial Judge was simply assessing the strengths and weaknesses of the Respondent's evidence as he was required to do.

38. Further to that, the majority's conclusion that it was unfair to hold the Respondent responsible for questions that had not been in asked in cross-examination or by the Learned Trial Judge ignores the fact that the Respondent presented his version of events at length with the assistance of counsel. He had every opportunity to place as much detail as he wished before the court in support of his version of events. Notably, he did not even mention his opinion that B.W. was angry with him until his version of events was coming under scrutiny, and having done so, he chose not to elaborate. Neither did his lawyer, who did not pursue the matter in re-examination.

Transcript of Proceedings, Appellant's Record, Tab 7, p. 171.

39. The Learned Trial Judge was required to evaluate the evidence as it stood. He could not add details to substantiate the Respondent's testimony, nor could he ignore their absence. With respect, the majority erred in concluding that he had treated the Respondent unfairly in considering the weaknesses in his evidence. As Twaddle J.A. observed in *R. v. Y.(C.L.)*, "[i]t is not uncommon to find adverse comments about a witness' credibility on the ground of too little detail in his or her evidence."

R. v. Y. (C.L.), 2006 MBCA 124, 213 C.C.C. (3d) 503, para. 36.

40. It is also worth noting that the Learned Trial Judge's concern about the lack of detail in the Respondent's evidence was coupled with his concern about the fact the Respondent only mentioned the sand mound when he was being interviewed by police weeks after the incident:

> I think it would have been a reasonable expectation that [the Respondent's] explanation as to this child being angered [at] him, I think it's reasonable to assume that he would [have] offered this explanation to someone, either when being confronted by the mother or in the more relaxed less anxiety-filled circumstances of discussing it with his foster mother. I think if the explanation about the child being angry at him because he had destroyed her mound, I think that would have been reasonable for him to have provided that explanation at some point earlier on than when he was interviewed with the police.
>
> Reasons for Judgment, Appellant's Record, Tab 1, pp. 7-8. (Emphasis added.)

41. The Respondent gave an unsupported opinion as to B.W.'s emotional state and did so for the first time at trial, during cross-examination. The Learned Trial Judge did not err in weighing these weaknesses in his evidence when assessing his credibility. With respect, the majority erred in holding that he had acted unfairly.

B. Did the Manitoba Court of Appeal err in unduly interfering in the Learned Trial Judge's credibility assessment by re-weighing the evidence and wrongly holding that he had misapprehended the evidence?

42. The majority of the Manitoba Court of Appeal held that the Learned Trial Judge had misapprehended the evidence in relation to the sand under the monkey bars. In its view, he had drawn an inference as to its consistency "which was not available to him on the evidence before him."

43. That evidence came largely from the testimony of the Respondent. He testified that the sand under the play structure (where the monkey bars were located) was similar to the sand under the swing set, which was pictured in a photograph entered as an exhibit. He further described the sand as follows:

> Q: Okay, do you remember if [the sand under the play structure] was wet or dry? Or if it had gravel in it or stones in it or anything like that?
>
> A: [L]ike I know the top layer's dry. (Inaudible) dig a bit deeper it'd turn wet and you'd get like rocks and all that.
>
> . . . . .
>
> Q: [F]rom this picture, it sort of looks like gravel sand. Is that what it was?
>
> A: There was[n't] really any rocks in it unless you dug deep.
>
> Transcript of Proceedings, Appellant's Record, Tab 7, pp. 166-167.

44. The Learned Trial Judge held that it was implausible that the dry sand under the play structure could be mounded into a formation six inches high and three inches wide, let alone one that "could resemble a penis." As to the Respondent's explanation that B.W. had "dug down into the under sand or the wet sand underneath," he stated that "what he's really referring to, I think, is that there's probably clay down there."

> Reasons for Judgment, Appellant's Record, Tab 1, p. 8.

45. The majority held that these inferences were "purely speculative as there was no evidence that there was any clay, dirt or mud where [B.W.] was digging." The Respondent had testified that B.W. had built the sand pile from sand, not clay, dirt or mud. Thus, in the view of the majority, the Learned Trial Judge had overreached and misapprehended the evidence.

> Reasons of the Manitoba Court of Appeal, para. 47. Appellant's Record, Tab 2, p. 31.

46. With respect, as Pfuetzner J.A. observed, the Respondent had testified that while the top layer of sand was dry, "dig a bit deeper [and] it'd get wet and you'd get, like, rocks and all that." This reasonably supported an inference that what the Respondent was referring to was clay. It was not necessary that the Respondent specifically say the word "clay." On the contrary, as Pfuetzner J.A. correctly observed, "[t]he entire purpose of drawing inferences is to make findings

of fact when there is no direct evidence precisely on point." Absent palpable and overriding error, these inferences are entitled to deference on appeal.

> Reasons of the Manitoba Court of Appeal, paras. 65, 71-73 and authorities cited therein. Appellant's Record, Tab 2, pp. 37-38, 40.

47. Moreover – and more fundamentally – whether the material under the dry sand was clay (as described by the Learned Trial Judge) or wet sand with rocks (as described by the Respondent), the Learned Trial Judge was entitled to infer that B.W. would have been dirty after digging in it deeply enough to build a mound that was six inches high and three inches wide. Again, this was a logical inference available on the evidence and absent palpable and overriding error, the majority ought not to have interfered.

> See, *e.g.*, *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235, 2002 SCC 33, paras. 21-23.

48. Similarly, the majority concluded that because B.W.'s mother had not been specifically asked whether B.W. had "sand, dirt, mud or clay" on her, her evidence that she had "check[ed] her out" when she bathed her and that there were "no indications that anything had happened" and no "physical signs at all" was insufficient to allow the inference that she was not dirty from digging in the sand as the Respondent had alleged.[4]

> Reasons of the Manitoba Court of Appeal, para. 48. Appellant's Record, Tab 2, pp. 31-32.

49. Again, with respect, this is the nature of drawing inferences. As Pfuetzner J.A. observed:

> It is difficult for me to accept the reasoning that a trial judge cannot rely on the careful observations of a concerned mother to infer that a child was not unusually dirty or sandy when being bathed. The fact that [B.W.]'s mother was not

[4] The Learned Trial Judge described B.W.'s mother as, *inter alia*, "very attentive," "very doting" and "very mothering." [Reasons for Judgment, Appellant's Record, Tab 1, p. 9.] (Emphasis added.)

> specifically asked if [B.W.] was dirty . . . does not prevent the trial judge from drawing the inference he did.
>
> Reasons of the Manitoba Court of Appeal, para. 65. (Emphasis added.) Appellant's Record, Tab 2, pp. 37-38.

50. The Learned Trial Judge drew inferences informed by common sense and experience based on the evidence presented at the trial. The inferences were "reasonably available from the evidence adduced at trial taken as a whole"

> *R. v. O.N.*, 2017 ONCA 923, 142 W.C.B. (2d) 751, para. 9.

51. This does not represent a misapprehension of evidence. On the contrary, drawing inferences and weighing evidence is the role of the finder of fact. The Learned Trial Judge's reasoning was essentially as follows:

- B.W.'s mother testified that she saw no signs that anything had happened when she gave her a bath, suggesting that B.W. was not especially dirty.
- This in turn suggested that B.W. had not dug into clay/wet sand and made a formation that was six inches high and three inches wide.
- In addition, it made no sense that six-year old B.W. would refer to a sand mound – described by the Respondent as "a regular pile of sand" – as looking and feeling like "a wiener."

52. While different judges may have drawn different inferences from the evidence, this is not the test. As Pfuetzer J.A. noted, trial judges have considerable leeway in their interpretation of the evidence, particularly where credibility is concerned. "The role of [appellate courts] is not to re-weigh the evidence and come to different conclusions than the judge at first instance who had the advantage of observing and hearing the witnesses first-hand."

> Reasons of the Manitoba Court of Appeal, para. 68. Appellant's Record, Tab 2, pp. 38-39.

53. As this Honourable Court observed in *R. v. Lee*, there is a distinction between interpreting evidence differently than the trial judge would have and a misapprehension on her/his part. Where a trial judge misstates or fails to give effect to the evidence, appellate intervention may be appropriate. Here, on the other hand, the Learned Trial Judge drew inferences available to him on the evidence and, with respect, the majority of the Manitoba Court of Appeal erred in holding otherwise.

R. v. Lee, [2010] 3 S.C.R. 99, 2010 SCC 52, para. 4.

Publication Ban & Restriction on Public Access

54. With respect to the publication bans pursuant to sections 110(1) and 111(1) of the *Youth Criminal Justice Act*, the Appellant respectfully submits that as long as the Court does not publish the name, or any information tending to identify the name, of the victim or the Respondent, no violation would occur.

55. With respect to a restriction on public access, the Appellant submits that the public should have access only to the redacted version of the Appellant's Record which does not contain information that is subject to the aforementioned publication ban.

Part IV – Costs

56. The Appellant does not seek costs and asks that no costs be awarded against it.

Part V – Order Sought

57. For the reasons set out above, the Appellant respectfully submits that the appeal should be allowed for the reasons given by Pfuetzner J.A. and the Respondent's conviction restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

CRAIG SAVAGE
Counsel for the Appellant
Attorney General for Manitoba

Part VI – Table of Authorities and Legislation

Authorities	**Cited at Paragraph No.**	**Tab No. (if applicable)**
Graat v. The Queen, [1982] 2 SCR 819, 1982 CanLII 33 (SCC)	31	
Housen v. Nikolaisen, [2002] 2 SCR 235, 2002 SCC 33 (CanLII)	47	
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R. v. Y. (C.L.), 2006 MBCA 124 (CanLII)	39	

Legislation	**Cited at Paragraph No./Page No.**
Youth Criminal Justice Act, S.C. 2002, c. 1 *Système de justice pénale pour les adolescents, LC 2002, c. 1*	Para. 54

Criminal Code, RSC 1985, c C-46, 715.1 *Code Criminel*, LRC 1985, ch C-46, 715.1	Paras. 4, 9
Criminal Code, RSC 1985, c C-46, 693(1)(a) *Code Criminel*, LRC 1985, ch C-46, 693(1)(a)	Page 9