SCC File No. 38220

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

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

-and-

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

RESPONDENT
(Appellant)

FACTUM OF THE RESPONDENT
(C.J, RESPONDENT)

(Pursuant to Rule 42 of the Rules of the *Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Introduction

1. The Respondent, a young person in foster care, was convicted at trial of sexual interference and invitation to sexual touching. It was a "he-said, she-said" case. In assessing the credibility of the young person, the Trial Judge made numerous errors which shifted the burden of proof to the accused. The Manitoba Court of Appeal correctly found that the Trial Judge's errors in making unavailable inferences and credibility findings led to an unfair trial and a miscarriage of justice. Their decision, though, was split. While the majority ordered a new trial, the dissent found the Trial Judge was entitled to draw the conclusions he did and declined appellate intervention.

2. The Crown appeals as of right and endorses the dissent. The Respondent maintains that deference to a trial judge cannot go so far as to allow an injustice to an accused to stand. A trial judge is not entitled to draw conclusions unsupported by evidence or to shift the burden of proof to the accused. When this occurs, an appellate court must be able to correct the resulting unfairness. This is what the majority properly did.

3. Even if this Court finds error in the majority's approach, the result should remain. While the Manitoba Court of Appeal focused its decision on specific errors, these were not outliers. There were others. The Trial Judge's decision and the errors therein created an unfair trial and the majority's remedy – a new trial – is required.

4. The right of appeal is important to a healthy, functioning justice system. While finality in litigation is always desirable, it must be balanced with the need to prevent miscarriages of justice. Finality cannot prevent a reviewing court from identifying and remedying errors, and deference to a trial judge cannot go so far as to shield a flawed decision from appellate intervention.

Facts

5. On August 20, 2015, RCMP in The Pas, Manitoba were contacted regarding an alleged incident of sexual interference. A trial began in Manitoba Provincial Court in The Pas on January

5, 2016. At trial, defence and Crown agreed to play the video statement of the complainant B.W. pursuant to s.715.1 (1) of the *Criminal Code*. The audio quality was poor, so the Trial Judge and both counsel went into the Trial Judge's chambers and attempted to watch it there. The video was still difficult to hear, so the Trial Judge adjourned proceedings to allow a transcript to be prepared. The trial resumed and was completed on March 4, 2016. The Trial Judge made an oral ruling from the bench that day.

6. The evidence of D.O., the mother of the complainant B.W., was that on August 17, 2015, the accused, C.J., had taken her daughters, B.W., aged five, and L., aged two, to the park near the home of S.J., who was "like a sister to her." S.J. was providing respite care to her parents' foster son C.J., who was seventeen years old. The three children were gone for thirty or forty-five minutes and were upon their return watching a movie in the house while D.O. sat with the adults in the sun porch. Shortly after their return, L. came into the sun porch and said that C.J. touched the "perogy", a term that D.O. knew L. used to refer to her "private area."[1]

7. D.O. assumed that C.J. had been inappropriately scratching himself. She went to talk to him and told him not to do that. When they left to go home, she put the children in the car and then asked them what had happened. L. demonstrated C.J. "touching the perogy." B.W. at first said she couldn't tell because it was a secret, but then said C.J. had touched her perogy, licked her perogy, and asked her to touch his wiener.[2]

8. D.O. returned to S.J.'s home, told S.J. what had happened, and confronted C.J. She reported the matter to the RCMP three days later. S.J. testified and mostly confirmed this sequence of events, though she said that when L. came into the sunroom, she said "[C.J.]", "da", "perogy." [3]

The sand

9. C.J. testified on direct examination that B.W. and L. played in the sand at the playground. He said that B.W. made a "tail" in the sand and said "[C.J.] look, it looks like a wiener." He responded "[B.W.] don't talk like that. That's not right." B.W. said that the pile of sand felt like a

[1] Transcript of proceedings, p. 65 line 1 – p.69 line 34 [Appellant's Record].
[2] Transcript of proceedings, p. 70 line 28 – p. 72 line 30 [Appellant's Record]
[3] Transcript of proceedings, p. 73 lines 17 – 33 [Appellant's Record].

wiener and that she had felt her little brother's. C.J. then broke up the pile of sand and lifted B.W. out of the sand area and they all went over to the teeter-totters.[4]

10. The Trial Judge then asked C.J. a number of questions. He asked about the type of sand in the sand area and the size of the mound that B.W. had made. C.J. said that the sand was dry on the top layer, but if you dug a bit deeper, "it'd turn wet and you'd get like rocks and all that." [5]

11. The Trial Judge referred to grainy photographs of the playground, including the sand, that were exhibits in the trial, and stated that the sand in the sandbox looked similar to the sand under the swing set and the monkey bars, with which C.J. agreed.[6]

12. The Trial Judge asked if it was "gravel sand", to which C.J. responded that "There was *(sic)* really any rocks in it unless you dug deep." The Trial Judge also said "…I would find it hard to imagine how anybody could make a castle or anything of any structure or substance from that kind of sand." C.J. responded that B.W. had pulled the sand together and then "kind of pushed it" into a "regular pile of sand." [7]

13. C.J. said that B.W. molded the sand into a structure about six inches high and three inches wide. B.W. dug down a bit with her hands to reach that sand. He testified that her hands became dirty so C.J. told her to wipe them on the grass.[8]

14. In his reasons for decision, the Trial Judge stated that he was concerned about C.J.'s testimony that B.W. had formed a mound of sand because he did not believe that the sand could be molded as C.J. described, and he felt that if B.W. had been digging in the sand, she would have been covered in dirt and mud, yet her mother did not comment on this.[9]

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[4] Transcript of proceedings, p.143 line 21- p.144 line 5 [Appellant's Record.].
[5] Transcript of proceedings, p.166 lines 14 – 32 [Appellant's Record].
[6] Transcript of proceedings, p.167 lines 2-13 [Appellant's Record].
[7] Transcript of proceedings, p. 167 lines 14-29 [Appellant's Record].
[8] Transcript of proceedings, p.167 line 30 – p.168 line 23 [Appellant's Record].
[9] Reasons for judgment by Allen, PJ, p. 8 line 13 – p.9 line 24 [Appellant's Record].

15. However, B.W.'s mother was never asked if B.W. was dirty, nor was S.J. The issue never came up in direct examination, and D.O. said on cross-examination that she bathed B.W. that evening and there was no indication that anything had happened to her.[10]

The timing of C.J.'s explanation

16. On direct examination, C.J. volunteered that later on the night of the alleged incident, he was confronted by D.O. He was playing a game and "she came up and (inaudible) face that she caused my glasses to go off and the controller fell out of my hand." She asked him what happened at the park and he "told her what happened." He said he "left out the part that where [B.W.] built that hill and everything that she said" because "I didn't want her to get in trouble." D.O. did not tell him what B.W. alleged he had done earlier in the park.[11]

17. C.J. later agreed on cross-examination that B.W. "seemed kind of mad" that he broke the pile of sand. After that happened, he went over to the teeter totters with B.W. and L. for six or seven minutes. The children were on either side and he was "tilting it back and forth."[12]

18. C.J. was cross-examined about why he did not let D.O. or S.J. know about the inappropriate comments or the sand mound that B.W. had made at the park. He said that he didn't want B.W. to get into trouble with "something taken away or punishment of some sort" and that he "didn't want her to get yelled at."[13]

19. C.J. further acknowledged on cross-examination that he thought about what had happened in the park after D.O. left, but he didn't call D.O. or S.J. to tell them about the mound of sand or the comments of B.W.[14]

20. The Trial Judge questioned C.J. about when he first mentioned B.W. making the mound of sand, and he said that it was when he spoke to a police officer "maybe a couple of weeks" after going to the park.[15]

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[10] Transcript of proceedings, p.78 line 34 – p.79 line 12 [Appellant's Record].
[11] Transcript of proceedings, p.145 line 24-p.146 line 8 [Appellant's Record].
[12] Transcript of proceedings, p.152 line 31 – p.153 line 16 [Appellant's Record].
[13] Transcript of proceedings, p.157 line 15 – p.158 line 6 [Appellant's Record].
[14] Transcript of proceedings, p.160 lines 18-30 [Appellant's Record].

21. S.J. testified that after D.O. and her children left her place on the night of the alleged incident, she had a conversation with S.J. where he repeated over and over in a fairly calm manner, "like that's disgusting, I didn't do it, I never did anything."[16]

22. No inconsistencies were put to C.J. as existing between his statement to police and his trial testimony.

23. The Trial Judge stated that "it's reasonable to assume that (C.J.) would offered *(sic)* 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." He went on to say that despite C.J. being only 17 years old and "a somewhat shy persons *(sic)*", it was unreasonable that he wouldn't have provided his explanation sooner.[17]

The complainant being "angry"

24. As stated previously, on cross-examination, C.J. said that B.W. "seemed kind of mad that he broke" the pile of sand. He also said that "after awhile she didn't seem like overly angry. But she just seemed like a little annoyed." [18]

25. He didn't ask her why she was mad, as he assumed it was because he had broken the pile of sand. He broke the pile of sand so that B.W. "wouldn't talk like that anymore." He found her comments inappropriate.[19]

26. The Trial Judge questioned the accused on numerous matters, but did not ask him any questions about the complainant's demeanour.

27. In his reasons, the Trial Judge said that he found it "a bit notable" that C.J. did not provide any evidence or examples as to "how he knew (B.W.) was angry or didn't give any examples of how he could tell that she was angry at him."[20]

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[15] Transcript of proceedings, p.168 line 26 – p.169 line 10 [Appellant's Record].
[16] Transcript of proceedings, p.90 line 31 – p.91 line 4 [Appellant's Record].
[17] Reasons for Judgment by Allen, P.J. p.7 line 26 – p.8 line 9 [Appellant's Record].
[18] Transcript of proceedings, p.156 lines 14-18 [Appellant's Record].
[19] Transcript of proceedings, p.156 lines 20-33 [Appellant's Record].
[20] Reasons for judgment by Allen, P.J. p.5 line 29 – p.6 line 3 [Appellant's Record].

28. Later in his reasons, the Trial Judge said "I am also concerned by the fact that (C.J.) says he knows (B.W.) 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."[21]

29. At a later date, C.J. received a sentence of probation, which is not at issue.

30. On appeal, C.J. argued that the Trial Judge made the following errors:

- He wrongfully took judicial notice as to the quality of the sand in the park and what could be formed with it
- He applied the wrong standard of proof when he said that there was "probably" clay under the sand
- He misapprehended the evidence of D.O., B.W.'s mother, finding that B.W. was not "filthy" when she was bathed later that night despite a complete absence of evidence on that issue
- He made a negative credibility finding against C.J. by finding that there was no corroboration for his comment that B.W. "seemed kind of angry" when he broke her sand pile
- He made a further negative credibility finding against C.J. because he did not provide a denial when first violently confronted by D.O., despite the fact that she did not provide any details as to what was alleged and therefore he was not obligated to respond
- He held the accused to a more stringent standard of credibility than the complainant

31. The majority of the Court of Appeal focused on the misapprehension of the evidence and considered first whether there was such a misapprehension, and secondly, whether it played an essential part in his reasoning, leading to a miscarriage of justice.[22]

32. The majority found that it was unfair of the Trial Judge to make a negative credibility finding against C.J. based on the fact that he had not described how he knew B.W. was angry when he was never asked about that in direct examination, cross-examination or further questioning by the Trial Judge. [23]

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[21] Reasons for judgment by Allen, P.J. p.8 lines 9-13 [Appellant's Record].
[22] *R. v. C.J.* 2018 MBCA 65 at 18-19 [Appellant's Record, p.21].
[23] *R. v. C.J.* 2018 MBCA 65 at 33-34 [Appellant's Record, pp.26-27].

33. The majority further found that the Trial Judge also erred when he drew conclusions about the nature and quality of the sand in the park in the absence of any evidence on this point.[24]

34. Additionally, the Trial Judge erred in speculating that if B.W. had been digging in clay and mud, she could have been expected to be "filthy", absent evidence that she was or was not "filthy". This flowed from the judge's erroneous conclusion that B.W. was not "filthy" when D.O. gave her a bath, although D.O. said no such thing and did not comment on B.W.'s state of cleanliness.[25]

35. The majority ordered a new trial.[26]

36. The dissenting Justice found that a credibility assessment is not reviewed on the same standard as a misapprehension of evidence. She found that the Trial Judge made a credibility assessment as he was entitled to do and that there was no basis for appellate intervention.[27]

PART II – POSITION ON THE ISSUES

37. The Manitoba Court of Appeal did not err in holding that the Learned Trial Judge unfairly required the Respondent to support his conclusion that B.W. was angry with him. The Learned Trial Judge demanded corroboration from the accused where none was required, which led to a misapplication of the W.D. principles.

38. The Manitoba Court of Appeal did not unduly interfere in the Learned Trial Judge's credibility assessment by re-weighing the evidence and wrongly holding that he had misapprehended the evidence. The Court correctly identified inferences that were made that were unavailable and evidence that was misapprehended, and intervened to prevent a miscarriage of justice.

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[24] *R. v. C.J.* 2018 MBCA 65 at 45 [Appellant's Record, p. 31].
[25] *R. v. C.J.* 2018 MBCA 65 at 47-48 [Appellant's Record, pp. 31-32].
[26] *R. v. C.J.* 2018 MBCA 65 at 55 [Appellant's Record, p. 34].
[27] *R. v. C.J.* 2018 MBCA 65 at 59-61 [Appellant's Record, pp. 35-36].

PART III – STATEMENT OF ARGUMENT

39. This appeal is most fundamentally about the ability of an appellate court to correct errors of a trial court when it has drawn unavailable inferences or has misapprehended the evidence. The question is neither new nor novel. Appellate courts across this country, and this Honourable Court, encounter it frequently and the law is well-settled. In this case, the majority followed well-settled law, notably the Ontario Court of Appeal's decision in *Morrissey*[28] endorsed by this Court in *Lohrer*. Its decision was correct and should not be disturbed.

40. *Morrissey* states that where a verdict is not based exclusively on the evidence adduced at trial, and the trial judge is mistaken as to material parts of the evidence that play an important part in the reasoning process leading to a conviction, the conviction is not a true verdict.[29]

The Manitoba Court of Appeal did not err in holding that the Learned Trial Judge unfairly required the Respondent to support his conclusion that B.W. was "angry" with him

41. This Honourable Court has previously said that a common-sense approach is to be taken when assessing the testimony of children. They should not be held to the same standard as adults, and flaws in their evidence should not be treated the same way as flaws in the evidence of adults.[30]

42. While C.J. was fifteen when the allegations arose, and seventeen when he testified, and therefore not a young child, he was described as being in foster care, being "delayed" and having trouble expressing himself, and any assessment of his evidence must be considered within this context.[31]

43. The Trial Judge acknowledged that "(C.J.) is only 17 years old and he's a somewhat shy persons *(sic)* and so on." [32]

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[28] *R. v. Morrissey* 1995 CanLII 3498.
[29] *R. v. Morrissey* 1995 CanLII 3498 at pp.34-35; approved in *R. v. Lohrer* 2004 SCC 80 (CanLII).
[30] *R.* v. *B. (G.)* [1990] 2 SCR 30, 1990 CanLII 7308 (SCC) at pp.54-55.
[31] Evidence of S.J., transcript of proceedings, p.92 lines 4-22 [Appellant's Record].
[32] Reasons for Judgment by Allen P.J. p.8 lines 3-5 [Appellant's Record].

44. Generally, a witness' credibility must be assessed having regard to contextual factors such as the witness' age, mental and emotional development.[33]

45. The Appellant argues that when C.J. testified that B.W. "seemed kind of mad" that he broke a pile of sand she had constructed, this was a bare assertion that should be given little weight. The Appellant further argues that C.J.'s comments as to B.W.'s emotional state were an important part of the evidence. Thirdly, the Appellant states that the Trial Judge's concern as to the Respondent's knowledge of the complainant's emotional state was heightened by the fact that he did not mention the issue of the sand mound to the complainant's mother when she confronted him, or his own foster mother.

46. The problem with the Appellant's argument is that the Trial Judge did not simply give "little weight" to his description of the complainant as being "kind of mad" when he destroyed her sand mound. The Trial Judge found that this "impacted on his credibility." Evidence that is given "little weight" neither supports nor disproves a conclusion; it is not considered either way. It may have been entirely appropriate for the Trial Judge to give "little weight" to this comment by the Respondent, as, contrary to the Appellant's assertion, it was not of particular value in adjudicating the substantive issue before the court.

47. The Respondent never mentioned the complainant being "angry" in his direct testimony. He simply said that when the complainant said that the pile of sand looked and felt like a "wiener", he told her not to talk like that and broke the pile of sand.[34]

48. On cross-examination, C.J. said that "(B.W.) seemed kind of mad that I broke it" and that they then went over to the teeter-totter for six or seven minutes. When asked if B.W. stayed angry at him, he said that "…after awhile she didn't seem like overly angry. But she just seemed like a little annoyed." He didn't ask her why she was annoyed because he assumed that it was because he broke the pile of sand.[35]

49. The Respondent never implied that the complainant made allegations against him because she was angry with him. He described her anger as fleeting and as not impacting his

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[33] *R. v. W. (R.)* [1992] 2 SCR 122, 1992 CanLII 56 (SCC) at p.135 d-h.
[34] Transcript of proceedings, p.143 line 26 – p.144 line 3 [Appellant's Record].
[35] Transcript of proceedings, p. 156 lines 16-22 [Appellant's Record].

continuing interaction with her. Neither defence nor the Crown argued in their submissions that the accused's perception of the complainant's anger was significant to the adjudication of the matter.

50. The Trial Judge questioned the accused on several areas of his testimony, but never asked him any questions as to "how he knew" that the complainant was angry. If this issue played a major role in the assessment of the credibility of the accused, the Trial Judge could and should have questioned him about it. As stated by the majority of the Manitoba Court of Appeal, quoting the Alberta Court of Appeal, to criticize an accused for not providing details of collateral events that were not asked for in direct or cross-examination is to do an unfairness to the accused that has the effect of shifting the burden of proof. [36]

51. This misapprehension is similar to that in *Minuskin*[37] where the trial judge made a negative assessment of the credibility of the accused on the basis that he said he was calm in a situation where being calm seemed unlikely. However, he had never said that he was calm and in fact had testified that he had raised his voice. In that case, the Ontario Court of Appeal found that this amounted to a misapprehension of the evidence, despite these matters seeming trivial, because the trial judge placed great significance on them. Similarly, in this case, an insignificant matter was elevated to take on great importance and the Trial Judge's misapprehension on this issue led to an unjust result as it related to a credibility assessment.

The timing of the accused's explanation

52. The Appellant states that the Trial Judge's concern about the lack of detail about the complainant's anger gains strength when considered together with the Trial Judge's criticism of C.J. for not providing his account to D.O. or S.J. immediately. However, it must be remembered that C.J. was a teenager. He was playing a video game when he was confronted by D.O., who did something to him that caused his glasses to fall off and the video game controller to fall from his

[36] *R. v. Hilton* 2016 ABCA 397 at 25.
[37] *R. v. Minuskin* 2003 CanLII 11604 (ON CA) at 29.

hand. She was angry and did not tell him exactly what he was alleged to have done. It is not surprising that he would be hesitant to provide his account of what had occurred at the park.[38]

53. The Trial Judge also criticized C.J. for not offering an explanation to his foster mother. However, C.J.'s foster mother was not called as a witness, and the court would therefore have no way of knowing what, if any, discussions he may have had with her. Moreover, had defence called her to say that he denied the allegation, her evidence would have been inadmissible both as hearsay and as self-serving, oath-helping testimony. Although S.J was not the Respondent's foster mother, he did discuss the matter with her and denied that anything untoward had taken place between him and B.W. at the park.[39]

54. In *J.S.W.*, the trial judge likewise believed that had the accused been innocent, he would have made an "unequivocal denial" when given the opportunity to do so. However, the Ontario Court of Appeal held that this was incorrect reasoning by the trial judge, as the accused made his response without full knowledge of the nature of the allegations against him. In that case, the accused said he wasn't sure if he had done anything inappropriate, but the court said that "to completely discount the entire evidence of an accused because he did not immediately and unequivocally deny a vague allegation constitutes an error of law on the part of the trial judge."[40]

55. In this case, the complainant's mother stated on direct examination that after the complainant disclosed the allegations to her, she "confronted" the Respondent, but she was not asked to elaborate as to what exactly she said to him.[41]

56. The Respondent himself said that when the complainant's mother confronted him, she asked him what happened at the park. He specifically denied being told what the complainant alleged he had done during that confrontation.

57. The accused provided his account to police about two weeks later, and no inconsistencies from that statement were put to him at trial. It would be an error of law to hold it against the

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[38] Transcript of proceedings, p.145 line 29 – p.146 line 8 [Appellant's Record].
[39] *R. v. Dinardo* 2008 SCC 24 (CanLII) at 39; Reasons for judgment by Allen, P.J. p.7 lines 26-32 [Appellant's Record]; Transcript of proceedings, p.90 line 31 – p.91 line 4 [Appellant's Record].
[40] *R. v. J.S.W.* 2013 ONCA 593 (CanLII) at 45-49.
[41] Transcript of proceedings, line 73 line 24 [Appellant's Record].

accused that he did not provide a denial when violently confronted by an adult, when there is no evidence that he was provided with specifics as to what was being alleged.

The Manitoba Court of Appeal did not unduly interfere in the Trial Judge's credibility assessment by re-weighing the evidence and wrongly holding that he had misapprehended the evidence.

58. The other major issue addressed by the Manitoba Court of Appeal was in relation to the sand under the monkey bars at the park where the offence was alleged to have occurred. It took on significance because at trial, the accused described the complainant as having made a pile of sand that she described as looking like a "wiener." He did not like her talking that way and destroyed it. While this was not directly relevant to the ultimate issue, it went to the credibility of the accused as it was an alternative accounting as to what occurred during the time he was at the park with the complainant. The Trial Judge relied on the complainant's mother's evidence to draw the conclusion that the complainant was not unusually dirty – or "filthy" - and therefore could not have been digging in the sand as stated by the accused.

The nature and composition of the sand

59. The Trial Judge assumed that there was "probably" clay under the sand in the park, and that if B.W, had been playing in it, she would be "filthy". However, none of the witnesses were specifically asked if she was "filthy" or not.

60. The Trial Judge inquired into the composition of the sand of his own motion, and interpreted the meaning of the comment by the accused that the "under sand" was wet and that there were rocks in it to mean that it was "probably" clay. There was no evidence about the quality of the sand presented by any witness, and certainly no expert witness. The court had only a photograph of other sand in the park, taken from a distance. The Trial Judge's comments about the "clay" amount to pure speculation.

61. Judicial notice is the only accepted way in which a court can rely upon a particular fact as being the truth without the requirement of proof. In order to attract judicial notice, the fact at

issue must be "of such general or common knowledge in the community that proof of it can be dispensed with." It should be used with caution.[42]

62. This Honourable Court has said that judicial notice has three requirements: that the matter be one of common and general knowledge, that it be well established and authoritatively settled, be practically indisputable, and that this common, general, and certain knowledge exist in the particular jurisdiction.[43]

63. In this case, it cannot be said to be of such general and common knowledge that proof of it is not required that dry sand, frequently walked upon by children at a play area, cannot be molded into a mound, or that it would have clay underneath it. The fact that the Trial Judge said that there was "probably" clay underneath the sand is also problematic. The standard of proof for facts in criminal trials is proof beyond a reasonable doubt, and "probably" does not rise to this standard. As previously noted, this was pure speculation.

The state of cleanliness of the complainant

64. A further misapprehension of the evidence was made when the Trial Judge found that because there was "probably" clay under the sand, B.W. would have been "filthy" from digging in it, and that she was not "filthy." The Trial Judge then went on to make a negative credibility finding against C.J. as a result.[44]

65. The complainant's mother stated that she gave B.W. a bath that evening and there was no indication that anything had happened to her.[45]

66. This does not answer the question as to whether the complainant was "filthy", even assuming that being "filthy" would establish whether or not she had been digging in the dirt. There was no evidence at all as to the complainant's state of cleanliness. The Trial Judge again engaged in pure speculation. Further, being "filthy" is not an "indication that anything had

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[42] *Regina v. Potts* 1982 CanLII 1751 (ON CA) at p.10.
[43] *Moge v. Moge*, [1992] 3 S.C.R. 813, 1992 CanLII 25 (SCC) p.873, quoting *Varcoe v. Lee* 181 P.223 (Cal. 1919) at 226.
[44] Reasons for Judgment by Allen, P.J. p.8 line 30 – p.9 line 8 [Appellant's Record].
[45] Transcript of proceedings, p.78 line 34 – p. 79 line 12 [Appellant's Record].

happened to her", which is the question her mother was asked, and which clearly seems to refer to areas of injury or irritation.

67. It is also unclear why the absence of sand on the complainant's body, if this were the case, would not support the Respondent's account, since had the complainant's "perogy" been exposed while under the play structure, it might be expected that there would be sand on her body.

68. Furthermore, the Respondent acknowledged that B.W.'s hands were dirty after playing in the sand, and said that he told her to wipe them off on the grass. There is no reason that other parts of her body besides her hands would be dirty.[46]

69. The Trial Judge clearly stated that he was making an adverse finding of credibility against the Appellant because of the lack of sand on the complainant's body, although there was no evidence that this was the case. This led him to reject the evidence of the accused. Having done so, the Trial Judge went on to consider the evidence of the complainant, which he found believable, and convicted the accused. Therefore, the misapprehension of the evidence regarding the nature of the sand as well as the lack of filth on the complainant led directly to a conviction and a miscarriage of justice.

70. The Appellant cites the dissenting Justice's comments that "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" and that "The fact that the complainant's mother was not specifically asked if the complainant was dirty by either Crown or defence counsel does not prevent the trial judge from drawing the inference he did." [47]

71. With respect, the fact that there was no evidence from any source that could support an inference that the complainant was dirty or not does prevent the Trial Judge from drawing such an inference. In the Model Jury Instructions, the example is given that an inference that it is

[46] Transcript of proceedings, p.168 lines 21-24 [Appellant's Record].
[47] *R. v. C.J.* 2018 MBCA 65 at 65 [Appellant's Record, p.38].

raining outside may be drawn where a witness has no knowledge as to the weather outside, but has seen someone in the lobby wearing a raincoat and carrying a dripping umbrella.[48]

72. In this case, many inferences drawn by the Trial Judge were simply not available to him. The complainant's mother testified and could have been asked the simple question as to whether or not her daughter was dirty. There was no need to draw an inference from existing facts; the person who could have answered the question from direct knowledge was before the court and was not asked the question. Furthermore, even if she had said that her daughter was "filthy", it is difficult to see how that could lead to a conclusion that she was or was not digging in sand or that she was or was not touched sexually. The Crown cannot rely on gaps in the evidence to prove an element of the offence. [49]

73. The Manitoba Court of Appeal was correct in finding that, rather than drawing appropriate inferences based on available evidence, the Trial Judge speculated impermissibly, making assumptions not supported by any evidence, which undermined the presumption of innocence, and led to an unfair trial for this young person.

Further difficulties with the trial judge's decision

74. In addition to the issues detailed in the Manitoba Court of Appeal's decision, the Trial Judge made other errors. It is important to note that a trial judge's reasons must be read as a whole, as noted by this Honourable Court on previous occasions. A review of the Trial Judge's reasons in this case makes it obvious that the reasons as a whole are so flawed that the conviction cannot be allowed to stand, and to do so would be to allow a potential wrongful conviction.[50]

Further difficulties with the dissent

75. The dissenting Justice stated that "the factors going into a credibility assessment are not reviewed on the same standard as a misapprehension of evidence."[51]

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[48] *R. v. Villaroman* 2016 SCC 33 at 23.
[49] *R v. Villaroman* 2016 SCC 33 at 49.
[50] *R. v. Villaroman* 2016 SCC 33 (CanLII) at 15.
[51] *R. v. C.J.* 2018 MBCA 65 at 59 [Appellant's Record, p.35].

76. However, a misapprehension of the evidence can, and often does, involve examining a credibility assessment.[52]

77. If a trial judge assesses an accused's credibility and finds discrepancies in their evidence that do not really exist, or that is tainted by misapprehensions, and this leads to a conviction, then that conviction cannot stand. If the dissenting Justice meant that there is a stringent standard before a misapprehension of the evidence in an assessment of credibility is found, the Respondent agrees, but that standard is easily met and surpassed in this case.[53]

Conclusion

78. Appellate judges must show deference to trial judges' determination of credibility, but this deference is not and never has been absolute. Where an error of law is involved, appellate intervention is justified even if the original decision is based on a credibility assessment. The Manitoba Court of Appeal did not substitute its own decision, but properly found that the original decision was too egregiously flawed to stand, and ordered a new trial.

79. An appeal should not be an insurmountable hurdle for an accused. An important element of a fair and transparent justice system is the ability to obtain meaningful review of its decisions. This is to be balanced with the importance of finality and respect for decision-makers, and that balance is well captured in the current case law, which was correctly followed in this case. The Manitoba Court of Appeal rightly identified an unfairness to the accused and ordered a new trial. Its decision is unassailable and should not be disturbed.

Publication ban and restriction on public access

80. The Respondent is in agreement with the Appellant's position that there should be a restriction on publication of the names of the Respondent, the complainant and the witnesses. With this restriction in place, the Respondent does not object to the public having access to the appeal materials or attending the hearing.

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[52] *R. v. Morrissey* [1995] O.J. No. 639 (QL) at 58.
[53] *R. v. Caron* 2018 BCCA 212 (CanLII) at 47-49.

PART IV - POSITION ON COSTS

81. The Respondent is not seeking costs and asks that costs not be ordered against it.

PART V – ORDER SOUGHT

82. The Order sought is that the Manitoba Court of Appeal decision granting the appeal be upheld and that the Respondent be granted a new trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

for Zilla Jones & Amanda Sansregret
Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

STATUTORY PROVISIONS

Criminal Code. R.S.C., 1985, c. C-46

Evidence of victim or witness under 18

715.1 (1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

Témoignages — victimes ou témoins âgés de moins de dix-huit ans

715.1 (1) Dans les procédures dirigées contre l'accusé, dans le cas où une victime ou un témoin est âgé de moins de dix-huit ans au moment de la perpétration de l'infraction reprochée, l'enregistrement vidéo réalisé dans un délai raisonnable après la perpétration de l'infraction reprochée et montrant la victime ou le témoin en train de décrire les faits à l'origine de l'accusation est, sauf si le juge ou le juge de paix qui préside est d'avis que cela nuirait à la bonne administration de la justice, admissible en preuve si la victime ou le témoin confirme dans son témoignage le contenu de l'enregistrement.