S.C.C. File No. 38870

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent in the Court of Appeal)

-and-

THOMAS SLATTER

Respondent
(Appellant in the Court of Appeal)

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A. OVERVIEW

1. The Court of Appeal majority overturned the Respondent's conviction for sexual assault and ordered a new trial, faulting the trial judge for failing to pay adequate attention to whether the mentally disabled complainant was a reliable witness. In diametrical opposition, the dissenting justice found the majority's concern about the complainant's reliability to be baseless. In this appeal as of right, the Appellant asks this Court to restore the Respondent's conviction. The level of scrutiny required by the majority for examining this complainant's reliability was, as held by Pepall J.A. in dissent, entirely unwarranted.

2. On December 18, 2017, the Respondent was convicted of sexually assaulting J.M., a young adult woman with intellectual and developmental disabilities. The Respondent was a friend and neighbour of the C. family, with whom J.M. lived. He was 37 years her senior. The sexual assaults occurred within a four-year period, between 2009 and 2013, at various locations. They ranged from sexual touching to sexual intercourse.

3. On appeal, the Respondent challenged the adequacy of the trial judge's reasons. His main complaint was that the trial judge failed to address J.M.'s reliability and, in particular, her "propensity for suggestibility". On October 8, 2019, the Court of Appeal for Ontario rendered a split decision. Trotter J.A., writing for the majority, agreed with the Respondent. He determined that the trial judge "failed to directly address J.M.'s reliability" and "failed to mention [the expert's] evidence concerning J.M.'s suggestibility". According to Trotter J.A., the trial judge's failure to do so rendered his reasons insufficient.

4. Pepall J.A., writing in dissent, disagreed. Reading the trial judge's reasons in their "entire context" with the "evidentiary record, the issues, and the submissions of counsel at trial", Pepall

J.A. was satisfied that the trial judge was "unquestionably alive to the issue of reliability and its subset of suggestibility". Furthermore, Pepall J.A. determined that there was "no air of reality" to Defence counsel's suggestibility argument. Accordingly, there was "no need [for the trial judge] to directly advert to it". Pepall J.A. concluded that the trial judge's reasons were sufficient. In her view, the majority demanded a standard of perfection that was inconsistent with the governing principles developed in the jurisprudence.

5. Pepall J.A. was correct. The majority of the Court of Appeal erred by failing to assess the adequacy of the trial judge's reasons in the context of *the record as a whole*.

6. The trial judge was clearly alive to the issue of J.M.'s reliability. This is apparent from both the trial record and the trial judge's reasons. During closing submissions, the trial judge and Defence counsel discussed reliability and suggestibility at length. In his reasons, the trial judge directly referred to Defence counsel's argument that J.M. was an "unreliable" witness. The trial judge pointed to several aspects of J.M.'s evidence that Defence counsel relied on to impugn her reliability. He ultimately rejected those arguments.

7. It was unnecessary for the trial judge to explicitly advert to Defence counsel's suggestibility argument in his reasons. The argument lacked evidentiary foundation. As Pepall J.A. pointed out, it was based on "mere speculation". There was absolutely no evidence that any of J.M.'s sexual assault allegations were suggested to her. To the contrary, witnesses who were questioned about J.M.'s disclosure to them adamantly rejected the possibility that her complaint was the product of suggestion. The expert evidence provided by a clinical forensic psychologist did *not* support any reasonable possibility that J.M. could be persuaded through suggestion to accept as true, matters she knew to be false. In these circumstances, there was no need for the trial judge to address Defence counsel's suggestibility argument. His reasons were not insufficient.

8. The majority's conclusion — that the trial judge's finding of guilt was unsafe due to unresolved concerns about J.M.'s reliability — was based on cursory consideration of the trial record. The trial judge's finding that J.M. was a credible witness who testified honestly was not challenged on appeal. In effect, the majority accepted that merely flagging the potential for "suggestibility" in the case of a mentally disabled complainant, raised substantial concern about whether her account, although honestly believed by her to be true, might in fact be unreliable. This conclusion was reached without meaningful consideration of whether the evidence actually supported it, and with little regard for what the trial record demonstrated about the complainant's disposition as an individual.

9. Pepall J.A. reached the opposite conclusion based on close examination of the trial record. Unlike the majority, she resisted giving credence to a bald and generalized assertion of "suggestibility", asking instead whether that argument was anchored in the factual reality of this case. This approach was correct in law and particularly important in a case involving a complainant with mental disabilities.

10. Canadian courts have acknowledged the prevalence of myths and stereotypes that continue to insidiously plague the prosecution of sexual offences.[1] This Court has recognized that women with mental disabilities are particularly vulnerable and more frequently the victims of sexual offences.[2] It is crucial to ensure that prejudicial assumptions about the capacities of complainants with disabilities do not infect the trial process; in particular, unfounded generalizations about their

[1]See, for example: *R v. A.R.J.D.*, 2018 SCC 6, affirming 2017 ABCA 237, at paras. 6-9, 42, 60-66, 71; *R v. Seaboyer*, [1991] 2 S.C.R. 577, at paras. 23, 134, 140-147, 165, 168-172, 195-197; *R v. Barton*, 2019 SCC 33, at paras. 55-56; 2017 ABCA 216, at paras. 8-9, 106, 159, 161, 312; *R v. A.B.A.*, 2019 ONCA 124, at paras. 5-12; *R v. Lacombe*, 2019 ONCA 938, at paras. 31-55.
[2] *R v. D.A.I.*, 2012 SCC 5, at para. 1.

credibility and reliability as witnesses.[3] Pepall J.A.'s approach in this case avoided the potential pitfall of unfairly assessing the complainant's evidence through a lens of preconception about the effect of her mental disability on her inherent reliability.

B. THE FACTS

(1) Background

11. J.M. is a young adult woman with intellectual and developmental disabilities. For most of her childhood, she was a ward of the Children's Aid Society (CAS). Before she turned 18, J.M. was placed with the C. family through an organization called Pathways to Independence.[4] Mr. and Mrs. C. acted as J.M.'s guardians.[5] The Respondent and his wife were close friends and neighbours of the C. family.[6]

(2) Sexual assault allegations

12. J.M. testified that the Respondent sexually assaulted her in different locations over a period of time. The assaults ranged from sexual touching to sexual intercourse. Throughout her testimony, J.M. maintained that she did not want to have sex with the Respondent. For instance, she stated: "I didn't want him to do any of this stuff at all, like. I didn't want him to do any of this to me".[7]

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[3] For fuller discussion of the systemic barriers faced by sexual assault complainants with mental disabilities in the Canadian criminal justice system, see the following articles by Janine Benedet and Isabel Grant: "Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities", *Fem Leg Stud* (2014) 22: 131-154; "Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases", *Osgoode Hall Law Journal* 50.1 (2012): 1-45; "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity and Mistaken Belief", (2007) 52:2 *McGill LJ* 243; "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues", (2007) *McGill L.J.* 515.

[4] *Stacey Callahan*, Appellant's Record, Volume III, at p. 25.

[5] *J.M.*, Appellant's Record, Volume IV, at p. 8.

[6] *Thomas Slatter*, Appellant's Record, Volume V, at p. 93.

[7] *J.M.*, Appellant's Record, Volume IV, at p. 62.

(a) The C.'s House

13. J.M. testified that sexual intercourse with the Respondent happened "several times" at the C.'s house, always in J.M.'s bedroom.[8] J.M. said that the Respondent came over when J.M. was home alone. Mr. and Mrs. C. were at the Toronto Exhibition. J.M. was cleaning the house at the time. The Respondent asked her why she was not cleaning her bedroom. J.M. replied that she did not want to.[9] She showed the Respondent her bedroom, and said "I told you it was messy". The Respondent said, "I don't care". He then "[threw her] on the bed" and "[took her] clothes off".[10] The Respondent took his clothes off, got "on top of [her]", and "forced his penis inside of [her] vagina".[11] During the assault, the Respondent did not say anything. When it was over, the Respondent left and J.M. continued cleaning the house.[12]

14. J.M. testified that sexual touching occurred in other areas of the C.'s home. J.M. said that one morning she was home alone, taking a shower. The Respondent came into the bathroom, grabbed the pink "scrunchie" from her hands, and "washed [her] body with it".[13] Afterwards, there was water "all over the bathroom". J.M. cleaned it up, and then hung the towels to dry "over the railing on the wall".[14]

15. J.M. also recalled being sexually assaulted on "Friday nights" when the Respondent and his wife came to the C.'s house to play cards. J.M. testified that the Respondent would come into her bedroom, and touch her "butt" and "boobs". He touched her on top of, and underneath, her

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[8] *J.M.*, Appellant's Record, Volume IV, at pp. 57-58.
[9] *J.M.*, Appellant's Record, Volume IV, at pp. 54-55.
[10] *J.M.*, Appellant's Record, Volume IV, at p. 56.
[11] *J.M.*, Appellant's Record, Volume IV, at p. 56.
[12] *J.M.*, Appellant's Record, Volume IV, at p. 57.
[13] *J.M.*, Appellant's Record, Volume IV, at pp. 61-62.
[14] *J.M.*, Appellant's Record, Volume IV, at p. 204.

clothing. J.M. did not say anything to the Respondent during these assaults.[15]

16. Finally, J.M. recalled an incident that happened while the Respondent was babysitting Mr. and Mrs. C.'s granddaughter. J.M. said that the Respondent came into her bedroom and touched her sexually. J.M. then went out with her friend, Kyle. When she came home, the Respondent "grabbed [her] ass".[16]

(b) The Respondent's House

17. J.M. testified that the Respondent had sexual intercourse with her "more than once" at his house.[17] This occurred in his bedroom. J.M. described the Respondent throwing her clothes on the floor, and then being "on top of [her]" on the bed.[18] The Respondent was not wearing any clothing when this happened.[19] J.M. recalled the Respondent telling her that she has "a nice body", "a nice bum", and that if she lost weight, she could be "skinny with big breasts".[20]

18. On another occasion, the Respondent touched J.M. while she was in his bathroom. He got her to weigh herself on the scale. While this was happening, he touched J.M.'s "boobs".[21]

(c) The Neighbour's House

19. The Respondent was house-sitting for his neighbours, Sherrie and Larry, while they were on vacation in Myrtle Beach. J.M. said that she accompanied the Respondent to Sherrie and Larry's house where he had sexual intercourse with her in the bedroom. J.M. testified that the Respondent

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[15] *J.M.*, Appellant's Record, Volume IV, at pp. 58-59.
[16] *J.M.*, Appellant's Record, Volume IV, at p. 167.
[17] *J.M.*, Appellant's Record, Volume IV, at pp. 84-85.
[18] *J.M.*, Appellant's Record, Volume IV, at p. 85.
[19] *J.M.*, Appellant's Record, Volume IV, at p. 85.
[20] *J.M.*, Appellant's Record, Volume IV, at p. 86.
[21] *J.M.*, Appellant's Record, Volume IV, at p. 98.

"[felt her] up by touching [her] vagina and [her] boobs".[22] She said that he took her clothes off. The Respondent put his "fingers up inside [her] vagina". He used "his whole hand to feel [her] boobs", and "[put] his mouth on them to suck on [them]".[23]

20. While the sexual assault was happening, J.M. recalled looking "on the side" or "up on the ceiling".[24] J.M. remembered telling the Respondent that they should "get going". Afterwards, she and the Respondent went to his house. J.M. grabbed a soft drink from the fridge. [25]

(d) The Quinte Conservation Area (Pooch Path)

21. J.M. and the Respondent went to the Quinte Conservation Area (also called Pooch Path) to walk his dogs in the summertime. J.M. said that on these occasions, the Respondent touched her "vagina", "butt" and "boobs". She said that he felt her by "sticking his two fingers up [her] vagina".[26] J.M. also said that sometimes there was sexual intercourse "off the path".[27] This happened in "several different spots".[28] He "[took her] clothes off", "[pulled] them down", and told her to "lay on the ground". He then stuck his penis inside her. During one assault, J.M. recalled saying: "please don't".[29] After having sex, the Respondent told her: "If you're going to tell anybody, I will deny it".[30]

(e) The Abandoned Building

22. J.M. and the Respondent walked to an abandoned building near their homes. She said that

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[22] *J.M.*, Appellant's Record, Volume IV, at p. 30.
[23] *J.M.*, Appellant's Record, Volume IV, at p. 31.
[24] *J.M.*, Appellant's Record, Volume IV, at p. 32.
[25] *J.M.*, Appellant's Record, Volume IV, at pp. 32-33.
[26] *J.M.*, Appellant's Record, Volume IV, at p. 43.
[27] *J.M.*, Appellant's Record, Volume IV, at pp. 38-39.
[28] *J.M.*, Appellant's Record, Volume IV, at p. 43.
[29] *J.M.*, Appellant's Record, Volume IV, at pp. 40-41.
[30] *J.M.*, Appellant's Record, Volume IV, at p. 59.

the Respondent pulled her clothes "down to [her] ankles" and had "doggie style sex" with her. She described the Respondent being behind her, his hands on her hips, sometimes touching her breasts.[31] She said that this happened outside of the building.[32] She explained that they could not go inside of the building because "there [was] glass everywhere".[33] J.M. could not remember if "doggie style sex" happened more than once.[34] While they were there, J.M. saw a doe.[35]

(f) The BBQ at CFB Trenton

23. The Respondent volunteered on Friday evenings at the local air force base (CFB Trenton). He was in charge of barbecuing. J.M. testified that on one of these nights, she was sitting outside, close to where the Respondent was barbecuing. The Respondent came over to J.M., leaned over her shoulder, and kissed her on the forehead and cheeks.[36] Someone complained about the interaction,[37] and Mrs. C. told J.M. to go inside.[38] After the incident, J.M. stopped attending the barbecues at CFB Trenton.[39]

(g) The Drive to Belleville

24. J.M. accompanied the Respondent to Belleville where he had a job cutting lawns. J.M. testified that on the drive to Belleville, the Respondent was "feeling [her] up" while she was in the

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[31] *J.M.*, Appellant's Record, Volume IV, at pp. 78-79.
[32] *J.M.*, Appellant's Record, Volume IV, at p. 81.
[33] *J.M.*, Appellant's Record, Volume IV, at p. 182.
[34] *J.M.*, Appellant's Record, Volume IV, at p. 81.
[35] *J.M.*, Appellant's Record, Volume IV, at p. 181.
[36] *J.M.*, Appellant's Record, Volume IV, at pp. 73-74.
[37] *Thomas Slatter*, Appellant's Record, Volume V, at p. 189; *Heather Slatter*, Appellant's Record, Volume VI, at pp. 43-44.
[38] *J.M.*, Appellant's Record, Volume IV, at pp. 75-76; *Heather Slatter*, Appellant's Record, Volume VI, at pp. 43-44.
[39] *J.M.*, Appellant's Record, Volume IV, at pp. 74-75; *Thomas Slatter*, Appellant's Record, Volume V, at pp. 188-189; *Heather Slatter*, Appellant's Record, Volume VI, at p. 44.

passenger seat. She said that he touched her "boobs and vagina".[40] After the Respondent cut the lawn in Belleville, he and J.M. went to Dairy Queen. J.M. testified that on the drive to Dairy Queen, the Respondent was "feeling [her] up as well".[41]

(3) <u>Disclosure of the sexual assault allegations</u>

25. J.M.'s initial disclosure occurred in July of 2013 while she was at summer camp. J.M. told her friend, A.C., that she had sex with a middle-aged neighbour.[42] There was no evidence that this was suggested to her. When Defence counsel asked J.M. if she "made this story up" in order to "have something to say to [A.C.] about having sex", J.M. replied: "I didn't make it up".[43]

26. On July 9, 2013, J.M. had her monthly meeting with Mr. and Mrs. C and her community outreach worker, Stacey Callahan. J.M. had been suffering from "anxiety", and was not completing her chores.[44] She disclosed to Ms. Callahan on a previous occasion that she was "angry and didn't know why".[45] At the monthly meeting, J.M. agreed to attend counselling with a behaviour therapist. J.M. also insisted "on walking the dogs with [the Respondent]".[46] Ms. Callahan asked J.M. whether her relationship with the Respondent was a "healthy relationship". Ms. Callahan wondered if J.M. "may have had a crush on [the Respondent]".[47]

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[40] *J.M.*, Appellant's Record, Volume IV, at p. 69.
[41] *J.M.*, Appellant's Record, Volume IV, at p. 70.
[42] *J.M.*, Appellant's Record, Volume IV, at p. 95; *A.C.*, Appellant's Record, Volume V, at p. 153-154, 156-157.
[43] *J.M.*, Appellant's Record, Volume IV, at p. 107.
[44] *Stacey Callahan*, Appellant's Record, Volume III, at pp. 47-49.
[45] *Stacey Callahan*, Appellant's Record, Volume III, at p. 47.
[46] *Stacey Callahan*, Appellant's Record, Volume III, at p. 49.
[47] *Stacey Callahan*, Appellant's Record, Volume III, at p. 50.

27. About a month later, in August of 2013, J.M. disclosed to Mrs. C. that the Respondent had touched her breasts. Mrs. C. phoned the Respondent, who denied touching J.M.[48] There was no evidence that this allegation was suggested to J.M. Following this disclosure, Mrs. C. told J.M. to take her granddaughter, T.C., with her whenever she went to the Respondent's home. J.M. did as she was told.[49]

28. On September 9, 2013, J.M. had another meeting with Mr. and Mrs. C. and Ms. Callahan. At this meeting J.M. disclosed that the Respondent had sexually assaulted her. J.M. testified that she "told them things but not the whole details".[50] After the disclosure, Ms. Callahan "stopped the discussion". She said that she "needed to report this to [her] supervisor" and that they may "need to call the police".[51] Again, there was no evidence that the sexual assault allegation was suggested to J.M. Ms. Callahan disagreed with Defence counsel's suggestion that J.M.'s allegation arose from leading questions.[52]

29. On September 10, 2013, Ms. Callahan took J.M. to meet with her supervisor, Darlene Brennan. At this meeting, J.M. told Ms. Brennan that the Respondent had "raped" her.[53] Ms. Brennan called the police. The same day, the three women went to the police station. J.M. gave a videotaped statement to Detective Maybee, describing the sexual assaults.[54]

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[48] *J.M.*, Appellant's Record, Volume IV, at pp. 96-97; *Thomas Slatter*, Appellant's Record, Volume V, at 121.
[49] *J.M.*, Appellant's Record, Volume IV, at p. 97.
[50] *J.M.*, Appellant's Record, Volume IV, at p. 116.
[51] *Stacey Callahan*, Appellant's Record, Volume III, at p. 58.
[52] *Stacey Callahan*, Appellant's Record, Volume III, at pp. 72-78.
[53] *J.M.*, Appellant's Record, Volume IV, at pp. 121; *Darlene Brennan*, Appellant's Record, Volume V, at pp. 8-10, 28-29.
[54] *Stacey* Callahan, Appellant's Record, Volume III, at pp. 62-63; *J.M.*, Appellant's Record, Volume IV, at pp. 123-124, 143-144, 208-215; *Darlene Brennan*, Appellant's Record, Volume V, at p. 10.

30. On September 13, 2013, J.M., Ms. Brennan, and Officer Simpson, went to the Quinte Conservation Area. J.M. pointed out where the sexual assaults occurred. This meeting was not recorded. When the three women returned to the parking lot, J.M. remembered more instances of sexual assault. Officer Simpson suggested that J.M. write down her recollections in a book.[55]

31. Finally, on September 17, 2013, Ms. Brennan drove J.M. to the police station. During the drive, as they were approaching Kenron Estates, J.M. disclosed that she and the Respondent had sexual intercourse near an abandoned building.[56] There was no evidence that this allegation was suggested to her. J.M. gave a second videotaped statement to Officer Simpson.[57]

(4) <u>Evidence regarding J.M.'s disabilities</u>

32. At trial, the Crown called Dr. Jessica Jones, a clinical forensic psychologist. The Crown sought to rely on Dr. Jones' evidence for two purposes. First, to explain how J.M.'s cognitive disabilities may "affect her capacity to provide voluntary and informed consent in social-sexual settings".[58] Second, to explain how J.M.'s cognitive disabilities may impact the answers she gives in response to questions asked at trial.[59] The trial judge qualified Dr. Jones to give evidence with respect to the former, but not the latter.[60]

33. Dr. Jones testified that J.M.'s intellectual disability is in the "mild range".[61] She explained that people in this category are at the "top end of the intellectual disabilities population". They are

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[55] *J.M.*, Appellant's Record, Volume IV, at pp. 155-156, 161; *Darlene Brennan*, Appellant's Record, Volume V, at pp. 11-17; *Amy Simpson*, Appellant's Record, Volume VI, at pp. 62-70.
[56] *J.M.*, Appellant's Record, Volume IV, at p. 158; *Darlene Brennan*, Appellant's Record, Volume V, at pp. 15-16.
[57] *J.M.*, Appellant's Record, Volume IV, at pp. 143-144; *Darlene Brennan*, Appellant's Record, Volume V, at p. 15; *Amy Simpson*, Appellant's Record, Volume VI, at pp. 63, 74.
[58] *Stacey Callahan*, Appellant's Record, Volume III, at pp. 106-107.
[59] *Jessica Jones*, Appellant's Record, Volume III, at pp. 130-137.
[60] *Jessica Jones*, Appellant's Record, Volume III, at pp. 120, 130-137, 150-151.
[61] *Jessica Jones*, Appellant's Record, Volume III, at p. 126.

considered to be "higher-functioning individuals" compared to other people with disabilities.[62] Dr. Jones testified that J.M. has difficulty "planning ahead" and "problem solving".[63] J.M. also gets confused about "temporal time" and the "chronological order of events".[64]

34. With respect to J.M.'s understanding of "social-sexual relationships", Dr. Jones testified that J.M. was able to "identify what's inappropriate or appropriate" but had difficulty explaining *why*. In Dr. Jones' opinion, this was because of the "nuance in interpreting those relationships".[65]

35. On the topic of "suggestibility", Dr. Jones gave the following evidence:

- "Suggestibility" is measured by looking at someone's psychological vulnerability to (1) accept a suggestive message that is given to him or her, or (2) change his or her answer in response to negative feedback;[66]
- Ongoing studies continue to investigate whether acceptance of suggestion by persons with mental disability signifies impact on the actual, original content of their knowledge base or whether they have retained the original information;[67]
- Generally speaking, people with intellectual disabilities are more suggestible than the normal population; [68]
- Suggestibility is more likely to occur when the questioner is a person in authority;[69]
- Suggestibility decreases if the person is recalling an incident that is personal, significant, and emotive. A sexual assault falls in this category;[70]
- J.M. is a unique individual, not to be stereotyped based on test results;[71]
- J.M.'s suggestibility profile is high (75^{th} percentile) compared to the normal population (50^{th} percentile). J.M. is therefore more likely than someone in the normal population to be subject to suggestibility.[72] J.M.'s suggestibility profile is average compared to other people with intellectual disabilities;[73] and

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[62] *Jessica Jones*, Appellant's Record, Volume III, at pp. 126-128.
[63] *Jessica Jones*, Appellant's Record, Volume III, at p. 142.
[64] *Jessica Jones*, Appellant's Record, Volume III, at p. 175.
[65] *Jessica Jones*, Appellant's Record, Volume III, at p. 146.
[66] *Jessica Jones*, Appellant's Record, Volume III, at pp. 166-167.
[67] *Jessica Jones*, Appellant's Record, Volume III, at p. 188.
[68] *Jessica Jones*, Appellant's Record, Volume III, at pp. 167, 168.
[69] *Jessica Jones*, Appellant's Record, Volume III, at p. 168.
[70] *Jessica Jones*, Appellant's Record, Volume III, at pp. 188-189.
[71] *Jessica Jones*, Appellant's Record, Volume III, at p. 165.
[72] *Jessica Jones*, Appellant's Record, Volume III, at p. 167.
[73] *Jessica Jones*, Appellant's Record, Volume III, at p. 168.

- J.M.'s suggestibility makes her "vulnerable to any uncertainty she may have".[74]

36. Dr. Jones was asked to comment on the first police interview transcript. Dr. Jones observed that there were some examples of "leading questions" or "forced choice questions" where J.M. changed or distorted her information. There were also some examples where J.M.'s information "stayed the same".[75] The transcript was not entered as an exhibit at trial. Dr. Jones was not asked to provide specific examples. During cross-examination, it was not put to J.M. that some of her responses during the police interview were the product of suggestion.

37. Defence counsel questioned other witnesses about J.M.'s suggestibility. When he put to Ms. Callahan that J.M. was a "pleaser" and was "likely to agree with [her] if [she] press[ed] her about things", Ms. Callahan disagreed.[76] When he suggested to Ms. Callahan that J.M.'s sexual assault allegation arose from leading questions, she also disagreed:[77]

> Q: So then you and the [C.'s] are at these monthly meetings through 2013, talking about her and as you said, brainstorming about what's going on […] Now she's not looking after herself as well and not doing her chores as well. You're looking to find out what's changed.
>
> A: Yes.
>
> Q: And you're brainstorming amongst yourselves, you and [Mr. and Mrs. C.], as to what that might be.
>
> A: Yes.
>
> […]
>
> Q: So when you're doing that, do you say things like, "Have you been sexually assaulted? Has…"
>
> A: No.
>
> Q: "…somebody touched you?"
>
> A: No.
>
> Q: So there's no suggestion of anything…

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[74] *Jessica Jones*, Appellant's Record, Volume III, at pp. 181-182.
[75] *Jessica Jones*, Appellant's Record, Volume III, at p. 169.
[76] *Stacey Callahan*, Appellant's Record, Volume III, at p. 71.
[77] *Stacey Callahan*, Appellant's Record, Volume III, at pp. 72-78, 92.

A: No.

Q: …that direct about it.

A: No.

[…]

Q: […] Can you recall today what words she used on September 9th, when she told you about these assaults? We've heard the words "sexual assault", we've heard the word "rape", but what words did she use that day?

A: "Inappropriately touched me."

Q: Okay. And did anyone else use that in the room or that was the first time she said something she said, "inappropriate touching"?

A: She said it.

Q: Okay. But she wasn't asked, "Were you touched inappropriately?"

A: No.

38. Similar questions were put to Ms. Brennan. Defence counsel asked Ms. Brennan about the use of the word "rape" in her phone call to the police. Ms. Brennan stated that those were J.M.'s words, not hers:[78]

Q: And you may not remember – we have a transcript of it – the way you describe it is as you did today, that you have a client who says she's been raped by a neighbour.

A: Yes, those are her words.

Q: Those are her words.

A: Her words.

Q: All right. So you're suggesting she used the word "rape" before you did on that day.

A: Yes. I reported her words to the OPP.

[…]

Q: I'm going to suggest to you that the first time the word was used about this was your word, not [J.M.'s].

A: No, it was [J.M.'s] word.

Q: But you never recorded that in your notes.

A: No. I was in Stacey's office, making the call, and I, I repeated [J.M's] word. She wouldn't use the words "sexual assault". That's the word she knows.

[78] *Darlene Brennan*, Appellant's Record, Volume V, at pp. 28-29.

39. Finally, Defence counsel questioned Officer Simpson about her failure to record the discussions with J.M. when they attended Pooch Path. Officer Simpson agreed that there were no recordings of their conversations. When asked why, she responded: "I don't have a reason. Not something I thought of at the time. In hindsight, I would do that differently, but at the time, no, I didn't give it any thought".[79] Defence counsel questioned her about this further:[80]

> Q: So, in hindsight, you have a concern that you had interaction with a witness and information was exchanged and that's not recorded, is that fair?
>
> A: Did I have a concern?
>
> Q: As we sit here now – you said a minute ago you would have done this differently, in hindsight.
>
> A: I don't know that I [had] a concern. I just maybe would have done things differently.
>
> Q: And you would have recorded the discussion on the pooch path?
>
> A: I don't know that I would have recorded the discussion but I believe that I may have recorded the pooch path, the walk that we took.

40. Officer Simpson also explained the reason why she suggested J.M. write down her recollections about the sexual assaults in a book. She testified:[81]

> I suggested it. I, I didn't, I don't think I asked her. I suggested that because she was starting to remember other locations at the pooch path, so I stopped everything and said to her, you know, I suggested she get a book and write down everything because she started remembering different things.
>
> […]
>
> At that time I was concerned because she was remembering all of these different thoughts and, and memories about the sexual assaults and I wanted her to write it down, and because we weren't recording it, I wanted to get her back to the detachment and have her do a statement that was on audio and video.

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[79] *Amy Simpson*, Appellant's Record, Volume VI, at p. 62.
[80] *Amy Simpson*, Appellant's Record, Volume VI, at p. 64.
[81] *Amy Simpson*, Appellant's Record, Volume VI, at pp. 70, 72.

(5) <u>The Respondent's evidence</u>

41. The Respondent testified. He denied having any sexual contact with J.M.[82] He agreed that J.M. was a vulnerable person, who was "like a 12-or-13-year-old girl". He testified that, because of her disability, he would never believe that she was consenting to sex.[83]

42. Some of the Respondent's evidence aligned with J.M.'s version of events. For instance, the Respondent testified that:

- At times, he would be home alone with J.M.;[84]
- Once or twice, J.M. would weigh herself on the scale at his house;[85]
- He walked his dogs with J.M. "on occasion". "Maybe once" they went to Pooch Path;[86]
- He and J.M. went to the abandoned building twice with his dogs. There was broken glass in the building. They saw a doe;[87]
- He looked after Sherrie and Larry's home while they were in Myrtle Beach;[88]
- He drove J.M. to Belleville with him on a job. They went to Dairy Queen. He did not tell his wife or Mr. and Mrs. C. that he took J.M. with him to Belleville;[89]
- He volunteered to barbecue on Friday nights at CFB Trenton. On one occasion, someone complained about the interaction between him and J.M. They said that he kissed J.M. on the cheek or forehead. The Respondent denied doing this. After the incident, however, J.M. had to stay inside;[90]
- On Friday or Saturday nights, he would play cards at the C.'s house;[91] and
- Mrs. C. called him to ask whether he had touched J.M.'s breasts. He denied it. After this phone call, J.M. started bringing T.C. with her when she came to the Respondent's house.[92]

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[82] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 107, 108, 109, 112, 114, 117, 118, 119-120, 122, 164, 170, 188-189, 198-199, 200.
[83] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 164-165.
[84] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 109, 110, 127.
[85] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 108, 109, 136-137.
[86] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 100, 107, 145, 191.
[87] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 118-119, 163.
[88] *Thomas Slatter*, Appellant's Record, Volume V, at p. 103.
[89] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 117, 128, 131, 132.
[90] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 94, 139-140, 188, 190.
[91] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 96, 140.
[92] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 121, 170.

(6) Closing submissions of counsel

43. Defence counsel began his closing submissions by stating, "this case is not so much about credibility as it is about reliability."[93] He referred to Dr. Jones' evidence about J.M.'s heightened suggestibility and made submissions about why it raised concern.[94] Defence counsel's suggestibility argument can be summarized as follows:

(1) J.M.'s disability caused her to be more susceptible to suggestion;

(2) J.M. discussed the sexual assaults with several people (A.C., Mrs. C., Stacey Callahan, and Darlene Brennan) before giving a videotaped statement to police;

(3) Without a record of these discussions, it could not be known whether the sexual assault allegations were a product of suggestion.

The trial judge had several exchanges with Defence counsel during his submissions on this point.[95]

44. Defence counsel also argued that there were a number of aspects of J.M.'s evidence that were "unlikely" or defied "common sense", and therefore called the reliability of her evidence into question.[96] For example, he submitted that:

- It was "hard to accept" that the Respondent would sexually assault J.M. when his wife, and Mr. and Mrs. C. were in the other room playing cards;[97]
- It stretched "credibility" and "reliability" that the Respondent would sexually assault J.M. and then bring her home to have "small talk" with his wife;[98]
- It was "incredibly bold" that the Respondent would have sex with J.M. at Pooch Path, where they would be visible to other dog walkers;[99]
- It did not "make any sense" that the Respondent would kiss J.M. in front of other people at the barbecue;[100] and

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[93] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 92, 101, 136.
[94] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 95-116, 128-130, 139.
[95] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 99-101, 107-109, 110, 114-115.
[96] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 123-124.
[97] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 120, 122.
[98] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at p. 121.
[99] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 121, 123.
[100] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at p. 124.

- Although "not required", there was no physical evidence to corroborate J.M.'s allegations.[101]

45. In his closing submissions, Crown counsel addressed Defence counsel's suggestibility argument, emphasizing that there was no evidence that any of the sexual assault allegations were suggested to J.M.[102] For instance, he stated:[103]

> […] in terms of suggestibility, nowhere is there any indication that things like doggie style, bathing in the shower incident, going to Dairy Queen, lawn-cutting at Settlers Landing […] or the barbecue incident or what happened at the abandoned shed, there's no suggestion in any of the evidence that words coming close to those descriptions were put in the mind of [J.M.].

The Crown alerted the trial judge to "the line between speculation and evidence in this case".[104]

46. Crown counsel also pointed to aspects of J.M.'s evidence that had a "ring of truth" including her testimony that the Respondent told her if she lost weight, she would be skinny with big breasts.[105] Finally, the Crown stressed that there were many details in J.M.'s account that were confirmed by other witnesses.[106] Citing the applicable case law, he argued that confirmatory evidence could be used to restore the trial judge's faith in the reliability of J.M.'s account.[107]

(7) Decisions below

(a) The trial judge's decision

47. In his reasons for judgment, the trial judge reviewed J.M.'s evidence, going through each

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[101] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 120, 123, 125-126, 137.
[102] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at pp. 152-153, 153-154, 161, 199-201.
[103] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at pp. 199-200.
[104] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at p. 200.
[105] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at p. 161.
[106] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at pp. 183, 202-203, 204, 205, 209-210.
[107] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at pp. 182-183.

allegation of sexual assault and noting the various instances of disclosure.[108] The trial judge also summarized the Respondent's evidence and the Respondent's wife's evidence.[109] His review of the evidence totalled 15 pages.

48. The trial judge then turned to his analysis. With respect to count 2 (sexual exploitation of a person with a disability), he concluded that the Respondent was in a position of trust toward J.M. and J.M. was a person with a mental disability; however, the trial judge was not satisfied beyond a reasonable doubt that the Respondent had "counselled" J.M. He acquitted the Respondent of this count.[110]

49. With respect to count 1 (sexual assault), the trial judge spent several pages outlining the relevant legal principles.[111] He summarized the aspects of J.M.'s evidence that Defence counsel submitted were "full of inconsistencies" and therefore "unreliable".[112] He then assessed J.M.'s evidence.

50. The trial judge highlighted parts of J.M.'s evidence that he felt had a "ring of truth", including:[113]

- J.M. testified that after the shower incident, "she cleaned up the water on the floor in the bathroom";
- J.M. testified that the Respondent told her "if she lost weight she would be skinny with big breasts";
- J.M. testified that the Respondent told her if she ever disclosed their sexual encounters, "he would deny it"; and
- When discussing their sexual experiences, J.M. told her friend at camp that she had sex with a "middle-aged neighbour".

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[108] *Reasons for Judgment*, Appellant's Record, Volume I, at paras. 8-28.
[109] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 29.
[110] *Reasons for Judgment*, Appellant's Record, Volume I, at paras. 32-40.
[111] *Reasons for Judgment*, Appellant's Record, Volume I, at paras. 45-47.
[112] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 43.
[113] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 48.

51. The trial judge also addressed Defence counsel's argument about the "improbability" of some of J.M.'s sexual assault allegations. In particular, the trial judge commented on the card game incident, the barbecue incident, and the fact that after sex at the abandoned building, J.M. returned to the Respondent's home where she engaged in small talk with the Respondent's wife. The trial judge effectively found that none of these events were "improbable" at all.[114]

52. Finally, the trial judge mentioned the significance of the fact that there was "substantial detail" in J.M.'s evidence with respect to "the abandoned house", "the BBQ at CFB Trenton", "the trip to Belleville with the stop at the Dairy Queen", and "the Pooch Park". The trial judge concluded that he was satisfied beyond a reasonable doubt that the sexual encounters occurred.[115]

53. On the issue of consent, the trial judge noted that there was a complete absence of any action or utterance by J.M. to suggest that she consented. On at least one occasion, she said: "please don't".[116] The trial judge convicted the Respondent of sexual assault.

(b) The Court of Appeal for Ontario's decision

54. The Respondent appealed his conviction to the Court of Appeal for Ontario. He raised three grounds of appeal, all focused on the adequacy of the trial judge's reasons. The Respondent contended that the trial judge: (1) failed to address J.M.'s reliability (in particular, her "suggestibility"); (2) erroneously used J.M.'s evidence to corroborate itself; and (3) failed to explain why he rejected the Respondent's evidence.

55. The Court of Appeal rendered a split decision. Trotter J.A., writing for the majority, allowed the appeal. With respect to the first ground of appeal, Trotter J.A. determined that the trial

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[114] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 48.
[115] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 48.
[116] *Reasons for Judgment*, Appellant's Record, Volume I, at paras. 49-51.

judge "failed to directly address J.M.'s reliability" and, in particular, "failed to mention [Dr. Jones'] evidence concerning J.M.'s suggestibility".[117] While Trotter J.A. accepted that there were "parts of the trial judge's reasons that seemed to allude to reliability considerations", he concluded that the trial judge's treatment of reliability was "minimal" and "incidental to his focus on J.M.'s credibility".[118] Trotter J.A. determined that it was "critical" that the trial judge "consider the evidence concerning J.M.'s heightened suggestibility".[119] According to Trotter J.A., the trial judge's failure to do so rendered his reasons insufficient.

56. Turning to the second ground of appeal, Trotter J.A. agreed with the Respondent that the trial judge "appeared to find that the various locations and contexts related to the allegations made J.M.'s account more trustworthy" (i.e. that he used J.M.'s evidence to corroborate itself).[120] However, Trotter J.A. ultimately concluded that he would not have allowed the appeal on this ground alone.[121]

57. With respect to the third ground of appeal, Trotter J.A. disagreed with the Crown's position that the trial judge's rejection of the defence evidence was "based on a considered and reasoned acceptance" of J.M.'s evidence. According to Trotter J.A., the fact that the trial judge's reasons were "tainted" by the errors identified in grounds one and two prevented such a finding.[122]

58. Pepall J.A., writing in dissent, would have dismissed the appeal. With respect to the first ground of appeal, Pepall J.A. conducted a thorough review of the law on sufficiency of reasons.[123]

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[117] *R v. Slatter*, 2019 ONCA 807, at paras. 64, 66.
[118] *Slatter*, *supra*, at para. 71.
[119] *Slatter*, *supra*, at para. 71.
[120] *Slatter*, *supra*, at para. 75.
[121] *Slatter*, *supra*, at para. 77.
[122] *Slatter*, *supra*, at paras. 85, 88.
[123] *Slatter*, *supra*, at paras. 107-116.

She then turned to the facts in this case. Reading the trial judge's reasons in their "entire context" with the "evidentiary record, the issues, and the submissions of counsel at trial", Pepall J.A. was satisfied that the "trial judge was unquestionably alive to the issue of reliability and its subset of suggestibility".[124] She further concluded that "by any measure", there was "no air of reality" to the suggestibility issue raised by Defence counsel.[125] It lacked factual foundation and was based on "mere speculation".[126] Pepall J.A. described the suggestibility argument as "so lacking in merit" that there was "no need to directly advert to it".[127] In support of her conclusion, she referred to:

- Exchanges between the trial judge and Defence counsel on the topic of suggestibility and reliability;[128]
- Parts of the trial judge's reasons which demonstrated that he was "alive to the issue of the complainant's reliability";[129]
- Examples from J.M.'s testimony which showed that she was "not unduly suggestible to persons of authority" and "would not agree to anything put to her";[130]
- What Pepall J.A. described as a "paucity of evidence that linked any 'suggestions' of sexual assault to the numerous and detailed descriptions of sexual assaults described by the complainant";[131] and
- The evidence of the BBQ incident, which lent support to both "the accuracy and veracity of [J.M.'s] testimony".[132]

In light of the above, Pepall J.A. determined that the reasons were sufficient.[133]

59. Turning to the second ground of appeal, Pepall J.A. accepted that the trial judge "could have been clearer and more precise with his language"; however, reading his reasons in the context

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[124] *Slatter*, *supra*, at paras. 123-124.
[125] *Slatter*, *supra*, at para. 142.
[126] *Slatter*, *supra*, at para. 141.
[127] *Slatter*, *supra*, at paras. 141, 142.
[128] *Slatter*, *supra*, at paras. 125-129.
[129] *Slatter*, *supra*, at paras. 130-135.
[130] *Slatter*, *supra*, at paras. 136-140.
[131] *Slatter*, *supra*, at paras. 141-142.
[132] *Slatter*, *supra*, at paras. 143-149.
[133] *Slatter*, *supra*, at paras. 150-151.

of the trial record, she disagreed that he used J.M.'s evidence as "self-corroborating". Pepall J.A. understood the impugned passage as "referring to confirmation of details by other witnesses". She explained that it was "entirely proper to rely on the fact that many details in the complainant's account were confirmed by other people, thus restoring faith in the reliability of the complainant's testimony". Pepall J.A. found that the trial judge's comment was "directly responsive" to the Crown's closing submissions to that effect.[134]

60. With respect to the final ground of appeal, Pepall J.A. found that the trial judge was "alive to the frailties of the complainant's evidence" and "looked for and found confirmatory evidence to restore his faith in the accuracy and reliability of her version". Pepall J.A. held that "implicit in [the trial judge's] reasoned acceptance of [J.M.]'s evidence was his rejection of [the Respondent's] evidence".[135]

PART II: THE QUESTIONS IN ISSUE

61. Did the majority of the Court of Appeal err in finding that the trial judge's reasons were insufficient? In particular, did the majority of the Court of Appeal err in finding that the trial judge:

(1) Failed to address J.M.'s reliability and suggestibility;
(2) Used J.M.'s evidence to corroborate itself; and
(3) Failed to explain why he rejected the Respondent's evidence?

PART III: STATEMENT OF ARGUMENT

A. OVERVIEW

62. The trial judge's reasons are sufficient. They explain why the Respondent was convicted and allow for meaningful appellate review. The Court of Appeal majority imposed a standard of

[134] *Slatter*, *supra*, at paras. 153-154, emphasis added.
[135] *Slatter*, *supra*, at paras. 157, 162, 163.

perfection that is inconsistent with this Court's jurisprudence. Pepall J.A., in dissent, was correct in finding that the trial judge's reasons were adequate. She properly assessed the reasons in the context of *the record as a whole*. In this context, she found that the trial judge: (1) was unquestionably alive to the issue of J.M.'s reliability and did not need to expressly advert to Defence counsel's suggestibility argument in his reasons; (2) properly relied on confirmatory evidence of other witnesses to restore his faith in J.M.'s account; and (3) implicitly rejected the Respondent's evidence based on a considered and reasoned acceptance of J.M.'s evidence. There were no errors in the trial judge's analysis and nothing more was required of him. That the trial judge *could* have — and the Court of Appeal majority *would* have — discussed the issues and evidence differently is of no moment.

B. THE TRIAL JUDGE ADDRESSED J.M.'S RELIABILITY AND DID NOT NEED TO ADVERT TO DEFENCE COUNSEL'S SUGGESTIBILITY ARGUMENT

(1) Relevant legal principles

63. The legal principles governing this ground of appeal are well established. The test for sufficiency of reasons is whether the reasons perform their function of allowing an appellate court to review the correctness of the trial decision.[136] Appellate courts considering the sufficiency of reasons should read them in their entire context, with the evidentiary record, the issues, and the submissions of counsel at trial.[137]

64. Trial judges are not held to "some abstract standard of perfection". The trial judge's duty is satisfied when the decision is "reasonably intelligible to the parties" and "provides the basis for meaningful appellate review of the correctness of the trial judge's decision".[138] There is "no

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[136] *R v. Sheppard*, 2002 SCC 26, at para. 25.
[137] *R v. R.E.M.*, 2008 SCC 51, at para. 37.
[138] *Sheppard, supra*, at para. 55.

general requirement that reasons be so detailed that they allow an appeal court to retry the entire case on appeal". Nor is there a "need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel".[139] Where the trial decision is deficient in explaining the result but the appellate court considers itself able to do so, the appellate court's explanation in its own reasons is sufficient. In that case, there is no need for a new trial.[140]

65. Appellate courts reviewing reasons for sufficiency should start from a stance of deference toward the trial judge's factual findings. This includes determinations about credibility and reliability. The trial judge is in the best position to determine matters of fact, and in the absence of palpable and overriding error, the trial judge's findings should be respected.[141]

(2) Application to the facts in this case

66. When the reasons for judgment are read as a whole, and in the context of the trial record, it is clear that the trial judge: (1) was alive to and addressed the issue of J.M.'s reliability; and (2) did not need to advert to Defence counsel's suggestibility argument.

(a) The trial judge was alive to and addressed the issue of J.M.'s reliability

67. The Court of Appeal majority acknowledged that there were "parts of the trial judge's reasons" that "allude to reliability considerations". However, the majority erred in finding that the trial judge's treatment of reliability was "minimal", and more was required.[142] The trial judge was clearly alive to and addressed the issue of J.M.'s reliability. As Pepall J.A. observed, the trial judge engaged with Defence counsel on the topic of reliability and its subset of suggestibility during closing argument. And in his reasons for judgment, the trial judge addressed aspects of J.M.'s

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[139] *R v. Dinardo*, 2008 SCC 24, para. 30.
[140] *Sheppard, supra*, at para. 55.
[141] *R.E.M., supra*, at para. 54.
[142] *Slatter, supra*, at para. 71.

evidence that Defence counsel argued undermined her reliability. In the circumstances of this case, this was more than sufficient.

68. Defence counsel's submissions on J.M.'s reliability took two forms: (1) pointing to J.M.'s propensity for suggestibility, and (2) raising aspects of J.M.'s evidence that counsel characterized as "improbable", "unlikely" or defying "common sense". The trial judge engaged with him on both.

69. With respect to Defence counsel's suggestibility argument, the trial judge expressed concerns about its viability. First, the trial judge raised the fact that J.M. testified about a series of events that occurred in different locations over an extended period of time.[143] The varying details and particulars of J.M.'s allegations undermined the argument that they were a product of suggestion. Second, the trial judge noted that there was no evidence that J.M.'s allegations had been suggested to her. He cited J.M.'s disclosure to Darlene Brennan and A.C. as examples.[144] Both points were picked up by the Crown during closing submissions, where he repeatedly emphasized that Defence counsel's argument was speculative and lacked a factual foundation.[145]

70. With respect to Defence counsel's argument that aspects of J.M.'s evidence were "unlikely" or "improbable", the trial judge disagreed. He addressed this argument in his reasons. As Pepall J.A. pointed out, the trial judge expressly acknowledged that he was being asked to find J.M.'s evidence "unreliable".[146] The trial judge listed all aspects of J.M.'s evidence that Defence counsel relied on to challenge her reliability.[147] He addressed the ones he viewed as material.

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[143] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 99-101, 107-109.
[144] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 115, 128-129.
[145] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at pp. 152-154, 161, 199-201.
[146] *Reasons for Judgment*, Appellant's Record, Volume I, at paras. 43, 44.
[147] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 43.

71. Regarding the "improbability" of the sexual assaults occurring during card games at the C.'s house,[148] the trial judge stated:[149]

> Although the complainant did not phrase it in these words, I find that Friday evening card games at the [C.'s house] became an opportunity for the accused on his way to the bathroom to briefly look in on the complainant and fondle her. These were likely but brief encounters. His absence from the card game would be explained by his bathroom visit.

Regarding the "improbability" of J.M. having a soft drink and small talk with the Respondent's wife after being sexually assaulted,[150] the trial judge noted:[151]

> Her vivid description of her sexual encounter with the accused at the abandoned building was in short order followed by a return to the [Respondent's] house. There she was given a diet pop and had small talk with [the Respondent's wife]. On the one hand, it might appear as an improbable sequence of events. On the other hand, it might speak to the complainant having become accustomed to sexual contact with the accused.

Regarding the "improbability" of the Respondent kissing J.M. in front of others at the barbecue,[152] the trial judge observed:[153]

> Regarding the BBQ incident, I note that the complainant did not say that [the Respondent] had asked her about her texting. She said that he kissed her on the forehead and cheek. In any event, this physical closeness of these two at the BBQ caused her to be told to go inside. After this incident, she stopped attending these Friday functions at the Air Base. I prefer and accept the evidence of the complainant regarding this incident.

In these passages, the trial judge indicated that he did not find J.M.'s version of events to be improbable at all. In doing so, he rejected Defence counsel's argument about the unreliability of J.M.'s accounts.

72. Furthermore, the trial judge was mindful of J.M.'s intellectual disabilities when appraising

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[148] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at pp. 120, 122.
[149] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 48, emphasis added.
[150] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at p. 121.
[151] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 48, emphasis added.
[152] *Defence Counsel Submissions*, Appellant's Record, Volume VI, at p. 124.
[153] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 48, emphasis added.

the significance of frailties in her evidence regarding the "timing and frequency of events", and any difficulties J.M. had in "describing and recollecting certain incidents".[154] Again, this involved addressing the issue of J.M.'s reliability. These shortcomings did not cause the trial judge to doubt the core of J.M.'s allegation — that the Respondent sexually assaulted her.

73. In light of the above, as Pepall J.A. observed, the trial judge was "clearly 'seized of the substance of the issue' of [J.M.'s] reliability".[155] Nothing more was required.

(b) The trial judge did not need to address Defence counsel's suggestibility argument

74. The Court of Appeal majority determined that it was "critical" for the trial judge to address Dr. Jones' evidence about J.M.'s "heightened suggestibility".[156] According to the majority, the issue was "clearly grounded in the evidentiary record", and the trial judge's failure to advert to it rendered his reasons insufficient.[157] This statement reflects misconstrual of the evidence. The position that J.M.'s suggestibility posed serious concern about her reliability was not borne out by the record. As Pepall J.A. noted, the suggestibility argument was based on "mere speculation" and "lacked a factual foundation".[158] It stemmed from Dr. Jones' generalized opinion about J.M. being more susceptible to suggestion than the average population on account of her disabilities; but it was unsubstantiated by the evidence of what *actually* occurred in this case. It also overlooked aspects of Dr. Jones' evidence that placed important qualifications on her opinion.

75. There was absolutely no evidence that any of J.M.'s sexual assault allegations were suggested to her. To the contrary, witnesses who were questioned about J.M.'s disclosure were

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[154] *Reasons for Judgment*, Appellant's Record, Volume I, at para. 48.
[155] *Slatter*, *supra*, at para. 135.
[156] *Slatter*, *supra*, at para. 71.
[157] *Slatter*, *supra*, at para. 66.
[158] *Slatter*, *supra*, at para. 141.

adamant that J.M.'s allegations came from her, and her alone.[159] As Pepall J.A. aptly observed:[160]

> … It is one thing to say that a witness is susceptible to suggestion however, there has to be a suggestion to be suggestible to. Here there was none. It was mere speculation.

76. During cross-examination of Dr. Jones, Defence counsel attempted to establish an evidentiary basis for his "suggestibility" argument. Dr. Jones agreed that there were parts of J.M.'s police interview where she changed or distorted her answers in response to "leading questions" or "forced choice questions".[161] However, Dr. Jones was never asked to provide specific examples and the police interview was not entered into evidence. Also, J.M. was not cross-examined on her statement to the police. Presumably, experienced Defence counsel would have questioned her about specific responses to police questioning if they appeared to be the product of suggestion and impacted material aspects of her allegation.

77. Dr. Jones also qualified her general opinion about J.M.'s suggestibility. First, she explained that suggestibility decreases when a person is recalling an incident that is "personal, significant, and emotive". She agreed that a sexual assault falls in this category.[162] Second, Dr. Jones explained that acquiescence to a suggestion by a person with mental disability did not necessarily mean that they accepted it as true. This was a subject of ongoing research.[163] Third, Dr. Jones explained that J.M.'s heightened suggestibility made her "vulnerable to any uncertainty she may have".[164] In other words, if J.M. was uncertain about the answer to a question, she was more likely than the

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[159] *Stacey Callahan*, Appellant's Record, Volume III, at pp. 72-78, 92; *Darlene Brennan*, Appellant's Record, Volume V, at pp. 28-29; *Amy Simpson*, Appellant's Record, Volume VI, at pp. 70, 72.
[160] *Slatter*, *supra*, at para. 141, emphasis added.
[161] *Jessica Jones*, Appellant's Record, Volume III, at p. 169.
[162] *Jessica Jones*, Appellant's Record, Volume III, at pp. 188-189.
[163] *Jessica Jones*, Appellant's Record, Volume III, at p. 188.
[164] *Jessica Jones*, Appellant's Record, Volume III, at pp. 181-182, emphasis added.

average person to agree with a suggested answer. This did not mean, however, that J.M. simply agreed with *anything* that was suggested to her (regardless of whether she knew it to be true or not). To the contrary, as Pepall J.A. noted, J.M.'s testimony at trial revealed that she "was not unduly suggestible to persons of authority, and was unwilling to agree with anything put to her". This would have been "abundantly clear to the trial judge who listened to and observed [J.M.] testify".[165]

78. The fact that counsel raises an issue in closing submissions does not, on its own, make it a "critical" issue that needs resolving. And when the trial judge chooses not to address the issue in the reasons for judgment, it properly falls to the appellate court to assess the significance of that omission. This means reviewing the record to determine whether the argument has some kind of evidentiary basis. If the argument lacks foundation — as was the case here — it cannot be said that the trial judge's failure to address it renders the reasons insufficient.[166] Pepall J.A.'s assessment of the strength of the evidence underpinning Defence counsel's suggestibility argument led her to conclude – correctly – that its omission from the trial judge's reasons was not fatal.

79. In the Court of Appeal majority's view, the trial judge's assessment of J.M.'s *reliability* as a witness was fatally deficient. Finding no error in the trial judge's assessment of J.M.'s *credibility*, Trotter J.A. was concerned about the trial judge's failure to expressly resolve "the issue of suggestibility" raised by Dr. Jones' evidence.[167] Since J.M.'s credibility was not in issue, the core of Trotter J.A.'s reasoning necessarily rested on this premise: that there was a realistic concern that J.M. could be persuaded by others to accept as true, suggestions she previously knew to be

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[165] *Slatter*, *supra*, at para. 136. See also **Appendix A** for transcript references showing J.M.'s resistance to suggestion in her testimony.
[166] *R v. Lights*, 2020 ONCA 102, at paras. 9-15.
[167] *Slatter*, *supra*, at paras. 70-71.

false. In other words, that her cognitive disabilities could compromise her ability to know fact from fiction.[168] Dr. Jones' evidence did not support this premise. In particular, Dr. Jones explained that it was unknown whether suggestion could actually influence the content of the person's knowledge, or whether they retained that knowledge in spite of acquiescing outwardly to the suggestion. This was a subject of ongoing research.[169]

80. The Court of Appeal majority engaged in a surface-level analysis. It determined that Defence counsel's suggestibility argument needed to be addressed, without any consideration of whether it was a viable argument *in this case*. Dr. Jones' evidence about J.M.'s heightened suggestibility was of limited probative value. There was absolutely no evidence that any of J.M.'s sexual assault allegations were suggested to her. In fact, multiple witnesses gave evidence to the contrary. In these circumstances, the majority erred in concluding that the trial judge's failure to advert to suggestibility rendered his reasons insufficient.

C. THE TRIAL JUDGE DID NOT USE J.M.'S EVIDENCE TO CORROBORATE ITSELF

(1) Relevant legal principles

81. Trial judges are presumed to know the law. When a phrase in the reasons is open to two interpretations, "the one which is consistent with the trial judge's presumed knowledge of the applicable law must be preferred over one which suggests an erroneous application of the law".[170]

82. An appellate court should not "analyze a trial judge's reasons by dissecting them into small

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[168] Authors Benedet & Grant comment that a stereotype faced by witnesses with mental disabilities is the assumption that they cannot distinguish fact from fiction; *supra at* FN 3, *Osgoode Hall Law Journal* 50.1 (2012): 1-45, at p. 9.
[169] *Jessica Jones*, Appellant's Record, Volume III, at p. 188.
[170] *R v. Morrissey*, [1995] O.J. No. 639 (ONCA), at para. 27.

pieces and examining each piece in isolation". Reasons "must be read as a whole" and "with an appreciation of the purpose for which they were delivered".[171] They must be "responsive to the issues raised at trial", and must be read "in the context of the entire trial". Reasons should offer assurance to the parties "that their respective positions were understood and considered".[172]

83. To the extent that a credibility assessment of a principal Crown witness demands a search for confirmatory evidence, such evidence "does not need to directly implicate the accused or confirm the Crown witness' evidence in every way". However, the evidence should be "capable of restoring the trier's faith in the relevant aspects of the witness' account".[173]

(2) Application to the facts in this case

84. The trial judge did not use J.M.'s evidence to corroborate itself. The trial judge stated:

> …Other aspects of her evidence refer in substantial detail to certain events and places. Those are the abandoned house, the BBQ at CFB Trenton, the trip to Belleville with the stop at the Dairy Queen on the way home and the Pooch Park. Despite certain inconsistencies in her evidence, I find that these varying particulars and details of places and events corroborate her evidence and add to her credibility.

The Court of Appeal agreed unanimously that standing alone, the appeal should not be allowed based on this passage in the trial judge's reasons.[174]

85. As Pepall J.A. noted, the trial judge "could have been clearer, and more precise with his language".[175] However, when his reasons were read in the context of the trial record, it was apparent that the trial judge was simply adverting to the fact that there were a number of details in

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[171] *Morrissey*, *supra*, at para. 28.
[172] *Morrissey*, *supra*, at para. 29.
[173] *R v. Kehler*, 2004 SCC 11, at paras. 12-16; *R v. B.(A.)*, [1997] O.J. No. 1578 (ONCA), at paras. 15-18.
[174] *Slatter*, *supra*, at para 77, 153
[175] *Slatter*, *supra*, at para. 154.

J.M.'s account which were confirmed by other witnesses.[176] This was a relevant consideration, enhancing both the credibility and reliability of J.M.'s account.

86. The above-noted passage was directly responsive to the Crown's closing submissions, which stressed the important role of confirmatory evidence in restoring a trial judge's faith in a complainant's account. Crown counsel explained that even when the evidence did not directly implicate the accused, or confirm the complainant's evidence in every respect, it could still be used to bolster the complainant's credibility and reliability.[177] The Crown referred the trial judge to a number of details in J.M.'s evidence that were confirmed by other witnesses.[178] In doing so, he emphasized that J.M.'s allegations of sexual assault were grounded in reality. As Pepall J.A. noted, the impugned passage in the trial judge's reasons must be read with this context in mind.[179]

87. The majority of the Court of Appeal seemed to accept that the trial judge *could have been* referring to aspects of J.M.'s evidence that were confirmed by other witnesses. However, the majority down-played the value of this confirmatory evidence, stating:[180]

> …To the extent that the trial judge was identifying aspects of J.M's evidence that were confirmed by other evidence, as the Crown suggests, the confirmation involved nothing more than neutral or background factors. There was nothing that confirmed the sexual assault allegations themselves.

First, there is no such requirement. The fact that the Respondent, his wife, and Mr. C. all confirmed a variety of peripheral details in J.M.'s accounts was a relevant and probative consideration with respect to J.M.'s credibility and reliability. This evidence was capable of restoring the trial judge's faith in both the veracity and accuracy of J.M.'s testimony. Second, the "BBQ incident" provided

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[176] *Slatter*, *supra*, at para. 154.
[177] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at pp. 182-183.
[178] *Crown Counsel Submissions*, Appellant's Record, Volume VI, at pp. 202-205, 209-210.
[179] *Slatter*, *supra*, at para. 154.
[180] *Slatter*, *supra*, at para. 75.

cogent confirmation of J.M.'s sexual assault allegations. The Respondent and his wife confirmed J.M.'s testimony that someone complained about the Respondent's interaction with J.M. at the barbecue, and that as a result, J.M. was told to go inside.[181] This confirmatory evidence related to more than just "neutral or background" factors. It supported an inference that the Respondent had a sexual or romantic interest in J.M.

88. In sum, the Appellant submits that when the impugned passage is read in the context of the trial record, it is clear that the trial judge was properly referring to the variety of details in J.M.'s account that were confirmed by other witnesses.

D. THE TRIAL JUDGE REJECTED THE RESPONDENT'S EVIDENCE BASED ON A CONSIDERED AND REASONED ACCEPTANCE OF J.M.'S EVIDENCE

(1) Relevant legal principles

89. An accused is not entitled to an acquittal "simply because his evidence does not raise any obvious problems". An accused's evidence may be rejected "based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence".[182] This provides "as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence".[183]

90. When a complainant's evidence conflicts with an accused's evidence, and the trial judge gives reasons for accepting the complainant's evidence, it follows "of necessity that [the trial judge] rejected the accused's evidence where it conflicted with the complainant's evidence". In

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[181] *Thomas Slatter*, Appellant's Record, Volume V, at pp. 188-189; *Heather Slatter*, Appellant's Record, Volume VI, at pp. 43-44.
[182] *R v. R.A.* 2017 ONCA 714, at paras. 55-56.
[183] *R v. J.J.R.D.*, [2006] O.J. No. 4749 (ONCA), at para. 53.

these circumstances, no further explanation for rejecting the accused's evidence is required. The "convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt".[184]

(2) Application to the facts in this case

91. The trial judge did not need to explicitly reject the Respondent's evidence in his reasons. He explained why he accepted J.M.'s conflicting evidence. He convicted the Respondent. It follows that the Respondent's evidence did not raise a reasonable doubt.

92. The majority of the Court of Appeal held that the trial judge's acceptance of J.M.'s evidence was "tainted by error" — namely, the errors identified in grounds one and two. This prevented the majority from finding that the trial judge's rejection of the Respondent's evidence was based on a "considered and reasoned" acceptance of J.M.'s evidence.[185]

93. There were no errors in the trial judge's assessment of J.M.'s evidence. As noted by Pepall J.A., the trial judge instructed himself on the applicable legal principles.[186] He properly focused his assessment on J.M.'s evidence, approaching it from a "common sense perspective" and "in the same manner as [he] would the evidence of a child in the range of 10-12 years".[187] The trial judge was "alive to the frailties in the complainant's evidence" and "looked for and found confirmatory evidence to restore his faith in the accuracy and reliability of her version".[188] The trial judge attributed frailties in J.M.'s evidence with respect to "the timing and frequency of events" to her intellectual and developmental disabilities. This "did not cause him to doubt the veracity and

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[184] *R v. R.E.M.*, *supra*, at para. 66.
[185] *Slatter*, *supra*, at paras. 85, 88.
[186] *Slatter*, *supra*, at para. 156.
[187] *Slatter*, *supra*, at para. 156.
[188] *Slatter*, *supra*, at para. 158.

accuracy" of her account.[189] The trial judge addressed "potential improbabilities in [J.M.'s] evidence" and concluded that he did not find her version of events to be improbable at all.[190] The trial judge also noted "specific details" in J.M.'s account which he felt had a "ring of truth".[191] In light of the above, the trial judge's acceptance of J.M.'s evidence was "considered and reasoned". As Pepall J.A. put it, "no further explanation was required".[192]

[189] *Slatter*, *supra*, at para. 158.
[190] *Slatter*, *supra*, at para. 158.
[191] *Slatter*, *supra*, at para. 158.
[192] *Slatter*, *supra*, at para. 158.

PART IV: SUBMISSIONS RESPECTING COSTS

94. The Appellant makes no submissions as to costs.

PART V: NATURE OF ORDER SOUGHT

95. The Appellant respectfully asks that this appeal be allowed, and that the Respondent's conviction be restored.

PART VI: IMPACT OF ANY ORDER, RESTRICTION, OR BAN

96. The s. 486.4(1) publication ban currently in place in this matter restricts the publication of any information that could identify the complainant or the C. family. Assuming the Court's reasons do not refer to the complainant, the C. family, or A.C. by their full names, the publication ban would have no impact on the release of the Court's reasons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2020.

_____ _____

Jamie Klukach **Caitlin Sharawy**

Counsel for the Appellant, the Attorney General of Ontario

PART VII: TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

Case law **Para(s)**

Secondary Sources **Para(s)**

APPENDIX A

Transcript References RE: J.M.'s Evidence

NOTE: The page numbers in the table refer to the page numbers in the original transcript.

Examples of J.M. pushing back, and not accepting what is put to her.	Examples of J.M. either asking for clarification, or providing the Court with clarification.	Examples of J.M. admitting that she does not know the answer to a question.	Examples of J.M. admitting that she does not remember certain things.
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p. 300, line 13-17	p. 251, line 11-16	p. 323, line 15-17	p. 230, line 1-6
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p. 308, line 24 – p. 309 line 5	p. 265, line 11-19, line 20-26		p. 271, line 7-10
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p. 328, line 26-30	p. 273, line 31 – p. 274, line 3		p. 291, line 5-7.
p. 337, line 15-17, 26-32	p.303, line 20 - p. 304, line 10		p. 292, line 24-31
p. 341, line 12-21	p. 305, line 10-31		p. 294, line 24-26

Examples of J.M. pushing back, and not accepting what is put to her.	**Examples of J.M. either asking for clarification, or providing the Court with clarification.**	**Examples of J.M. admitting that she does not know the answer to a question.**	**Examples of J.M. admitting that she does not remember certain things.**
p. 342, line 5-19	p. 309, line 31-32		p. 297, line 20-27
p. 342, line 10-23	p. 311, line 24-32		p. 301, line 6 - 9, 29-31 to page 302, line 10.
p. 342, line 30- p. 344, line 23	p. 327, line 31 – p. 328, line 15		p. 305, line 10-20
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