Court File No. 38870

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and –

THOMAS SLATTER

Respondent
(Appellant)

RESPONDENT'S FACTUM

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TABLE OF CONTENTS

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RESPONDENT'S FACTUM

PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. The Respondent raised as a key plank of his defence on his trial for sexual assault in this matter a submission as to the unreliability of the complainant's allegations based on expert evidence from the prosecution's expert that, in light of the complainant's intellectual disability, she was much more susceptible than the norm to suggestive or leading questions, especially when posed by persons in authority, coupled with evidence that at least some aspects of the complainant's allegations had arisen, and/or evolved, in response to such influences.

2. The Respondent also presented a substantial defence case, including detailed testimony from himself and his spouse contradicting that of the complainant in important respects, describing circumstances rendering the allegations improbable, and (in the Appellant's case) denying the allegations against him.

3. The trial judge's reasons for conviction did not address the plank in the Respondent's defence regarding the complainant's enhanced susceptibility to

suggestive and leading questioning, or the expert evidence supporting it. Nor did those reasons explain why the defence evidence did not give rise to a reasonable doubt. The trial judge's reasons also contained apparently illogical reasoning supporting his acceptance of the complainant's evidence - that the complainant's allegations were made more credible by the volume and variety of different circumstances in which they were alleged to have occurred.

4. The Respondent appealed, submitting that the conviction should be set aside because of (1) the trial judge's failure to deal with the first plank in the Respondents's reliability submission, the suggestibility issue; (2) the trial judge's apparently illogical reasoning that the allegations of sexual assault were made more likely because the complainant alleged they happened in varying locations and circumstances; and (3) the trial judge's failure to explain why the defence evidence did not give rise to a reasonable doubt. The majority in the Court of Appeal (Trotter J.A. speaking for himself and Doherty J.A.) allowed the appeal.

5. As to the trial judge's failure to deal with the suggestibility issue, the majority correctly characterized the question before it as whether the reasons failed to respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel, and thereby left the reasons so deficient as to foreclose meaningful appellate review.

6. The majority carefully examined the trial judge's reasons, the submissions of counsel, and the evidence, to reach the conclusion that the suggestibility issue was sufficiently important to require that it be dealt with, and that the trial judge's reasons, read the context of the trial record, were so deficient as to foreclose meaningful appellate review of the trial judge's handling of that issue. Because there was no attempt to address or reconcile the evidence bearing on this issue in the trial judge's reasons, the appellate court was left to speculate as to whether the trial judge appreciated the significance of the evidence marshaled in support of the issue, and the role (if any) that it played in his ultimate findings.

7. The majority rejected the Crown's argument that it should review various elements of the trial record and, even in light of the expert evidence, find that the complainant's reliability was not compromised by her suggestibility, stating that this was a matter for the trial judge, beyond the scope of proper appellate review.

8. On the second ground of appeal, the majority concluded that the trial judge's reasons did appear to reflect the illogical reasoning that the complainant's allegations were made more credible by the variety of different circumstances in which they were alleged to have occurred; and that even if he had not made that error, and was merely identifying aspects of the complainant's evidence that were confirmed by other evidence, he had provided no analysis for that conclusion, leaving the appellate court, as with the first issue, to speculate as to what he had in fact done with the issue.

9. As to the third ground of appeal, the majority observed that, although the Respondent had testified at length and was cross-examined extensively by the Crown on all aspects of the complainant's allegations, many parts of his evidence were supported by his wife's testimony, and both gave evidence contradicting the complainant on the circumstances surrounding the alleged incident, the trial judge did not explicitly reject the Respondent's evidence, failed to make any finding about the evidence of Mrs. S., and gave no indication why their evidence did not raise a reasonable doubt. Consequently, the trial judge's reasons had failed to perform their essential function – to inform the accused as to why his evidence did not leave the trial judge with a reasonable doubt.

10. The majority acknowledged that, where the trial judge has accepted the complainant's evidence, that might in itself be taken as a sufficient basis for his rejection of the contrary defence evidence. However, in order to be capable of justifying the apparent rejection of the defence evidence without any explanation, the trial judge's acceptance of the complainant's evidence has to be "considered and reasoned". Given the trial judge's errors in dealing with the complainant's evidence identified in the first two grounds of appeal, his acceptance of her evidence was not "considered and

reasoned", and therefore not a legitimate basis for rejecting the evidence of the Respondent and his wife.

11. Pepall J.A., dissenting, would have dismissed the appeal. She concluded that the trial judge's reasons dealt adequately with the suggestibility issue because passages in his reasons and his interchanges with counsel showed that the trial judge was alive to the reliability issue, and, on Pepall J.A.'s review of the evidence at trial, the suggestibility argument raised by the defence was in any event so lacking in merit that the trial judge didn't need to explain whether he had rejected it or why.

12. As to the second ground of appeal, Justice Pepall accepted the Crown's argument that the problematic passage in the trial judge's reasons could be read as innocuous, merely making the point that many details in the complainant's account of the several different events were confirmed by other witnesses.

13. As to the third ground of appeal, Justice Pepall found the trial judge's failure to explain his rejection of the defence case supportable on the basis that his rejection of the Respondent's evidence was implicit in his "considered and reasoned" acceptance of the complainant's evidence – a line of reasoning open to her because she had rejected the first two grounds of appeal, so that there were no deficiencies in the trial judge's reasons preventing them from being "considered and reasoned".

14. The Crown appeals to this Court, arguing, essentially, that the majority got it wrong and Pepall J.A. got it right. The Crown asserts that the majority's conclusions were based on nothing more than a "cursory" "surface level" consideration of the trial record, reached "without meaningful consideration of whether the evidence actually supported it", and "with little regard" for what the trial record demonstrated about the complainant as an individual.

15. The Respondent submits that the majority correctly defined the legal framework governing its analysis of all three issues. Moreover, the majority's application of that

framework to the entire trial record – the evidence, the submissions of counsel, and the trial judge's reasons bearing on the issues - was, as one would expect from appellate jurists of this calibre, comprehensive, painstakingly thorough, and balanced – the antithesis of "cursory" or "surface level". The Appellant has failed to demonstrate reversible error by the majority. This appeal should accordingly be dismissed.

STATEMENT OF FACTS – THE APPELLANT'S STATEMENT OF FACTS

16. The Appellant's statement of the facts omits some aspects of the record and the reasons, and mischaracterizes others, resulting in an unbalanced picture of the case. We have therefore set out in what follows what we hope to be a complete and balanced picture of the evidence, and the reasons of the Courts below, so as to make clear the foundation on which the majority in the Court of Appeal built its analysis of the issues.

STATEMENT OF FACTS – FACTS RELIED ON BY THE RESPONDENT

The Background

17. The Respondent Mr. Thomas S., a retired welder 65 years old at the time of trial, runs a property maintenance business with his spouse out of their home in Kenron Estates, a mobile home park near Belleville.[1] By 2009 - 2013, the S.'s and their neighbours Arnie and Lorraine C. were close friends, going out to events together, spending time at each other's homes, and playing cards regularly at the C. residence.[2]

18. The C.'s provided foster care for developmentally delayed adults under the aegis of Pathways to Independence, an agency in Belleville. As of 2009 – 2013, the

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[1] Evidence of the Respondent, Appellant's Record Vol. V Tab 2 p. 87 - 89, evidence of Mrs. S. Vol. VI Tab 1 p. 2.

[2] Evidence of the Respondent, Appellant's Record Vol. V Tab 2 p. 93 line 5 – p. 97 line 15, evidence of Mrs. S. Vol. VI p. 5 line 20 – p. 8 line 25, transcript of Arnold C. preliminary inquiry evidence, Exhibit #5, Appellant's Record Vol. II Tab 9 p. 50-52.

complainant resided in the C. home pursuant to a placement with Pathways.[3] The complainant was roughly 18 - 22 years of age in that time frame. She suffered from an intellectual disability. At Mrs. C.'s suggestion, the complainant walked the S.'s dogs to help keep her weight down, sometimes with Mr. S., sometimes with Mrs. S, at various places in the vicinity, including the streets of the mobile home park, an off-leash dog trail (the "Pooch Path") in the Conservation Area a short drive away, and an abandoned property neighbouring the mobile home park.[4]

The Complainant's Allegations

19. The complainant's allegations against the Respondent were summarized by the trial judge, a summary adopted by the majority. We set out a condensed version here, and would refer the reader to the majority's description at para. 19 – 30 for complete details[5]:

20. The M.'s Home: The complainant said that she went with the Respondent on one of his visits to check on the home of the M.'s, friends of the S.'s in the mobile home park, when they were away. Inside the M.'s' home, the Respondent removed the complainant's clothes, put his fingers in her vagina, and then fondled and sucked her "boobs".

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[3] Evidence of Stacey Callaghan, Appellant's Record Vol. III Tab 2 p. 19 line 15 – p. 20 line 15, p. 25 line 1-31, p. 67 line 10-25, Evidence of Darlene Brennan, Appellant's Record Vol. V Tab 1 p. 5 line 15 – p. 6 line 19, Majority Reasons in the Court of Appeal, para. 8, Appellant's Record Vol. I Tab 3 p. 42.

[4] Evidence of the Respondent, Appellant's Record Vol. V Tab 2 p. 98 line 15 - p. 100 line 30, p. 106 line 10 – p. 107 line 10, p. 140 line 30 – p. 145 line 25, evidence of Mrs. S. Appellant's Record Vol. VI Tab 1 p. 8 line 25 –p. 16 line 10, p. 34 line 20 – p. 40 line 5, Transcript of Arnold C. preliminary inquiry evidence, Exhibit #5, Appellant's Record Vol. II Tab 9 p. 51, 55 - 56, 65 - 66, Majority Reasons in the Court of Appeal, para. 17 - 19, Appellant's Record Vol. I Tab 3 p. 45.

[5] Majority Reasons in the Court of Appeal, para. 8, Appellant's Record Vol. I Tab 3 p. para. 19 – 30, Appellant's Record Vol. I, Tab 3, p. 45 ff.

21. The Pooch Path: The complainant described driving with the Respondent to the Pooch Path more than once. The appellant would touch her vagina (by putting two fingers inside) and her "boobs". She also said that "sometimes there [would] be sex included.". The Respondent took off the complainant's clothes and laid down the blanket, at "several spots" off the path

22. Mr. and Mrs. C.'s Residence: The complainant testified that the Respondent sometimes came to her home when she was alone. She described one incident when the Respondent came over when she was cleaning the house, took her clothes off, and then his own, and had sexual intercourse with her. Similar incidents occurred on other occasions. S.'s frequently visited Mr. and Mrs. C.'s home on Friday nights to play cards. The Respondent would leave the table to use the washroom and stop by the complainant's bedroom to touch her "butt" and "boobs", sometimes above the clothing, and sometimes under. On another occasion, the Respondent let himself into Mr. and Mrs. C.'s trailer and came into the bathroom where the complainant was showering, and bathed her with a "scrunchie".

23. The Dairy Queen Incident: The Respondent invited the complainant to come with him one time when he was going to cut a lawn, promising to take her to the Dairy Queen. The complainant said that the Respondent "[felt] me up" while she sat in the passenger seat of his vehicle. He had one hand on the steering wheel and reached across with his other to touch her.

24. The Airbase Incident: The complainant testified that Mr. and Mrs. C. and the S.'s would socialize at the local air force base (CFB Trenton) some Friday evenings. The Respondent volunteered by operating the BBQ while the others were inside the building. The complainant was allowed to be outside on these nights until an incident occurred. She was texting on her phone when the Respondent leaned over and kissed her on the forehead and cheeks. After that occurred, Mrs. C. told the complainant to stay inside.

25. The Abandoned House: The complainant said she and the Respondent had engaged in "doggie style sex" at an abandoned building a short walk from Kenron Estates She was unsure of how many times it happened.

26. The S.'s Home: The complainant testified that the Respondent sometimes had intercourse with her at the S.'s' home, in the main bedroom. The Respondent removed the complainant's clothing and his own and placed it on the floor. The Respondent once told the complainant that, if she lost weight, she would be a skinny girl with big breasts.

The Sequence of Disclosure

27. As the complainant spoke to various people, most of whom were persons in authority, she alleged increasingly serious sexual conduct. This progression was accurately detailed by the majority[6]:

> (1) Statements made to A.C., a friend of the complainant, in July, 2013 at summer camp. A.C. testified that she and the complainant were discussing men that they liked or had sex with. During this conversation, the complainant said that there was a neighbour of hers with whom she had sex. The complainant reported that the neighbour kissed her and touched her inappropriately. The complainant smirked and giggled during this conversation. A.C. said that the complainant smiles a lot- "that's just her." In cross-examination, A.C. adopted a previous statement in which she reported asking the complainant if she had wanted the sexual activity to occur. The complainant changed the subject without answering. A.C. did not report the conversation to anyone because the complainant did not say that the sexual activity was without her consent.

[6] Majority Reasons in the Court of Appeal, para. 16, 31 - 42, Appellant's Record Vol. I Tab 3 p. 45, 49 ff.

The complainant testified about this conversation explaining that she and A.C. were discussing "stuff that happened to us." Although she could not recall her exact words, the complainant recalled telling A.C. that she was having sex with a middle-aged neighbour. On cross-examination, she denied making the story up.

(2) In August of 2013, the complainant told Mrs. C., her foster mother, that the Respondent had touched her breasts. Mrs. C. called the Respondent to confront him with this allegation. The complainant said that she overheard the Respondent on the phone and heard him say, "[N]o ma'am, I didn't." The Respondent and his wife confirmed that this call happened in the way that the complainant described it. Mrs. C. did not testify at trial. There was no evidence as to the exchange between her and the complainant that preceded this allegation and the call.

(3) On September 9, 2013, the complainant disclosed the sexual assaults to Stacey Callahan, a case worker with Pathways. A few months earlier, in July 2013, Ms. Callahan had asked the complainant if her relationship with the Respondent was "unhealthy". The complainant denied that it was. When Ms. Callahan met with the complainant and Mrs. C. on September 9, 2013, the complainant said, "You're right. Tom's been touching me." The complainant did not provide any details at the time. However, Ms. Callahan learned that the complainant had disclosed the touching to Mrs. C. two to three weeks earlier. The complainant was asked why, when Stacey Callahan first asked about her relationship with the Respondent, she denied that it was "unhealthy". The complainant said that, while she never wanted any of the sexual contact to happen, she liked walking the dogs.

(4) The next day, September 10, 2013, Ms. Callahan took the complainant to see her supervisor at Pathways, Darlene Brennan. The complainant told Ms. Brennan what the Respondent had done to her. Ms. Brennan called the police to report the matter. Ms. Brennan told the police that the complainant said she had been "raped" by the Respondent. Ms. Brennan insisted that the word "raped" came

from the complainant. She denied that she was the first to use this word. Ms. Brennan acknowledged that this important detail was not recorded in her notes. However, she testified that the complainant would not use an expression such as "sexual assault".

(5) The complainant met with a police officer, Paul Maybee, that same day, on September 10, 2013. The interview was recorded. In this interview, the complainant told P.C. Maybee that she was having "flashbacks" of things that happened to her in the past. At trial the complainant said that she did not tell P.C. Maybee everything that happened. She said that she was uncomfortable because "he is a male." The complainant had not expressed this concern about P.C. Maybee before trial.

(6) Shortly after the interview with P.C. Maybee, the case was assigned to Detective Amy Simpson. Det. Simpson arranged to meet the complainant, along with Ms. Brennan, at the Pooch Path on September 13, 2013. This was the first time Det. Simpson met the complainant. The purpose of the meeting was for the complainant to point out where the incidents had happened. They walked along the path and the complainant pointed to various locations where she said she was sexually assaulted. The three also looked for condoms and packaging but were unsuccessful. Det. Simpson testified that, given the passage of time, she did not expect to find any such debris. Importantly, none of this encounter, which lasted for about an hour, was recorded.

(7) On September 17, 2013, Ms. Brennan took the complainant for an interview with Det . Simpson on September 17, 2013. On the way, the complainant pointed to the abandoned house close to Mr. and Mrs. C.'s residence and said the Respondent sexually assaulted her at this location. There was no record of this conversation. The complainant then gave her formal statement to Det. Simpson.

(8) Arrangements were made to have the complainant see a counsellor, Mary Joan Brinson. Ms. Brinson's notes indicated that the complainant said the abuse began "shortly after she was placed with [Mr. and Mrs. C.]", i.e., around four years earlier. Defence counsel pointed out this was inconsistent with the complainant's statement to Ms. Callahan - made just a few days earlier - that the assaults began in early 2013.

Confronted with this inconsistency, the complainant admitted that she told different things to different people. The complainant said she remembered more about the incidents as time went on. She denied the suggestion that she made up the allegations against the Respondent because she was often in conflict with Mrs. C.

The Evidence Provided by the Crown's Expert

28. The Crown called Dr. Jessica Jones, a forensic clinical psychologist and professor of psychiatry, trained in assessing, treating and diagnosing mental disorders, with a subspecialty in intellectual and developmental disabilities, and over 20 years' experience in the field. Her training and experience equipped her to examine the level of intellectual, academic and adaptive functioning of individuals, including their capacity or ability to testify, and, in that context, their susceptibility to suggestion in various forms. [7] She was qualified to administer and interpret psychometric testing of individuals.[8] She was qualified by the trial judge to give expert evidence on the cognitive ability of adults with developmental disabilities.[9]

29. At the request of the Crown, Dr. Jones reviewed a series of reports on the complainant, obtained background information from her caregivers, and conducted an

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[7] Evidence of Dr. Jones, Appellant's Record Vol. III Tab 3 p. 113 line 1 to p. 114 line 15, p. 115 line 1 to p. 116 line 3, p. 116 line 25 to p. 117 line 27, p. 118 line 12 – 25.

[8] Ibid p. 115 line 24 – p. 116 line 3.

[9] Ibid p. 120 line 5 – 15.

in-person battery of assessments of the complainant, each measuring a discrete aspect of her intellectual functioning, allowing Dr. Jones to assess the complainant's level of intellectual functioning across a broad spectrum, including her suggestibility. The tests were designed to be standardized and norm-referenced, ensuring consistency and validity.[10] Dr. Jones affirmed that she was to assess the complainant as a unique individual, not a stereotype.[11]

30. Dr. Jones diagnosed the complainant as having an intellectual developmental disorder resulting in a "mild" disability, placing the complainant's intellectual functioning at the bottom two percent of the general population.[12] Dr. Jones' assessment of the complainant included testing to measure her suggestibility – her susceptibility to leading questions, or questions which gave an indication of the desired answer. This was, like the others, a standardized and norm-referenced test. It allowed Dr. Jones to assess the complainant's suggestibility both as compared to the normative population, and to other persons with intellectual disabilities.[13]

31. Dr. Jones testified that generally, people with intellectual disabilities are "highly predisposed to being more suggestible and [to] acquiesce". In Dr. Jones' opinion, the complainant was in the 75th percentile for suggestibility, meaning that the complainant was 75% more suggestible than the normative population.[14] [emphasis added]

32. Dr. Jones testified that those questioning such disabled individuals must be careful to avoid asking leading questions, or questions suggesting preference for a particular answer, because such an individual will be more likely to respond to a leading

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[10] Ibid p. 118 line 20 to p. 119 line 3, p. 120 line 23 to p. 125 line 20, p. 154 line 9 to p. 155 line 28, p. 158 line 20 – 25, p. 163 line 17 to p. 164 line 8, p. 165 line 4 to p. 166 line 24.

[11] Ibid p. 165 line 1 – 3.

[12] Ibid, p. 122 line 10 to p. 123 line 2, p. 127 line 9 – 14, .

[13] Ibid, p. 165 line 17 to p. 166 line 24.

[14] Ibid, p. 167 line 12 to p. 168 line 12.

question by agreeing with what the questioner suggests, even when the suggestion is unintentional.[15] This particularly when the questioner is a person in authority, like a police officer or a caregiver.[16] Furthermore, the individual will have a heightened propensity to acquiesce and provide an affirmative response when he or she is uncertain about something.[17]

33. Dr. Jones further testified that when a highly suggestible person is questioned repeatedly, it may result in the provision of new or modified information.[18] Dr. Jones agreed that because answers may be influenced by the content and presentation of the questions, it is difficult to assess the reliability of information provided unless there is an accurate record of the questioning that elicited the response.[19]

34. Dr. Jones acknowledged in re-examination that suggestibility decreases if the subject of discussion is "more personalized, significant and emotive to the person" such as sexual assault.[20]

35. Dr. Jones reviewed a transcript of the complainant's first police interview, with P.C. Maybee, on September 10, 2013 as detailed above at para. 27(5). Dr. Jones observed "multiple" examples of leading questions or forced-choice questions where the complainant changed or distorted what she had said before. But there were also examples "where the information stayed the same". Dr. Jones explained that the complainant's level of suggestibility was not static, but rather depended on the facts and the question posed "to her, whether it is pressured or not." She said that "[t]here are numerous examples where [the complainant] stayed with the same answer and then

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[15] Ibid, p. 181 line 23 to p. 182 line 14

[16] Ibid, p. 168 line 19 – 31.

[17] Ibid, p. 182 line 8 – 15.

[18] Ibid, p. 169 line 12 – 15.

[19] Ibid, p. 172 line 12 – 30.

[20] Ibid, p. 188 line 14 to p. 189 line 8.

numerous examples where she went back to [the] initial answer."[21] Dr. Jones was not asked to provide examples of the phenomena she described. Defence counsel did not ask for a transcript of this interview to be entered into evidence. Crown counsel did not question the admissibility or weight to be given to Dr. Jones' evidence. In re-examination, he did not seek to have Dr. Jones qualify or explain her description of the police interview.

The Defence Case

36. The Respondent and Mrs. S. testified at length (Mr. S.'s testimony spanned some 113 pages of transcript, Mrs. S.'s 50 pages), providing evidence contradicting that of the complainant, describing circumstances rendering the allegations improbable, and (in the Appellant's case) denying the allegations against him.[22]The defence had also called the witnesses A.C. and Det. Simpson as part of its case.[23]

The Defence Position at Trial

37. The Respondent, in addition to relying on the defence evidence, raised a two-pronged challenge to the reliability – as opposed to credibility – of the complainant's evidence.

38. The first plank in that challenge to the complainant's reliability was the suggestibility issue – the Respondent's submission as to the unreliability of the complainant's allegations, anchored on the expert evidence from Dr. Jones as to the complainant's enhanced susceptibility to leading or suggestive questions and the consequent importance of a reliable record of the questioning, coupled with evidence

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[21] Ibid, p. 168 line 32 to p. 169 line 25, p. 170 line 26 to p. 171 line 28.

[22]Evidence of the Respondent, Appellant's Record Vol. V Tab 2 p. 87 ff. and Tab 4 p. 161 ff; Evidence of Mrs. S., Appellant's Record Vol. VI Tab 1 p. 1 ff.

[23] Evidence of A.C., Appellant's Record Vol. V Tab 3 p.151 ff.;Evidence of Amy Simpson, Appellant's Record Vol. VI Tab 2 p. 59 ff.

that at least some aspects of her allegations appeared to have arisen in response to such influences in the questioning that occurred, for example the first police interview reviewed by Dr. Jones, and with an absence of any reliable record of most of the questioning that had occurred.[24]

39. The second plank in the Respondent's reliability submission was the argument that the reliability of her evidence was eroded by inconsistencies and implausibilities in various elements of her allegations.[25]

Reasons for Judgment at Trial

40. The trial judge's reasons, while they referred to the second plank in the Respondent's challenge to the reliability of the complainant's evidence, based on inconsistencies and implausibilities in her allegations, said nothing about the first plank in that challenge, the suggestibility issue, or Dr. Jones' evidence supporting it. Moreover, the trial judge, in his discussion of the inconsistencies / implausibilities reliability issue he did mention, seemed to fall into an assessment of whether the complainant was trying to tell the truth, rather than considering the distinct issue of whether her evidence was reliable. After reviewing several pieces of the complainant's evidence, the trial judge, in what was the conclusive paragraph of his reasons for conviction, said:

> [48]… These are excerpts from her evidence which I find to have the ring of truth. Other aspects of her evidence refer in substantial detail to certain events and places. … I find that these varying particulars and details of places and events corroborate her evidence and add to her credibility. I am satisfied beyond a

[24] Submissions of trial defence counsel, Appellant's Record Vol. VI Tab 3 p. 97 line 10-15, p. 98 line 30 – p. 100 line 15, p. 101 line 10 – p. 102 line 20, p. 107 line 4 to p. 108 line 15, p. 115 line 17 to p.117 line 30, p. 130 line 12 - 28

[25] Ibid, p. 111 line 9 – 30, p. 120 line 1 – 25, p. 121 line 7 to p. 126 line 30, p. 137 line 15 to p. 138 line 15; as discussed by the trial judge at para. 43 - 44, Reasons for Judgment at trial, Appellant's Record Vol. 1 Tab 1, p. 20 – 22.

> reasonable doubt that sexual encounters between the accused and the complainant occurred…"[emphasis added][26]

41. The trial judge also appeared to reason in that passage that the complainant's allegations were made more credible by the variety of different circumstances in which they were alleged to have occurred, saying *"I find that these varying particulars and details of places and events corroborate her evidence and add to her credibility.*" On its face, this reasoning seemed illogical; allegations of sexual assault are not made more likely because the complainant alleges they happened in varying locations and circumstances.

42. The trial judge also failed to explain why the defence evidence did not give rise to a reasonable doubt. In the second underlined passage in para. 48 as quoted just above, the trial judge went directly from acceptance of the complainant's evidence as "credible" to his conclusion of guilt beyond a reasonable doubt, with no analysis of the defence evidence, no explanation as to why it failed to raise a reasonable doubt. Nor was there any such analysis anywhere else in the trial judge's reasons.

The Appeal to the Court of Appeal

43. On appeal to the Court of Appeal, the Respondent raised three grounds of appeal:

> (1) Failure by the trial judge to adequately address the suggestibility issue arising from the evidence of the Crown's expert witness regarding the particular suggestibility of the complainant, and the interplay between that evidence and the sequence of disclosures by the complainant.

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[26] Reasons for Judgment at trial, para. 48, Appellant's Record Vol. I Tab 1 p.24 – 27.

(2) The illogical reasoning of the trial judge that the allegations of sexual assault were made more likely because the complainant alleged that they happened in varying locations and circumstances.

(3) Failure by the trial judge to adequately explain his apparent rejection of the defence evidence.

44. The majority in the Court of Appeal (Justice Trotter writing for himself and Justice Doherty) accepted all three, finding (1) and (2) determinative in requiring a new trial. The minority (Justice Pepall) dissented on all three. To avoid repetition, we reserve discussion of the details of their reasons for argument.

PART II – THE RESPONDENT'S POSITION WITH RESPECT TO THE QUESTIONS RAISED BY THE APPELLANT

45. The Respondent agrees that the questions raised by the appeal are accurately stated by the Appellant as: Did the majority of the Court of Appeal err in finding that the trial judge:

1. Failed to address the complainant's reliability and suggestibility;
2. Used the complainant's evidence to corroborate itself; and
3. Failed to explain why he rejected the Respondent's evidence.

PART III – STATEMENT OF ARGUMENT

THE FIRST QUESTION FOR THIS COURT - DID THE COURT OF APPEAL ERR IN FINDING THAT THE TRIAL JUDGE FAILED TO ADDRESS THE COMPLAINANT'S RELIABILITY AND SUGGESTIBILITY?

46. The first question for this Court: Did the Court of Appeal err in concluding that the trial judge's reasons were so deficient as to foreclose meaningful appellate review in that they failed to adequately grapple with the suggestibility issue - the defence challenge to

the reliability of the complainant's allegations given her enhanced susceptibility to suggestion?

47. We begin by reviewing the law governing what the Court of Appeal was required to do in addressing this issue. We then demonstrate that the majority did exactly what it was required of it. We then examine the errors which the dissent and the Appellant Crown claim were made by the majority, and explain why no errors were made as alleged.

The Law Governing What The Court Of Appeal Was Required To Do In Addressing This Issue

48. When presented with an appeal on the ground that the reasons given by the trial judge in a criminal proceeding are inadequate, the question for the appellate court is whether the trial judge's reasons, considered in the context of the evidence, the live issues as they emerged at trial, and the submissions of counsel, deprive the appellant of the right to meaningful appellate review. If the appellate court concludes that the trial judge, on the record as a whole, did not deal with the substance of the critical issues on the case, then, and then only, it is entitled to conclude that the deficiency of the reasons constitute error in law.[27]

49. Whether an issue at trial is of sufficient importance that the trial judge's failure to grapple with it in his reasons will render those reasons inadequate must be assessed by the appellate court in light of the evidence, the submissions of counsel at trial, and the entire history of the trial. Ultimately, the appellate court has to form a judgment as to whether, taking all of those factors into account, the issue in question is seen to be sufficiently important, in the context of the trial as a whole, to require the trial judge to

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[27] *R. v. Sheppard 2002 SCC 26, [2002] 1 S.C.R. 869, [2002] S.C.J. No. 30, (Supreme Court of Canada) at para. 55*; *R. c. Dinardo 2008 SCC 24, [2008] 1 S.C.R. 788, [2008] S.C.J. No. 24, 231 C.C.C. (Supreme Court of Canada) at para. 24 – 34*; *R. v. M. (R.E.) 2008 SCC 51, [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, (Supreme Court of Canada) at para. 15 – 25, 29, 34 – 57*; *R. v. Capano 2014 ONCA 599, [2014] O.J. No. 3829, (Ontario Court of Appeal) at para. 46 – 52*.

address it in his reasons. Various terms have been used to describe such issues – "live issues", "central issues", "critical issues", "key issues", "important issues".[28]

50. Even if the reasons when read alone appear to be deficient, the appellate court must consider whether the reasons for the trial judge's conclusion are, nonetheless, patent on the record. If so, the reasons will be deemed sufficient despite their apparent deficiency.[29]

51. However, the appellate court's ability to "save" deficient reasons by referring to the record is limited. The appellate court must be able to say that, on looking at the record, it is patent or obvious that the trial judge did grapple with the issue, and why he resolved it as he apparently did. The appellate court cannot go past that and engage in an examination of the evidence to see whether, in the judgment of the appellate court, it can explain the result the trial judge apparently reached.[30]

52. One example of an issue which can be a "live issue" calling for the trial judge to address it in his or her reasons is the issue of the complainant's reliability. Depending on the circumstances of the case, the reliability, as opposed to the credibility, of the complainant may be a distinct issue of sufficient importance to be the sort of live issue which the trial judge must grapple with.[31]

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[28] *R. v. Sheppard, para. 28, 39, 42, 45, 55; R. c. Dinardo, para. 27 - 31; R. v. M. (R.E.) at para. 29, 34, 35(3), 41, 43, 57; R. v. Capano at para. 47 – 50.*

[29] *R. v. Sheppard, para. 46; R. c. Dinardo para. 32; R. v. M. (R.E.) para. 39 – 40, 44; R. v. Capano para. 50, 52.*

[30] *R. c. Dinardo para. 32 – 33; R. v. Capano para. 52; R. v. Black 2017 CarswellOnt 10794, 2017 ONCA 599, (Ontario Court of Appeal) at para. 40, aff'd. R. v. Black 2018 2018 SCC 10, [2018] 1 S.C.R. 265, (Supreme Court of Canada) at para. 3.*

[31] *R . v. C. (H.), 2009 ONCA 56, at paras. 40-47; R. v. Nicholson,[1995] OJ No. 3152, 45 CR (4th) 130 (Ont. C.A.) at paras. 1-5; R. v. Perrone, 2014 MBCA 74 at paras. 25 – 35;*

The Court of Appeal Correctly Applied the Governing Legal Framework to the Trial Record

53. In dealing with the first ground of appeal in the Court of Appeal, the argument that the trial judge's reasons were inadequate because they failed to deal with the first plank in the defence's challenge to the reliability of the complainant's evidence, the suggestibility issue, the Court of Appeal had to assess whether the issue was, in the context of the trial record, a "live", "central", "critical", or "key" issue of sufficient importance to call for comment by the trial judge. The majority concluded that it was. As we will demonstrate in what follows, that conclusion was correct; it was firmly anchored in the trial record – in the evidence, and in counsel's submissions.

54. Throughout trial defence counsel's closing submissions, the suggestibility issue, and its roots in the evidence, formed a major plank in the defence challenge to the reliability of the complainant's evidence, distinct from the leg of that challenge based on inconsistencies and implausibilities in the complainant's evidence. Trial counsel expressed this aspect of defence case in clear and compelling language, making clear that it was a key issue, a central plank of the defence.[32] As quoted by the majority:

> "Here it is incremental disclosure with unrecorded interviews with a vulnerable suggestive witness whose evidence can be changed by questioning. So I suggest to you that's different that the girl who comes forward and says to the police one thing, says a bit more at the preliminary inquiry, says a little bit more at trial. It's not what happens here. It's a developing story that gets wider as she's asked about it. But we don't have those interviews.
>
> And even when we do have the interviews, there [are] leading questions in them. There [are] questions that change her answers, as the doctor pointed out about the first interview. [Emphasis added.]…"[33]

[32] Submissions of trial defence counsel, Appellant's Record Vol. VI Tab 3 p. 97 line 10-15, p. 98 line 30 – p. 100 line 15, p. 101 line 10 – p. 102 line 20, p. 107 line 4 to p. 108 line 15, p. 115 line 17 to p.117 line 30, p. 130 line 12 - 28.

[33] Ibid, p. 130 line 12 - 28.

55. Trial counsel systematically took the trial judge through the elements of the evidence which gave substance to this issue, inter alia by establishing the nexus between Dr. Jones' evidence and the manner in which the complainant's disclosures had actually unfolded:

> (1) The allegation made to A.C. at camp in July, 2013 that the complainant had had sex with a middle-aged neighbour, made in the context of the complainant and her "best friend" sharing their sexual experiences, and A.C. first telling about having had sex and then inviting the complainant to tell about her own sexual activity. This would be a clear situation in which, leaving aside normal teen peer pressures, the complainant's enhanced susceptibility to providing the sort of answer that seems to be desired, to provide an affirmative answer, could come into play.[34]
>
> (2) The absence of any evidence as to what was said between Mrs. C. and the complainant that led up to the complainant's allegation in July 2013 to Mrs. C. that Mr. S. had touched her breasts. Trial counsel pointed out the connection to Dr. Jones' evidence that, given the enhanced susceptibility of the complainant to questioning encouraging or discouraging a certain answer, and to leading questions, it was difficult to assess the reliability of allegations when there was no record of the discussion which precipitated them.[35]
>
> (3) Similarly, the absence of any record of the discussion between Ms. Callaghan and the complainant that precipitated the allegations made on September 9, 2013.[36]

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[34] Submissions of trial defence counsel, Appellant's Record Vol. VI Tab 3 at p. 129 line 25 – p. 130 line 10.

[35] Ibid, Appellant's Record Vol. VI Tab 3 at p.126 line 5 – p. 128 line 25.

[36] Ibid, Appellant's Record Vol. VI Tab 3 at p. 128 line 5-25.

(4) The evidence indicating that the complainant never used the word “rape” in any allegation until Ms. Brennan used it in her discussions with the complainant and Ms. Callaghan on September 10, 2013. Ms. Brennan insisted the complainant used the term first, but admitted that her notes made no mention of it being used by the complainant before Ms. Brennan used it. As counsel observed, it seems unlikely that the complainant’s use of the term would not have been noted. Trial counsel pointed out the tie-in to Dr. Jones’ evidence about the complainant adding to or modifying her evidence in response to suggestion inherent in questioning.[37]

(5) As discussed by the majority, the presence in the record of the first police interview by Officer Maybee on September 10, 2013, of "multiple" examples of leading questions or forced-choice questions where the complainant changed or distorted what she had said before, thus tying into Dr. Jones’ evidence about the complainant’s enhanced susceptibility to adjusting her answers in response to such questioning.

(6) The absence of evidence as to the content of the questioning of the complainant during her attendance at the pooch path with Officer Simpson and Ms. Brennan, feeding into Dr. Jones’ point about the impossibility of assessing the reliability of the complainant’s responses.[38]

56. Against this backdrop, the majority found that the issue of the complainant’s suggestibility, as an aspect of her reliability, was a live issue in this case that had to be addressed, noting that it was an important plank in the defence position, clearly grounded in the evidentiary record, and emphasized in defence counsel's closing

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[37] Submissions of trial defence counsel, Appellant’s Record Vol. VI Tab 3 at p. 107 line 3 – p. 108 line 15, p. 135 line 20-30.

[38] Submissions of trial defence counsel, Appellant’s Record Vol. VI Tab 3 p. 100 line 10-15, p. 126 line 8-15, p. 127 line 9 p. 741 line 24.

submissions. [39]The Respondent submits that, on this record, that reasoning is unimpeachable.

57. The Crown on appeal argued, as it does here, that the suggestibility issue was not strong enough on the evidence that the trial judge was required to deal with it. The Crown argued that the complainant's testimony did not reveal that she was a particularly suggestible witness; that the level of detail in the complainant's evidence made it unlikely that all of her allegations were suggested to her by others; and that the appellant's argument was based on speculation about what may have been said to the complainant in the days following her disclosure to Ms. Callahan, and others.[40]

58. The majority agreed that the complainant had seemed to "hold her own" while being questioned by counsel and the trial judge, and observed that these arguments were all plausible, and had been advanced by the Crown at trial. However, it concluded that the Crown was essentially asking the appellate court to review the record and, even in light of Dr. Jones' evidence, find that the complainant's reliability was not compromised by her suggestibility. The majority declined to be drawn into that sort of analysis, stating that it was a matter for the trial judge, and beyond the scope of proper appellate review.[41]

59. The Respondent submits that this was, again, the correct result on the record in this case. On the trial record, the suggestibility leg of the Respondent's challenge to the complainant's reliability was an important plank in the defence position, clearly grounded in the evidentiary record, and emphasized in defence counsel's closing submissions. No more was required to make the issue a live issue that the trial judge was required to address. The authorities cited above make clear that the majority was right to decline the Crown's invitation to try, on the written record, to explore and weigh the details of the

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[39] Majority Reasons for Judgment in the Court of Appeal, para. 61 – 63, 66, Appellant's Record Vol. I Tab 3 p. 57 - 59.

[40] Ibid, para. 67 - 69, Appellant's Record Vol. I Tab 3 p. 59 - 60.

[41] Ibid, para. 69 – 70, Appellant's Record Vol. I Tab 3 p. 60.

evidence to see if it could construct a basis to support what the trial judge might have decided or not decided.

60. The majority then considered whether the trial judge's reasons addressed the issue adequately, or, to the contrary, were so deficient that they foreclosed meaningful appellate review. The majority concluded that they were deficient. Justice Trotter:

> "[64] I agree with the appellant that the trial judge failed to directly address [the complainant's] reliability. The trial judge's reasons focus almost exclusively on [the complainant's] credibility or sincerity as a witness. The trial judge isolated several aspects of her evidence that he found to have "the ring of truth", leading him to find the allegations proved beyond a reasonable doubt.
>
> [65] The trial judge referred to the evidence of Dr. Jones in relation to [the complainant's] general intellectual abilities and how her testimony should be approached, as required by the Supreme Court in R. v. W (R.), [1992] 2 S.C.R. 122. …
>
> [66] Although the trial judge relied on Dr. Jones' evidence in this context, he failed to mention her evidence concerning the complainant's suggestibility. The issue was clearly grounded in the evidentiary record. It was emphasized in defence counsel's closing submissions. Yet, because there is no attempt to address or reconcile this evidence in the trial judge's reasons, we are left to speculate whether the trial judge appreciated the significance of this evidence and the role (if any) that it played in his ultimate findings.
>
> "[70]…As the Crown correctly submits, a trial judge's findings on the credibility and reliability are entitled to deference …[citation omitted].The problem in this case is that there is nothing upon which to defer on the issue of suggestibility. The trial judge made no finding. He may have found this evidence to be inconsequential. He may have inadvertently overlooked this aspect of Dr. Jones' evidence. It is a matter of speculation.
>
> [71] I acknowledge that there are parts of the trial judge's reasons that seem to allude to reliability considerations. However, his treatment of reliability is minimal and clearly incidental to his focus on the complainant's credibility. In this case, it was critical that the trial judge at least consider the evidence concerning the complainant's heightened suggestibility. His reasons give no indication that he did."[42]

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[42] Majority Reasons for Judgment in the Court of Appeal, para. 64 - 71, Appellant's Record Vol. I Tab 3 p. 58 - 61.

61. Again, the Respondent submits that, on this record, that reasoning was unimpeachable, the conclusion correct. We observe, as did the majority, that Crown counsel on appeal had acknowledged that the trial judge had not expressly found the complainant to be a reliable witness, nor had he specifically addressed the issue of suggestibility.[43]And, on any fair reading of his reasons, it is simply not possible to discern with any confidence whether the trial judge came to grips with the suggestibility leg of the reliability issue, and if he did, why he dismissed it as not raising a reasonable doubt.

62. The majority accepted that the record could be examined in order to see if, despite the gap in the reasons, it made apparent that the trial judge dealt with the issue and why, if he did, he dismissed it, but found that, in this case, it did not assist. Even in the context of the record, the trial judge's treatment of reliability was "minimal and clearly incidental to his focus on the complainant's credibility", and the reasons just could not be read to offer any assurance to the parties that their respective positions were understood and considered by the trial judge.[44]

63. The Respondent submits that this was, again, the correct result on the record in this case. There was nothing on the face of the trial record which could be taken as a "patent" or "obvious" indication that, despite the silence in his reasons, the trial judge had grappled with the suggestibility issue, and if he did resolve it against the Respondent, why he did so; and the authorities cited above make clear that it is not the function of the appellate court to explore and weigh the evidence to see if it can construct a basis to support what the trial judge might have decided.

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[43] Ibid, para. 67, Appellant's Record Vol. I Tab 3 p. 59.

[44] Majority Reasons for Judgment in the Court of Appeal, para. 67 – 68, 71, Appellant's Record Vol. I Tab 3 p. 56 – 61.

The Errors Which the Dissent and the Crown on Appeal Claim the Majority Made Were Not Errors; the Dissent Itself Fell Into Error

64. Justice Pepall found that the majority had erred in accepting that the suggestibility issue was a "live issue" which the trial judge should have dealt with in his reasons[45]. She appears also to have decided that in light of the indications in the record that the trial judge was alive to the reliability issue, and the weakness of the evidence supporting the issue, it could be inferred that he had dismissed it on that basis, had "seized the matter", so nothing further was required.[46]The Appellant Crown, in its attack on the decision of the majority, adopts and expands upon the dissent's arguments.

65. In what follows, we first deal with the errors which Justice Pepall and the Appellant say that the majority made in accepting that the suggestibility issue was a live issue, important enough that the trial judge was required to deal with it. We then deal with the errors they say the majority made in finding that the trial judge's reasons failed to deal adequately with the issue. We will show, in each instance, that the criticism of the majority's analysis is unfounded.

The Errors Which Justice Pepall And The Appellant Say That The Majority Made In Accepting That The Suggestibility Issue Was A Live Issue – No Such Errors Were Made – the Dissent and the Appellant are in Error

66. Firstly, Justice Pepall erred in citing, as a reason for the suggestibility issue not being "live", that trial defence counsel had not listed the suggestibility issue as one of the elements of his challenge to the complainant's reliability.[47] As discussed earlier, the significance of the suggestibility issue as a central plank in the defence case was made

[45] Dissenting Reasons for Judgment in the Court of Appeal, para. 136 – 142, 151, Appellant's Record Vol. I Tab 3 p. 86 – 89, 91 – 92.

[46] Ibid, para. 93 – 95, 125 – 131, 150 – 151, Appellant's Record Vol. I Tab 3 p. 67 – 68, 81 – 84, 91 - 92.

[47] Ibid, para. 135, Appellant's Record Vol. I Tab 3 p. 86.

clear by trial defence counsel from near the outset of submissions and throughout.[48] Justice Trotter was entirely accurate when he said:

> "From the outset of the trial, the complainant's suggestibility - a factor related to her reliability - was an important plank in the defence position."[49]

67. Second, Justice Pepall, by engaging in a review of the evidence to reach her view that the suggestibility issue was so lacking in merit that the trial judge was not required to deal with it, fell into three errors.

68. Firstly, she erred in taking the wrong approach to the question of what is a live issue in this context. The correct approach, as applied by the majority, asked whether the issue was an important plank in the defence position, clearly grounded in the evidentiary record, and emphasized in defence counsel's closing submissions. That approach is consistent with the fundamental purpose of the requirement for reasons – to ensure that the parties can understand why the important issues, as framed and pursued by the parties in the case at hand, were decided against them.[50] Justice Pepall in effect posits an approach in which the appellate court goes beyond that to see if it can find pieces of evidence which, in its own weighing of the evidence on the paper record, could support the trial judge's (implicit) decision not to discuss the issue, even though it was framed, presented and argued as an important issue at trial. Justice Pepall's approach, we submit, is unacceptable for at least three reasons.

69. First, it would run counter to the fundamental purpose of the requirement for reasons – that the parties be able to understand how the issues as they were framed and presented in their case at their trial were decided against them and why they were

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[48] Submissions of trial defence counsel, Appellant's Record Vol. VI Tab 3 p. 97 line 10-15, p. 98 line 30 – p. 100 line 15, p. 101 line 10 – p. 102 line 20, p. 107 line 4 to p. 108 line 15, p. 115 line 17 to p.117 line 30, p. 130 line 12 – 28.

[49] Majority Reasons for Judgment in the Court of Appeal, para. 61, Appellant's Record Vol. I Tab 3 p. 57.

[50] *R. c. Dinardo para. 25; R. v. M. (R.E.) at para. 16 – 17, 37, 41; R. v. Capano, para. 47 – 49.*

decided that way. A party who has seen what was, on the record, a major and live issue in its case at trial not addressed at all by the trial judge should not be denied the right to reasons because the appellate court, judging the evidence itself in hindsight on the cold paper record, thinks the party's case on the point was weak. That surely was for the trial judge to decide on the live record – and explain.

70. Second, such an approach, as discussed earlier, goes beyond the proper role of the appellate court. Faced with apparently inadequate reasons, it is not the function of the appellate court to pick through the paper record, analyzing it as the trial judge should have analyzed the live record at trial, to see if it can assemble sufficient evidence to provide a basis on which one could explain why the trial judge might have decided as he did.[51]

71. Third, even if it were the role of the appellate court to weigh the evidence, Justice Pepall did not do so in a balanced fashion. She referred to aspects of the evidence which she felt weakened the suggestibility issue, but said nothing to balance it against the substantial body of evidence, canvassed above, establishing the materiality of the issue. This only serves to underline the inadvisability of the appellate court attempting to engage in the sort of analysis of the evidence that should be conducted by a trial judge who has the benefit of a living trial record.

72. The Appellant Crown adds additional threads to Justice Pepall's criticism of the majority's acceptance that the suggestibility issue was a live or key issue that the trial judge had to address, but, we submit, falls into the same sort of errors as does the dissent. First, it mischaracterizes the evidence so as to buttress its contention that the suggestibility issue was not a live issue. Second, it repeats the dissent's error in delving through the evidence to find what it says are aspects of the evidence that could be seen to support the trial judge's presumed dismissal of the issue.

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[51] See references at note 30 supra.

The Appellant Mischaracterizes The Majority's Reasoning and the Evidence So As To Buttress Its Contention That The Suggestibility Issue Was Not A Live Issue

73. The Appellant asserts that the majority accepted that all that was required for the suggestibility issue to be "live" was that defence counsel flag it as such; that the majority therefore engaged in no more than a "cursory", "surface level" consideration of the evidence, leading it to fall for "bald and generalized assertions of suggestibility" with "little regard for what the trial record demonstrated about the complainant's disposition as an individual", reached "without meaningful consideration of whether the evidence actually supported it".[52]

74. The Respondent submits that this critique of the majority's analysis, and the evidence, is without merit. The majority did not simply accept trial defence counsel's "flagging" of the issue as being sufficient to require that it be addressed by the trial judge's reasons and consequently engage in only a cursory", "surface level" consideration of the evidence. The majority, as one would expect from appellate jurists of this calibre, engaged in a thorough and detailed review of the entire record as it bore on this issue – the submissions of counsel, the evidence of the Crown's expert witness[53]; the evidence of the complainant's allegations[54], and the evidence of the progression of disclosures by the complainant, including the elements of those interactions that tied into the suggestibility concern explained by the Crown's expert[55].

75. Nor did the evidence considered by the majority consist of "bald and generalized assertions of suggestibility". To the contrary, and as canvassed in detail earlier, Dr. Jones assessed the complainant as a unique individual, not a stereotype. Her evidence

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[52] Appellant's Factum para. 7 – 8, 74, 78, 80.

[53] Majority Reasons for Judgment in the Court of Appeal, para. 8 - 15, Appellant's Record Vol. I Tab 3 p. 42 - 44.

[54] Ibid, para. 16 - 30, Appellant's Record Vol. I Tab 3 p. 45 - 49.

[55] Ibid, para. 31 - 42, Appellant's Record Vol. I Tab 3 p. 49 - 53.

as to the complainant's enhanced suggestibility was based on a thorough review of the complainant as a unique individual.[56]

76. Nor did the majority have "little regard for what the trial record demonstrated about the complainant's disposition as an individual", reached "without meaningful consideration of whether the evidence actually supported". Dr. Jones' evidence was, as just noted, rooted in assessment of the complainant as a unique individual. And it is clear that the majority had a balanced grasp of all aspects of the evidence bearing on the suggestibility issue, including those cited by the Crown at trial and on appeal as weighing against the reliability concern framed by trial defence counsel. Thus the majority referenced:

- the evidence of Dr. Jones indicating that the complainant's suggestibility would be less pronounced where the complainant was questioned about an emotive event such as a sexual assault[57];
- that Dr. Jones had not been asked to, and had not, provided any details of the questions and answers she had found to demonstrate suggestibility in the police interview by P.C. Maybee[58];
- the evidence of the social worker, Ms. Brennan, insisting that she had not suggested the word "rape" to the complainant before the complainant used it, even though her notes failed to mention that;[59]
- that the complainant seemed to hold her own when being cross-examined at trial[60].

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[56] See para. 28 ff., supra.

[57] Majority Reasons for Judgment in the Court of Appeal, para. 12, Appellant's Record Vol. I Tab 3 p. 43.

[58] Ibid, para. 15, Appellant's Record Vol. I Tab 3 p. 44.

[59] Ibid, para. 36, Appellant's Record Vol. I Tab 3 p. 51.

[60] Ibid, para. 69, Appellant's Record Vol. I Tab 3 p. 60.

- In fact, review of the reasons of the majority discloses numerous points at which the majority has shown a solid command of pertinent details of the complainant's evidence.[61]

77. The Appellant Crown asserts that the suggestibility issue was not live because there was no evidence that any of the complainant's sexual assault allegations were suggested to her.[62]No witness admitted that they suggested any of the complainant's sexual assault allegations to her. However, there was certainly evidence from which a reasonable trier of fact, armed with Dr. Jones' evidence as to the complainant's special susceptibility, could have inferred, at least to the level of reasonable doubt, that such suggestion may have occurred during the disclosure process, and that the complainant's allegations had progressed in response to those suggestions:

> (1) The overall progression of the nature and gravity of the complainant's allegations as she went through a series of interactions with persons, most in authority, from a vague allegation of consensual sex made in a teenage "I've had sex, what about you?", situation, to touching her breasts, to repeated unhealthy touching, to "rape", and to multiple incidents of forced intercourse.
>
> (2) The circumstances of the initial disclosure to A.C., in which we have first telling about having had sex and then inviting the complainant to tell about her own sexual activity, a clear situation in which the complainant's enhanced susceptibility to providing the sort of answer that seems to be desired, to provide an affirmative answer, could come into play.
>
> (3) The evidence about statements made to social workers on September 10, 2013, wherein we have Ms. Brennan telling the police that the complainant said she had been "raped" by the Respondent. Ms. Brennan insisted that the word

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[61] Ibid, para. 18, 33, 37, 41 - 42. Appellant's Record Vol. I Tab 3 p. 45, 50, 51, 52 - 53.

[62] Appellant's Factum, para. 75.

"raped" came from the complainant, and denied that she was the first to use this word. However, she admitted in cross-examination that this important detail was not recorded in her notes. It would be for the trier of fact to decide whether the word “raped” came from the complainant or Ms. Brennan. It would certainly be open to him to have a reasonable doubt as to whether it was suggested to the complainant.

(4) The first recorded police interview with P.C. Maybee on September 10, 2013, in which Dr. Jones, on reviewing the transcript observed "multiple" examples of leading questions or forced-choice questions where the complainant changed or distorted what she had said before.

The Appellant argues that this is not evidence of the complainant’s allegations of sexual assault being the product of suggestive questioning or her special susceptibility because Dr. Jones was not asked by defence counsel to provide examples of the phenomena she described, nor did he ask for a recording or transcript of this interview to be entered into evidence.

We observe, however, that Crown counsel at trial obviously could have asked Dr. Jones if any of the problematic questions and answers bore specifically on the content of the sexual assault allegations or something going to the reliability of the complainant’s allegations. However, trial Crown counsel chose not to do that, thus leaving in place, unchallenged and unqualified, Dr. Jones’ indication that some of the statements made by the complainant to the officer during her interview about the sexual assault allegations against the Respondent were instances of leading questions or forced-choice questions where the complainant changed or distorted what she had said before.

In those circumstances, we respectfully submit that it would be open to the trier of fact to infer that some of the problematic questions and answers seen by Dr.

Jones bore on the content of the sexual assault allegations, or the reliability of the complainant's allegations, or at least raised a reasonable doubt in that regard.

78. The Appellant argues that the suggestibility issue was not strong enough to be "live" because Dr. Jones qualified her opinion by noting that the complainant's special susceptibility to suggestion would be less pronounced in regard to subject matter more personalized, significant and emotive to the person, such as sexual assault. The Respondent submits that there is no merit to this argument. A trier of fact might decide, looking at all of the evidence, that the complainant's allegations had been affected by her suggestibility to the point that he had a reasonable doubt as to their reliability, or he might decide, given this qualifier to Dr. Jones' evidence, that it did not raise a reasonable doubt. But that was for the trial judge to assess on what he had seen and heard at trial, not for the appellate court to assess on the paper record.

The Appellant Repeats The Dissent's Error In Delving Through The Evidence To Find What It Says Are Aspects Of The Evidence That Could Be Seen To Support The Trial Judge's Presumed Dismissal Of The Issue.

79. This sort of after the fact analysis of the paper record, picking through the evidence looking for pieces which could weigh one way or the other on the merits of the suggestibility issue, as already discussed, is, in any event, precisely the sort of analysis that should have been carried out by the trial judge, and should not be conducted by the appellate court in an effort to make up for the trial judge's failure to do so.

The Errors in the Appellant's Argument that It Could In Any Event Be Inferred From The Trial Judge Being Alive To The Issue, and What He Said About Reliability, That He Had In Fact Dealt With It.

80. The Appellant Crown's argument expands on Justice Pepall's view[63] that, despite the complete silence of the trial judge's reasons on the suggestibility issue, it can be inferred that the trial judge seized the matter of the suggestibility issue because (1) a

[63] Dissenting Reasons for Judgment in the Court of Appeal, para. 150 – 151, Appellant's Record Vol. I Tab 3 p. 91 – 92.

review of the interactions with counsel during submissions shows that the trial judge was alive to the suggestibility issue, and engaged with counsel on the issue; and (2) the trial judge addressed the reliability issue in his reasons. The Respondent respectfully submits that no such inference can sensibly be drawn from the record.

81. Defence counsel drew the suggestibility issue to the trial judge's attention, and the trial judge appeared to acknowledge it.[64] However, there is little in the way of "engagement" with counsel on the suggestibility issue. Whenever the issue is broached by defence counsel, the trial judge's response, if anything beyond an acknowledgment, was to refer to his apparent view, discussed under the second ground of appeal, that the number and varied settings of the complainant's allegations made them more credible.[65]

82. There was only one passage in these interactions that could be taken as an actual reference by the trial judge to the evidence bearing on the suggestibility issue, when the trial judge observed that there was no evidence that Darlene Brennan, one of the social workers who had interacted with the complainant when she disclosed the assaults at the abandoned house, had suggested anything to her about that allegation.[66] But there is no discussion giving us any window into what the trial judge understood or thought about the evidence of Dr. Jones and its interplay with the all of the elements of

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[64] Submissions of trial defence counsel, Appellant's Record Vol. VI Tab 3 p. p. 97 line 7 - 18, p. 99 line 30 to p. 100 line 17 , p. 101 line 14 – 19, p. 107 line 26 to p. 108 line 21, p. 115 line 10 – 20, 129 line 28 – p. 130 line 28.

[65] Submissions of trial defence counsel, Appellant's Record Vol. VI Tab 3 p. 97 line 18, p. 100 line 17 - p. 101 line 1, p. 101 line 14 – 19, p. 107 line 26 to p. 109 line 12, line 10 – 20, p. 129 line 28 – p. 130 line 28.

[66]Submissions of trial defence counsel, Appellant's Record Vol. VI Tab 3 p. 115 line 25 – 28. The Appellant says in its Factum that the trial judge also suggested that there was no evidence that A.C. had suggested anything to the complainant, but the trial judge made no such comment. See Submissions of trial defence counsel, Appellant's Record Vol. VI Tab 3 p. 102, 115 – 116.

the disclosure process, or about the key suggestibility issue advanced on the basis of that evidence.

83. It must be remembered that where, as here, the trial judge's reasons are apparently inadequate because they are entirely silent on a live issue, the reasons can only be saved from a finding that they are insufficient if the appellate court is satisfied that the trial judge's reasoning on that live issue are "patent" or "obvious" on a review of the record. We submit that the mere fact that the trial judge was, at trial, aware of the suggestibility issue, and made one passing reference to one aspect of the evidence on that issue during an interchange with counsel at trial, falls far short of making "patent" or "obvious" the trial judge's handling of the whole issue, including its core, the evidence of Dr. Jones on the point.

84. As to the trial judge's discussion of the reliability issue in his reasons, his reasons did discuss the second leg of the defence challenge to the complainant's reliability, based on inconsistencies / implausibilities in the complainant's evidence.[67] However, we submit, that is of no assistance to the Crown. The fact that the trial judge discussed in detail <u>that</u> leg of the defence challenge only serves to highlight the contrasting total absence from the reasons of any discussion of the suggestibility leg of the challenge, and the evidence, particularly that of Dr. Jones, on the issue.

85. The problem is compounded when one notes that when the trial judge did advert to the second leg of the reliability issue, he seemed to respond to it by finding that the complainant's evidence seemed truthful – "the ring of truth" – rather than, as he should have, assessed the complainant's reliability.[68] This only serves to reinforce the appellate court's inability to conclude from the trial judge's reasons that he actually did grapple with the effect of the complainant's special susceptibility on her <u>reliability</u>

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[67] Reasons for Judgment at trial, para. 43 – 44, Appellant's Record Vol. I Tab 2 p. 21 – 22.

[68] Reasons for Judgment at trial, para. 48, Appellant's Record Vol. I Tab 2 p. 24 – 27.

THE SECOND QUESTION FOR THIS COURT - DID THE MAJORITY OF THE COURT OF APPEAL ERR IN FINDING THAT THE TRIAL JUDGE USED THE COMPLAINANT'S EVIDENCE TO CORROBORATE ITSELF

86. The Respondent advanced as his second ground of appeal in the Court of Appeal that the trial judge, in the key passage at para. 48 of his reasons quoted above, engaged in the illogical reasoning that the complainant's allegations were made more credible by the variety of different circumstances in which they were alleged to have occurred.

87. The majority agreed that, taken at face value, the reasons reflected that error. The majority went on to say that even if the trial judge were taken only to have been identifying aspects of the complainant's evidence that were confirmed by other evidence, he provided no analysis for his conclusion that the aspects of the evidence that he identified confirmed the complainant's evidence and enhanced her trustworthiness. As a result, the appellate court was again left to speculate about what the trial judge meant in this important passage - important because in the very next sentence he found that the allegations were proved beyond a reasonable doubt.[69]

88. The majority concluded that they would not allow the appeal based on this ambiguous passage in the trial judge's reasons standing alone. However, in combination with the error identified above in relation to reliability and suggestibility, this apparently problematic reasoning did have a bearing on the last ground of appeal.[70]

89. Justice Pepall in dissent accepted the Crown's argument that the passage could be read as innocuous – merely referring to confirmation of details by other

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[69] Majority Reasons for Judgment in the Court of Appeal, para. 73 - 76, Appellant's Record Vol. I Tab 3 p. 61 – 62.

[70] Ibid, para. 77, Appellant's Record Vol. I Tab 3 p. 62 – 63.

witnesses.[71].On appeal, the Appellant Crown repeats the argument, invoking the proposition that where there is an ambiguity in a trial judge's reasons, the appellate court will prefer the interpretation which correctly applies the law. The Respondent submits that there are two flaws in this argument.

90. Firstly, the presumption that the trial judge's statement was meant in a legally correct sense is only relevant where the passage is truly ambiguous – i.e., in which the passage can fairly be said to be "open to two interpretations".[72] The presumption is not intended to "save" a passage in a judgment which, on a fair reading, reflects error, by adopting a strained interpretation of the language which would conform to the law. The majority was, we submit, right to say that this passage, taken at face value, conveys the error described. The innocuous interpretation the Crown, and the dissent, would apply clearly strains the words used.

91. Second, if the passage were indeed ambiguous, reference to statements made by the trial judge during his interactions with counsel seem to resolve that ambiguity. There are at least two statements by the trial judge in which he appears to make precisely the reasoning error his reasons appear to describe – that the allegations are made more credible by their variety.[73]

92. In the final analysis, the Respondent submits that the majority was correct in interpreting the passage in the reasons as indicating legal error, and, at best, as representing yet another gap in the trial judge's reasons, which would feed into the overall conclusion of the majority that the trial judge's reasons were inadequate.

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[71] Dissenting Reasons for Judgment in the Court of Appeal, para. 153 - 154, Appellant's Record Vol. I Tab 3 p. 92.

[72] *R. v. Y. (C.L.) 2008 SCC 2, [2008] 1 S.C.R. 5, [2008] S.C.J. No. 2, (Supreme Court of Canada) at para. 11; R. v. S. (M.) 2008 ONCA 616, [2008] O.J. No. 3465, (Ontario Court of Appeal) at para. 55.*

[73] Statements by the trial judge during submissions by trial defence counsel, Appellant's Record Vol. VI Tab 3 p. 100 line 15 to p. 101 line 1; p. 108 line 16 to p. 109 line 11.

THE THIRD QUESTION FOR THIS COURT – THE TRIAL JUDGE'S FAILURE TO EXPLAIN HIS APPARENT REJECTION OF THE DEFENCE EVIDENCE

93. The third ground of appeal the Respondent raised in the Court of Appeal was the trial judge's failure to explain his apparent rejection, as not raising a reasonable doubt, of the defence evidence. As noted earlier, the Respondent and Mrs. S. testified at length, contradicting the complainant, describing circumstances rendering the allegations improbable, and (in the Appellant's case) denying the allegations against him. Yet the trial judge failed to explain why the defence evidence did not give rise to a reasonable doubt. As can be seen at para. 48 of his reasons, quoted earlier, the trial judge went directly from acceptance of the complainant's evidence as "credible" to his conclusion of guilt beyond a reasonable doubt. There was utterly no analysis there or anywhere else of the defence evidence, nor was there any explanation as to why it failed to raise a reasonable doubt.

94. In the Court of Appeal, the Respondent relied on the authorities establishing that where there is a live conflict in the evidence, then it is reversible error to fail to explain why the defence evidence does not give rise to a reasonable doubt.[74] The majority in the Court of Appeal agreed that the trial judge had not explained his apparent rejection of the defence evidence.[75] The majority acknowledged that a failure to explain can be justified in some cases on the premise that the trial judge's acceptance of the complainant's evidence could be seen as the reason for rejecting the evidence of the accused per the decisions of this Court in cases such as J.J.R.D.[76] and R. v. M. (R.E.).[77]

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[74] *R. v. Lagace [2003] O.J. No. 4328, 181 C.C.C. (3d) 12, 59 W.C.B. (2d) 438 (Ontario Court of Appeal) at para. 30-31, 44; R. v. Maharaj [2004] O.J. No. 2001, 186 C.C.C. (3d) 247, 71 O.R. (3d) 388 (Ontario Court of Appeal), at para. 1-5, 13-14, 19-35; R. v. D. (S.) [2004] O.J. No. 2142, 186 C.C.C. (3d) 304, (Ontario Court of Appeal), at para. 21, 26-31*.

[75] Majority Reasons for Judgment in the Court of Appeal, para. 78 - 88, Appellant's Record Vol. I Tab 3 p. 63 – 66.

[76] *R. v. J.J.R.D., 2006 CanLII 40088 (ON CA)*

[77] *R. v. M. (R.E.) at para. 66.*

However, that means of plugging the gap in the trial judge's reasons was not applicable in this case because, for one thing, the trial judge never said that, and, in any event, the authorities make clear that application of that line of reasoning was itself dependent on the trial judge's reasons for accepting the evidence of the complainant being "considered and reasoned", which they were not given the inadequacies canvassed in respect of the first two grounds of appeal.[78]

95. Neither Justice Pepall in dissent nor the Crown on appeal suggest that they see the governing law on the point any differently. Rather, they invoke the R. v. M. (R.E.) line of reasoning on the premise that since, as they argue, the trial judge made neither of the two errors in his handling of the complainant's evidence, his reasons could be seen as "considered and reasoned" so as to fall within R. v. M. (R.E.).[79]

96. The Respondent submits that the Crown's appeal on this point can be dismissed on the straightforward basis that, since the majority was correct in identifying the first two errors in the trial judge's reasoning leading to his acceptance of the complainant's evidence, it was also correct in saying that the R. v. M. (R.E.) explanation was not available because the trial judge's reasons were, by definition, not "considered and reasoned".

97. Although that may suffice to dispose of the Crown's appeal on this issue, the Respondent further submits that the R. v. M. (R.E.) line of reasoning should in any event be confined to the sort of case from which it arose, where the evidence of the complainant and the accused can plausibly be perceived as relatively matched stacks of evidence, so that accepting one logically carries with it rejection of the other.[80] It should

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[78] Majority Reasons for Judgment in the Court of Appeal, para. 83 - 88, Appellant's Record Vol. I Tab 3 p. 64 – 66. *R. v. Wills 2016 ONCA 965, (Ontario Court of Appeal) at para. 14 – 16; R. v. A.N. 2017 ONCA 647, (Ontario Court of Appeal) at para. 13-19*.

[79] Dissenting Reasons in the Court of Appeal, para. 155 ff., Appellant's Record Vol. I Tab 3 p. 93 ff.

[80] *R. v. J.J.R.D at para. 53; R. v. M. (R.E.) at para. 66.*

not be extended to cases like the present one, where the defence case is composed of not only a "stack" of the evidence of the accused, but other elements, such as the evidence of Mrs. S. which conflicted in places with the complainant's evidence.[81]

SUMMARY AND CONCLUSION

98. The majority correctly defined the legal framework governing its analysis of all three issues. The majority's application of that framework to the trial record was, comprehensive, painstakingly thorough, and balanced – the antithesis of "cursory" or "surface level". It is the dissent which fell into error, and the Appellant has failed to demonstrate reversible error by the majority. This appeal should accordingly be dismissed.

PART IV – SUBMISSIONS CONCERNING COSTS

99. The Respondent makes no submissions concerning costs.

PART V – ORDER REQUESTED

100. The Respondent asks that the appeal be dismissed.

PART VI – IMPACT OF ANY ORDER, RESTRICTION OR BAN

101. The Respondent agrees with the Appellant's submission that, given the terms of the governing non-publication order, the Court's reasons will be compliant if they do not identify the complainant, the C. family, or the witness A.C. by name.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of June, 2020.

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[81] Majority Reasons for Judgment in the Court of Appeal, para. 44, 46, 52, 81, Appellant's Record Vol. I Tab 3 p. 53 – 55, 64.

PART VII - TABLE OF AUTHORITIES

Case law	Para.(s)
1. R. v. A.N. 2017 ONCA 647, (Ontario Court of Appeal)	94
2. R. v. Black 2017 CarswellOnt 10794, 2017 ONCA 599, (Ontario Court of Appeal) aff'd. R. v. Black 2018 2018 SCC 10, [2018] 1 S.C.R. 265, (Supreme Court of Canada)	51
3. R. v. Capano 2014 ONCA 599, [2014] O.J. No. 3829, (Ontario Court of Appeal)	48, 49, 50, 51, 68
4. R . v. C. (H.) (2009), 2009 ONCA 56, 241 C.C.C. (3d) 45, (Ont. C.A.)	52
5. R. c. Dinardo 2008 SCC 24, [2008] 1 S.C.R. 788, [2008] S.C.J. No. 24, 231 C.C.C. (Supreme Court of Canada)	48, 49, 50, 51, 68
6. R. v. D. (S.) [2004] O.J. No. 2142, 186 C.C.C. (3d) 304, (Ontario Court of Appeal)	94
7. R. v. J.J.R.D., 2006 CanLII 40088 (ON CA) (Ontario Court of Appeal).	94, 97
8. R. v. Lagace [2003] O.J. No. 4328, 181 C.C.C. (3d) 12, 59 W.C.B. (2d) 438 (Ontario Court of Appeal);	94
9. R. v. Maharaj [2004] O.J. No. 2001, 186 C.C.C. (3d) 247, 71 O.R. (3d) 388 (Ontario Court of Appeal)	94
10. R. v. M. (R.E.) 2008 SCC 51, [2008] 3 S.C.R. 3, [2008] S.C.J. No. 52, (Supreme Court of Canada)	48, 49, 50, 68, 94, 97
11. R. v. Nicholson [1995] O.J. No. 3152, 45 C.R. (4th) 130, (Ont. C.A.)	52
12. R. v. Perrone 2014 MBCA 74, [2014] M.J. No. 217, 383 D.L.R. (4th) 683, (Manitoba Court of Appeal)	52