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)

And

CANADIAN ASSOCIATION FOR COMMUNITY LIVING, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., DISABLED WOMEN'S NETWORK CANADA, ARCH DISABILITY LAW CENTRE, BARBRA SCHLIFER COMMEMORATIVE CLINIC and CRIMINAL LAWYERS' ASSOCIATION

Interveners

RESPONDENT'S FACTUM

(RESPONDING TO INTERVENTIONS)

ROBERT J. REYNOLDS

Reynolds O'Brien LLP
183 Front Street
P. O. Box 1327
Belleville, ON K8N 5J1
Telephone: (613)-966-3031
Fax: (613) 966-2390

Email: rreynolds@reynoldobrien.com

Counsel for the Respondent

MATTHEW ESTABROOKS

Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
P. O. Box 466, Stn. A
Ottawa, ON K1P 1C3
Telephone: (613) 786-0211
Fax: (613) 788-3573

Email: matthew.estabrooks@gowlingwlg.com

Agent for the Respondent

JAMIE C. KLUKACH
CAITLIN SHARAWY

Attorney General of Ontario
720 Bay Street, 10th Floor
Toronto, ON M5G 2K1
Telephone: (416) 326-4600
Fax: (416) 326-4656
Email: jamie.klukach@ontario.ca
Email: caitlin.sharawy@ontario.ca
Counsel for the Appellant
Attorney General of Ontario

NADIA EFFENDI

Borden Ladner Gervais LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9
Telephone: (613) 369-4795
Fax: (613) 230-8842
Email: neffendi@blg.com

Agent for the Appellant
Attorney General of Ontario

SUZAN E. FRASER

Fraser Advocacy
31 Prince Arthur Avenue
Toronto, ON M5R 1B2

Tel: 416-703-9555
Fax: 877-704-0348
Email: fraser@fraseradvocacy.com

NADIA EFFENDI

Borden Ladner Gervais LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Tel: 613-369-4795
Fax: 613-230-8842
Email: NEffendi@blg.com
Email: jLeindecker@blg.com

KERRI JOFFE

ARCH Disability Law Centre
55 University Avenue, 15th Floor
Toronto, ON M5J 2H7
Tel: 416-482-8255, Ext 2222
Fax: 416-482-2981
Email: joffek@lao.on.ca

Counsel for the Interveners, Women's Legal Education and Action Fund (LEAF), DisAbled Women's Network of Canada (DAWN) and ARCH Disability Law Centre (ARCH)

Ottawa Agent for Counsel for the Interveners, Women's Legal Education and Action Fund (LEAF), DisAbled Fax: **Women's Network of Canada (DAWN) and ARCH Disability Law Centre (ARCH)**

DEEPA MATTOO
TAMAR WITELSON

Barbra Schlifer Commemorative Clinic
503 – 489 College Street
Toronto, ON M6G 1A5
Tel: 416-323-9149 ext. 244
647-278-4744
Fax: 416-323-9107

Email: dmattoo@schliferclinic.com
twitelson@schliferclinic.com

Birenbaum Law
1200 – 555 Richmond Street West
Toronto, ON M5V 3B1

JOANNA BIRENBAUM
Tel: 647-500-3005
Fax: 416-968-0325

Email: joanna@birenbaumlaw.ca

Counsel for the Intervener
Barbra Schlifer Commemorative Clinic

NADIA EFFENDI

Borden Ladner Gervais LLP
1300 – 100 Queen Street
Ottawa, ON K1P 1J9
Tel: 613-369-4795

Fax: 613-230-8842

Email: neffendi@blg.com

Ottawa Agent for the
Intervener, Barbra Schlifer
Commemorative Clinic

JANINE BENEDET

Peter A. Allard School of Law
University of British Columbia
1822 East Mall
Vancouver, BC V6T 1Z1

Tel: (604) 822 0637
Fax: (604) 822 8108

Email: benedet@allard.ubc.ca

Counsel for the Intervener
Canadian Association for Community
Living

MOIRA S. DILLON

Supreme Law Group
900 – 275 Slater Street
Ottawa, ON K1P 5H9

Tel: (613) 691-1224
Fax: (613) 691-1338

Email: mdillon@supremelawgroup.ca

Ottawa Agents for Counsel for
the Intervener Canadian
Association for Community Living

MATTHEW R. GOURLAY
Henein Hutchison LLP
235 King Street East, First Floor
Toronto, ON M5A 1J9
Tel: 416.368.5000
Fax: 416.368.6640
Email: mgourlay@hhllp.ca

MARIE-FRANCE MAJOR
Supreme Advocacy LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3
Tel: 613.695.8855
Fax: 613.695.8580
Email:mfmajor@supremeadvocacy.ca

CASSANDRA M. DEMELO
DeMelo Law Professional Corporation
239 Colborne Street
London, ON N6B 2S4
Tel: 519.204.7966
Fax: 519.204.8871
Email: cassandra@demelolaw.com

Counsel for the Intervener

Ottawa Agent for Counsel for the Intervener, Criminal Lawyers' Association

TABLE OF CONTENTS

SCC Court File No. 38870

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

And

THOMAS SLATTER

Respondent
(Appellant)

And

CANADIAN ASSOCIATION FOR COMMUNITY LIVING, WOMEN'S LEGAL EDUCATION AND ACTION FUND INC.,
DISABLED WOMEN'S NETWORK CANADA, ARCH DISABILITY LAW CENTRE,
BARBRA SCHLIFER COMMEMORATIVE CLINIC and CRIMINAL LAWYERS' ASSOCIATION

Interveners

RESPONDENT'S FACTUM
(RESPONDING TO INTERVENTIONS)

PART I – RESPONDENT'S REPLY TO THE INTERVENTION OF WOMEN'S LEGAL EDUCATION AND ACTION FUND INC., DISABLED WOMEN'S NETWORK CANADA AND ARCH DISABILITY LAW CENTRE

1. These Interveners argue that the majority in the Court of Appeal erred in finding that the trial judge's reasons failed to deal adequately with the issue of the complainant's reliability.

2. Firstly, the Interveners assert that the majority's approach was wrong in law because it departed from this Court's well-established jurisprudence governing appeals based on inadequate reasons. The Interveners seem to suggest that, on that

jurisprudence, it was, as a matter of law, not open to the Court of Appeal to find that the trial judge's reasons dealt inadequately with the issue of the complainant's reliability.[1]

3. The Respondent submits that this argument is untenable. The majority's approach to the issue of the adequacy of the trial judge's reasons in regard to the reliability issue is entirely consistent with this Court's jurisprudence. As canvassed in the Respondent's main Factum at para. 48 – 52, the Court of Appeal is entitled and required to ask itself 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 by failing to deal with the substance of the live issues - one of which can, depending on the evidence in the case at hand, be the issue of the complainant's reliability. There is no support whatever in the authorities for the notion that, as a matter of law, the appellate court cannot find a trial judge's reasons on a reliability issue to be inadequate in the circumstances of a particular case.

4. The Interveners also seem to adopt the argument of the Appellant Crown that the majority erred in finding that the issue of the impact of the complainant's suggestibility on her reliability was sufficiently live, sufficiently important, that the trial judge was required to deal with it. The Interveners, like the Crown, argue that the majority should have weighed the various pieces of evidence bearing on the complainant's reliability differently than it did.[2]

5. We would observe that the Interveners' argument on this point seems to add nothing beyond their support for the Crown's position. In any event, we submit that the argument is ill-founded for all of the reasons discussed in the Respondent's main Factum at para. 53 ff. Essentially, the majority found that the reliability issue was

---

[1] LEAF-DAWN-ARCH Factum para. 3, 14.

[2] LEAF-DAWN-ARCH Factum para. 15 – 16.

sufficiently important as to require the trial judge to grapple with it in his reasons, and that he had failed to do so. That was a judgment that the appellate court was entitled to reach on this record. The Interveners, like the Crown, fall into the error made by the dissent – they say that the majority should, like Justice Pepall, have gone through the evidence to see if it could find elements which could plausibly support the result the trial judge reached. But that goes beyond the appellate court's proper role.

6. The Interveners argue that the majority preferred the Crown expert's generalizations over the trial judge's individualized assessment of the complainant, thereby causing substantive inequality.[3] There is no merit to this argument. As canvassed at para. 28 – 35 of the Respondent's main Factum, the expert's testimony was not a matter of "general opinion" or "generalizations". While built on the foundation of the expert's knowledge of her field, including the statistics regarding suggestibility in the intellectually disabled population, Dr. Jones' evidence about the complainant was firmly founded as well on her detailed and apparently very thorough testing and assessment of the complainant, and the complainant's observed response to suggestive questioning. In any event, the majority did not "prefer" Dr. Jones' evidence over the trial judge's individualized assessment of the complainant. Rather, it considered Dr. Jones' evidence, along with all of the rest of the evidence, the conduct of the trial, and the submissions of counsel, and concluded, correctly, that the issue of the impact of the complainant's suggestibility on her reliability was sufficiently live that it should have been dealt with.

7. The Interveners appear to argue that, by finding that the trial judge failed to deal adequately with the issue of the impact of the complainant's suggestibility on her reliability, the majority has added a new element to the legal standard required of a trial judge's reasons – a requirement that the trial judge must expressly deal with the impact of the complainant's suggestibility in any case where the complainant is "labelled with

---

[3] LEAF-DAWN-ARCH Factum para. 16.

an intellectual disability", even though "there is no demonstrable evidence of a complainant adopting suggestions made to her…".[4] This argument is, with respect, without merit. The majority did no such thing. Rather, it found, on the record in this case, including the evidence of the Crown's expert, based on detailed individualized testing and assessment, the evidence about the complainant's response to suggestive questioning in her first police interview, and the submissions of counsel, that, in this case and on this record, the trial judge was required to grapple with the issue and had not done so.

8. The Interveners argue that the majority decision reinforces the harmful stereotype that all women labelled with intellectual disabilities are suggestible. The decision does no such thing. There was no evidence about, and no effort by either side, to rely on stereotypes. As discussed in the Respondent's main Factum at para. 28 – 35 and para. 75 – 78, the evidence about the complainant's suggestibility in this case was, in fact, the antithesis of stereotyping, rooted as it was in Dr. Jones' expert testimony, her thorough testing and observation of this complainant, and her unchallenged evaluation of the complainant's manner of responding to suggestive questioning.

9. The Interveners argue that the majority's finding, that the issue of the impact of the complainant's suggestibility on her reliability was sufficiently important that the trial judge should have dealt with it, creates a barrier to the participation of women with intellectual disabilities in the trial process – they will have to overcome the generalized notion that, by virtue of being women with such a disability, they are suggestible and unreliable.[5] Again, the majority's decision does no such thing, because there was no evidence of such generalizations at this trial, and no indication in the majority decision that it relied on any such generalizations in reaching its conclusion. Its findings were firmly anchored in the evidence about this complainant in this individual case.

---

[4] LEAF-DAWN-ARCH Factum para. 17.

[5] LEAF-DAWN-ARCH Factum para. 19 – 21.

10. The Interveners argue that the approach to the adequacy of the trial judge's reasons taken by the dissent is more aligned with substantive equality because it focuses on the evidence about the complainant rather than the expert evidence.[6] The Respondent submits that the difference in approach between majority and dissent had nothing to do with inequality.

11. Rather, the difference rested in their conflicting approach to the problem posed by the trial judge's failure to deal with what, we submit, was obviously an important issue at trial. The majority, having correctly decided that the trial judge's reasons did not adequately address the issue, declined to further analyze the evidence to see if some plausible basis for what the trial judge apparently did could be reconstructed from the evidence, observing that to do so would go beyond the proper role of the appellate court. Justice Pepall, however, fell into that very error, and engaged in an examination of the evidence to see whether it could explain the result the trial judge apparently reached.

PART II – RESPONDENT'S REPLY TO THE INTERVENTION OF BARBRA SCHLIFER COMMEMORATIVE CLINIC

12. This Intervener indicates that it only wishes to make submissions on the issue of whether the majority in the Court of Appeal erred in finding that the trial judge's reasons on the reliability issue were inadequate. It goes on to state the thrust of its position as being that the proper approach to this issue must consider whether a complainant's reliability can be challenged based on a stereotype or group generalization; and that the proper approach must reject extra and unwarranted scrutiny based on discriminatory broad assertions and stereotypes.[7]

---

[6] LEAF-DAWN-ARCH Factum para. 24.

[7] Barbra Schlifer Factum para. 11 – 12.

13. The Intervener then continues at some length to describe the issues of inequality, discrimination and stereotyping experienced by migrant and/or deaf or otherwise disabled women.[8] After that review, the Intervener makes the bald assertion that:

> "38. … the Court of Appeal majority's approach relied on stereotypes about the complainant's suggestibility and reliability that were detached from the reality of the complainant's evidence. We submit this imposed an additional hurdle for the complainant because of her disability. This unwarranted scrutiny of the complainant's reliability created an additional barrier to justice for an already significantly marginalized complainant." [9]

14. No reasoning, nor any reference to the reasons of the Court of Appeal, appears in support of this assertion.

15. The Respondent submits that, in essence, this Intervener is doing no more than lend its voice to the chorus of Crown and the other group of Interveners, accusing the majority of the Court of Appeal of stereotypical reasoning. For all of the reasons already articulated here and in the main Factum, the Respondent submits that the majority did no such thing.

PART III – CONCLUDING OBSERVATIONS

16. This Court has laboured for the better part of the last 35 years to cleanse the substantive and procedural criminal law of the pernicious effects of stereotypes and generalized assumptions, whether about race, or gender or disability, on the substantive law itself, on the fact-finding process, and the process of applying the law to the facts so found. In particular, to identify and expunge from the system generalized and

---

[8] Barbra Schlifer Factum para. 12 – 37.

[9] Barbra Schlifer Factum para. 38.

stereotypical assumptions about how women and/or those experiencing physical or intellectual impairments act in certain circumstances, or how they will testify.

17. This trial, and the handling by the majority in the Court of Appeal of the issues raised on appeal, including the adequacy of the trial judge's reasons, present a compelling example of the positive fruits of this Court's labour. No party to this proceeding, no witness in the proceeding, and neither the trial judge nor the Court of Appeal, presented any evidence, advanced any argument, or engaged in any reasoning, reliant on or even suggestive of any stereotypical reasoning, and generalized assumptions about women, or intellectually disabled individuals. Rather, they focused on the evidence about this case and the individuals in it, including expert evidence built not on some sort of generalized assumptions, but on research combined with detailed testing and assessment of the individual involved. The majority found that, on this evidence in this case, the reliability issue was important enough that the trial judge should have addressed it and he did not.

18. The Crown, supported by the Interveners, complains that the majority should not have found that the issue was important enough that it needed to be addressed. Insofar as that is based on a challenge to the majority's view as to the importance of the issue when seen in the context of the trial record as a whole in this case, and its analysis of the trial judge's reasons, that is fair ball – if they can convince this Court that the majority erred in its analysis, the appeal should succeed.

19. However, insofar as they go beyond that, and seek to discredit the reasoning of the majority of the Court of Appeal as being founded on, reliant in any way on, stereotypical assumptions about women and the disabled, the Crown and the Interveners ascribe to the majority errors in reasoning – pernicious errors – which, quite simply, are not there on any plausible reading of the majority's reasons.

20. In the face of such an attack on the reasoning of the majority in this case, it becomes important that this Court respond in terms which affirm that appellate courts

can and must continue to review the adequacy of trial judges' reasons in a balanced and objective fashion, led by all of the evidence in each case. That review should not be tilted or limited by reliance on stereotypical assumptions. But nor should it be discouraged or impeded by the giving of any support to the notion that an appellate court which closely scrutinizes the reliability of a complainant who is disabled or otherwise marginalized, or which gives serious consideration to reliable and unchallenged expert evidence about the reliability of an individua complainant or witness in such circumstances, should be assumed to have thereby fallen prey to stereotypical prejudices.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of August, 2020.

"Robert J. Reynolds"

_____

Robert J. Reynolds
Reynolds, O'Brien LLP
Barristers and Solicitors
183 Front Street, Box 1327
Belleville, Ontario
K8N 5J1
Tel: (613) 966-3031
Fax: (613) 966-2390
Solicitor for the Respondent