WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
>
> (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
>
> (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. D.T., 2014 ONCA 44
DATE: 20140121
DOCKET: C55797

Rosenberg, Rouleau and Strathy JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

D. T.

Appellant

Tina Yuen, for the appellant

Erin Winocur, for the respondent

Heard: October 8, 2013

On appeal from the convictions entered on March 23, 2012 by Justice Douglas M. Belch of the Superior Court of Justice, sitting without a jury.

Strathy J.A.:

[1] The appellant stood trial on an indictment alleging that between June 1, 2008 and November 20, 2009, he committed sexual assault on D.B. contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C.46 (the "*Code*"), and touching for a sexual purpose of D.B., a person under the age of sixteen, contrary to s. 151 of the *Code*. Following a three day trial, the trial judge reserved his decision. He

found the appellant guilty on both counts. The appellant was sentenced to a term of imprisonment of one year and three years' probation.

[2] He appeals his convictions on the grounds that: (a) the trial judge failed to conduct an assessment of D.B.'s credibility in accordance with the principles in *R. v. W. (D.)*, [1991] 1 S.C.R. 742; and (b) the finding of guilt was unreasonable. The sentence appeal was abandoned. The parties agree the conviction for sexual assault should be stayed on the basis of *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[3] For the reasons that follow, I would allow the appeal and order a new trial.

A. OVERVIEW

[4] D.B., who was eleven years old at the time of trial, claimed he had been sexually assaulted by the appellant, a family friend, whom he referred to as his uncle. He said the assaults occurred two years earlier, when he was nine, in two locations: the family home and the appellant's apartment.

[5] It took some time for the allegations to come to light. In the early summer of 2009, the appellant's ex-girlfriend told D.B.'s mother she was concerned the appellant was "bothering" a young man around D.B.'s age. The mother testified that some time later she asked D.B. whether anyone had been touching him. He said no. Later in the summer, she again asked, specifically mentioning the appellant. Again D.B. said no. A week or two later, his mother spoke to him a

third time. This time, D.B. said the appellant had touched him in his “private area”. D.B.’s mother did not report this to the authorities. Nor did she raise it directly with the appellant.

[6] In the fall of 2009, D.B. began to see a school counsellor to help him deal with anger issues at home and in school. On November 20, 2009, two or three months after the disclosure to his mother, he told the counsellor he had been “sexually touched” and began to cry. He said the person told him not to tell anyone. The teacher contacted the authorities and the appellant was ultimately charged.

B. THE EVIDENCE AT TRIAL

[7] Because of my disposition of the appeal, I will summarize the evidence of the five witnesses in some detail. The witnesses were: (a) the investigating police officer; (b) D.B.; (c) the school counsellor; (d) D.B.’s mother; and (e) the appellant.

(a) The investigating officer

[8] The investigating officer interviewed D.B. six days after he spoke to the counsellor. The officer had also investigated the allegations regarding the appellant “bothering” another youth. That boy told the officer nothing inappropriate had happened and no charges were laid.

(b) The complainant

[9] D.B. explained that the appellant was a close friend of his father. The appellant played sports with D.B., dated the family babysitter and babysat D.B. and his two sisters for a few months. The appellant had lived with DB.'s family for a period of time, and D.B. visited the appellant's apartment a couple of times after he moved out of their house.

[10] D.B. then stated the crux of the allegations. He said the appellant had "sexually touched" him seven or eight times.

[11] The indictment, however, was a global one, referring to the period June 1, 2008 to November 20, 2009, without particularizing the offences. In the course of his direct evidence and on cross-examination, D.B. described six incidents of sexual assault. He said he remembered these incidents in order, but could not place them precisely in time. He thought they occurred during the summer of 2009, but in his statement to the police, he had suggested some of the incidents occurred in the winter and he was inconsistent as to whether they occurred over one or two years.

[12] D.B. recalled the first incident happened when the appellant was living with his family. On a weekend evening, at approximately 11:30 to 12:00, while his mother and sisters were upstairs sleeping, D.B. was sitting on the appellant's lap in a rocking chair while they watched television. He had previously sat on the

appellant's lap a few times without anything inappropriate happening. This time, however, while his father slept on the couch nearby, the appellant "started touching [his] penis over the pants" for "maybe two or three minutes". The appellant stopped when the father began to wake up.

[13] On cross-examination, it was pointed out to D.B. that his evidence at the preliminary inquiry was the appellant had touched him *under* his clothes, after having initiated the touching on top of them. D.B. said he could not remember whether it was on top or under his clothes and he began to cry. He did not remember which hand the appellant touched him with, what he was wearing, what the appellant was wearing, what was on television, the season, or whether the appellant said anything during the incident.

[14] The second incident occurred about a month later. The appellant was babysitting. D.B.'s sisters were outside and D.B. was inside playing video games. The appellant walked in and, without saying anything, sat down beside D.B. and began to touch his penis, "[m]ainly underneath" his pants, for approximately two minutes. D.B. "told him to stop … [b]ecause [D.B.] didn't know what he was doing, and [he] didn't like it." The appellant stopped and walked away. In cross-examination, D.B. could not remember whether the second incident occurred at his house or at the appellant's apartment, though there was no evidence the appellant had video games at his apartment.

[15] The third incident occurred while D.B. was in his house alone with the appellant. D.B. went upstairs to get his video game system from his sisters' room. The appellant followed him into the room and put his hand inside his pants and on his penis. The appellant stopped when he heard the sisters returning. He touched him for "[a] minute". When cross-examined, D.B. confirmed this was the only incident in his sisters' room. However, at the preliminary inquiry, D.B. had testified about an incident in which the appellant performed fellatio on him in his sisters' room. When confronted with this discrepancy, D.B. said he could not remember whether the incident ever happened.

[16] The fourth incident was two or three days later at the appellant's apartment. The babysitter and D.B.'s sisters went for a walk. D.B. and the appellant were watching television when the appellant touched him for about a minute underneath his clothes. The appellant wanted D.B. to perform fellatio on him, but did not take his penis out of his pants. He said "come on [D.B.], suck it, suck it." D.B. refused. D.B. did not remember the appellant saying anything else, and "really [didn't] know" how it progressed from touching to a request for fellatio. The babysitter and his sisters returned about ten minutes later. In cross-examination, D.B. could not remember whether the touching was over or under his clothes. He could not recall the time of day or whether he was sitting down or standing up. He also said it lasted two or three minutes, rather than the one minute he mentioned previously.

[17] The fifth incident was the first of two incidents allegedly involving fellatio. Sometime after the appellant first touched him, D.B. could not remember when, the appellant performed oral sex on him for about two minutes. D.B. got an erection. The appellant had said “oh, come on, [D.B.], let me suck you; let me suck you. It will feel good. Nothing is going to happen.” He could not remember whether the appellant said anything else, nor could he remember why the appellant stopped after two minutes. It occurred somewhere in D.B.’s house. On cross-examination, he could not remember whether the appellant pulled his pants down or whether they remained up.

[18] The sixth incident also involved fellatio in D.B.’s house. D.B. was watching television when the appellant “came over and pulled down [his] pants.” Without saying anything, he performed fellatio on D.B. for about two minutes. D.B. got an erection. When cross-examined, D.B. could not recall whether the sixth incident occurred in his family’s house. He did not remember what he was wearing, what time of the year it was or what year it was.

[19] D.B. admitted his behavioural issues had caused a series of babysitters to quit. There was a “blow up” due to the children’s behaviour one day when the appellant was babysitting and he did not continue to babysit after that day. D.B. had problems at the beginning of the 2009-10 school year, and was sent to the principal’s office a couple of times.

[20] D.B. said his mother approached him with questions about whether he had been touched. The first time she questioned him, he said no. The second time, D.B. said, he approached his mother and told her the appellant had touched him. He could not recall the time between his disclosure to his mother and speaking to his counsellor in November 2009. He trusted his counsellor and knew he could go to her with problems. He had been meeting with her for some time before he told her about the assaults. After he disclosed to her, he gave a statement to his teacher, a C.A.S. social worker and a police officer. He told them the appellant had threatened him and his family to prevent him from telling anyone. Six days later, he admitted this was a lie. When asked about this in cross-examination, D.B. explained his motivation for lying:

> Q. So, why then, [D.B.], if you knew you had to tell the truth, did you tell [your teacher], [the C.A.S. social worker], and [the police officer] that the reason you didn't tell anybody was because [D.T.] threatened to kill your parents and hurt you if you did?
>
> A. Um, well, I was really mad and … I was just really mad at him and I wanted to get him in lots of trouble.

[21] Defence counsel also questioned D.B. about whether he had touched a girl at a sleepover. Defence counsel suggested that D.B. had told the appellant about this incident, and the appellant told him to discuss it with his parents. D.B. denied the incident ever happened. D.B. also denied the suggestion he had fabricated the allegations of sexual abuse to get attention from his parents, who, defence

counsel suggested, were often too drunk to give him much attention. Finally, he denied inventing the allegations to take the focus off his problems at school.

(c) The counsellor

[22] D.B. was assigned to a school counsellor in late October 2009, because of anger issues at school and problems with his older sister. The counsellor testified D.B. disclosed the sexual assaults to her on November 20, 2009:

> So, we went to a private spot in the school and I said to him: what's wrong? You look like there is something bothering you; and he said to me that he had been, um, sexually assaulted; that he had been touched; and then he started to cry, and so I started to ask a few more questions…

D.B. told her he had told his parents, but he did not think they had told anyone. She called C.A.S. and his mother.

[23] The counsellor observed a difference in D.B. after he disclosed. He was very upset and was away from school for a few days. When he returned, he had trouble staying in class and focusing on work:

> My time increased with him after the disclosure, based on his emotional needs and the fact that he needed to talk; he needed to be out of the classroom; he couldn't stay in the classroom without breaking down.

[24] After the counsellor had met with D.B. twice a week until February 2010, D.B.'s parents requested she "back off" so he could focus on his school work. They were going to get him professional help.

[25] On cross-examination, she agreed with the suggestion that D.B.'s disclosure was "very vague". The precise words D.B. used were that he had been "sexually touched".

(d) D.B.'s mother

[26] D.B.'s mother began her testimony by describing the appellant's relationship with her family. The appellant would come by every weekend and stayed throughout the week if he was not working. He lived with them for one or two months in the winter of 2008 when he split up with his wife. He ended up dating the family's babysitter. The babysitter took a job at a grocery store and quit babysitting. Around September 2008, the appellant, who lived just down the street, volunteered to babysit occasionally. She had no reservations about him doing so. He only watched the children a couple days a week, either at their home or his apartment. D.B.'s mother agreed that the appellant did not babysit the children during the summer of 2009. That summer, her husband was at home looking after the children, having been laid off in March.

[27] The babysitter whom the appellant dated was the person who initially raised concerns about the appellant in the early summer of 2009. D.B.'s mother had not noticed any problems with the appellant prior to that time. D.B. did not behave any differently around the appellant. However, she did notice a change in his attitude:

> All the [*sic*] sudden he was starting to change in attitude. He was starting to be defiant at school, had a little more of a temper at home, and not really as easy to settle down, but not just because [the appellant] had been there …

[28] After she spoke with the babysitter she paid closer attention to the appellant:

> [The babysitter] was concerned that a young man in the village was being bothered by [the appellant], and wanted to make sure that I knew what was going on, and I didn't have any concerns at the time, but of course when that was brought up, we kind of just made sure that he wasn't much around him much [*sic*] anymore. He wasn't allowed alone with him; just kept our eye on him and …

[29] She never confronted the appellant about whether he touched her son, although she did ask him whether he knew what the babysitter was saying about his relationship with the other boy. In her statement to the police, she indicated the babysitter might have been having issues in her relationship with the appellant. After she spoke to the babysitter, and before speaking to D.B., she asked her daughters about the appellant. They had not noticed or heard anything of concern.

[30] Within a couple of months, she asked D.B. whether anyone had touched him or done anything inappropriate. On examination-in-chief, she said she did not mention the appellant by name. He said "no". In cross-examination, she could not be sure she did not mention the appellant by name on this first occasion. A

short time later, she asked a second time; this time she was sure her question was specific to the appellant. In direct examination, she suggested this second time was when D.B. disclosed the abuse. In cross-examination, she was clearer that he disclosed on a third occasion, a week or two after the second. He said "yes, he has touched me, and he has touched me in my private area with his hand." She was "pretty sure" she initiated the third discussion. She asked if everything was okay and he said "well, I just thought I would let you know." She did not know how to react so she spoke with her husband and the appellant's ex-wife. She did not ask D.B. for details until later and then she asked where it happened. He told her: "at our house, at his house, and that he had put his mouth on his penis."

[31] At the end of the previous school year, in the spring of 2009, his teacher approached her about her son's anger issues. His teacher thought he should get counselling at a program outside school. He did intake for a program in August 2009, but did not start until October or November. He was seeing the school counsellor, but there came a point when D.B.'s mother felt it was too distracting for him to discuss the incident at school.

[32] On cross-examination, D.B.'s mother acknowledged she had told the investigation officer her son had an imagination. She also agreed she had been concerned that by feeding information to D.B. she had precipitated the disclosures.

(e) The Appellant

[33] The appellant lived with D.B.'s family for about two months from January to March 1, 2008, because he had separated from his wife. When he lived with the family, he slept in the girls' room and "[t]hey slept downstairs on the couches or on the floor; wherever they found a spot to lie down." The appellant testified he was never alone with the children during the time he lived with the family. He played sports often with D.B. He treated him like his own son and D.B. often sat on his lap. He described the family as "[a] lot of times dysfunctional," noting "[t]he kids ran around rampant throughout the neighbourhood; very little supervision." In the summer of 2009, the father "was drinking 24 beer a day." The appellant could drink a similar amount in a day. He claimed that after his job ended, in late July 2009, he saw the family less frequently because of his diminished financial circumstances.

[34] The appellant testified D.B.'s father did not give very much attention to his son, who was often seeking attention by "having massive breakdowns or, you know, crying until he got what he wanted". D.B.'s father gave beer to D.B. "all the time," but the appellant claimed he never did so. The appellant saw D.B. looking at "[t]hings he shouldn't have been" on the computer "[a]fter school" and told his parents about it "on numerous occasions".

[35] The appellant said D.B. told him about an incident at a sleepover in which D.B. touched a girl. He told D.B. to “go tell [his] parents.” D.B. told the appellant that if he told his parents, he “would F-ing well tell them that he [the appellant] was lying.”

[36] He did not babysit during the time he lived with the family. The woman he ended up dating was babysitting during that time. They moved in together in June or July 2008. He babysat from October 2008 to January 2009, in the afternoon after he finished his shift at work. He babysat once or twice a week for an hour and a half to two hours. He drank beer on the couch while he babysat. He did not babysit in the summer of 2008 or 2009. Occasionally, his girlfriend would pop into their apartment with the kids to pick up the dog for a walk.

[37] The appellant was alone with D.B. on many occasions over the course of his relationship with the family. Nonetheless, he maintained he was never alone with D.B. during the period he babysat the children.

[38] In an exchange to which the trial judge attached great significance, which I will set out in more detail below, the appellant was asked whether he touched D.B. sexually when he was sitting on his lap. The appellant replied, “[n]ot to my knowledge.” When he was asked what he meant by that statement, he added, “[w]ell, I mean absolutely no.”

C. THE TRIAL JUDGE'S REASONS

[39] The trial judge began by noting the central issue was whether the alleged incidents occurred. He then "reminded [himself] of the basic principles of any criminal trial," starting with the presumption of innocence and the burden on the Crown of proof beyond a reasonable doubt. He then stated:

> A trial is not about which version of the evidence I accept, but rather has the Crown proven the accused guilty beyond a reasonable doubt? If a reasonable doubt exists as to the guilt of the accused, he must be acquitted.

[40] Although he did not cite *W. (D.)* at this point, he would refer to it expressly three more times in the course of his reasons.

[41] The trial judge gave an overview of the evidence. None of this overview, with the exception of one statement discussed below, seems to contain any findings of fact or credibility.

[42] D.B. claimed the appellant "sexually touched him on more than one occasion". His testimony was not consistent as to whether the incidents occurred over one or two years. D.B. disclosed the incidents to his mother after she asked him a second time whether the appellant touched him. In making this statement, the trial judge did not acknowledge he was resolving an inconsistency in the evidence. Implicitly, he seems to have accepted D.B.'s mother's testimony that she approached D.B. the second (of the three) times, as well as D.B.'s testimony

that he disclosed the second time. He disclosed to his school counsellor a couple of months later, which led to police involvement and charges against the appellant. When D.B. gave a statement to the police, he claimed the appellant threatened him and his family to procure his silence. Six days later, D.B. admitted this was not true and he had only said it to get the appellant in “lots of trouble”. The appellant denied the allegations. He testified D.B. had difficulties at school. The appellant thought that D.B. falsely accused him because he feared the appellant would tell his parents about a sleepover in which D.B. may have touched a girl. D.B. denied this had ever happened and denied he had ever told the appellant anything like it.

[43] The trial judge next turned to the witnesses’ testimony. He reviewed D.B.’s evidence first. D.B. testified that the appellant touched his penis area both on top of and under his clothing and twice performed fellatio on him. D.B.’s evidence about the incidents was not entirely consistent, though the trial judge noted that defence counsel did not cross-examine him in chronological order, which might explain some of the confusion.

[44] The trial judge then addressed each of the six incidents described by D.B. In his review of the incidents, he did not appear to make any findings of fact or credibility. He presented the incidents as a review of the witnesses’ testimony.

[45] After reviewing the six incidents, the trial judge stated some basic principles of law. He noted the distinction between credibility and reliability and discussed the special issues relating to the evidence of children; he cited *R. v. H.C.*, 2009 ONCA 56, 241 C.C.C. (3d) 45, at paras. 41-42; *R v. W. (R.)*, [1992] 2 S.C.R. 122, at paras. 23-25, which referred to *R. v. B. (G.)*, [1990] 2 S.C.R. 30. These authorities instruct trial judges to take a "common sense approach" to children's testimony and to carefully assess their evidence but not on an adult standard, especially with respect to precision of memory.

[46] The third legal issue he addressed was *W. (D.)*. In this second reference to its principles he stated:

> [The appellant] testified. This brings into play *W. (D.)*, *supra*. If I believe his evidence that he did not commit the offence as charged, I must find him not guilty. Even if I do not believe his evidence, if it leaves me with a reasonable doubt about his guilt or about an essential element of the offence charged, I must find him not guilty of that offence. Even if his evidence does not leave me with a reasonable doubt of his guilt or about an essential element of the offence charged, I may convict him only if the rest of the evidence that I do accept proves his guilt of it beyond a reasonable doubt. What must be avoided is a resolution of the case on an either/or basis, or on the basis that I consider [D.B.'s] version more credible than [the appellant]. A decision to convict [the appellant], according to either of these two chains of reasoning is wrong because it is unfaithful to the burden and standard of proof required of the prosecution.

[47] The trial judge then reviewed the appellant's evidence. The appellant denied touching D.B. sexually. He testified D.B. could be difficult, and his conduct had driven away a series of babysitters. He had been in trouble at school, including having been sent to the principal's office. He said D.B. may have made up the allegations to get attention from his father, who was frequently drinking heavily. He may also have made up the allegations to avoid further trouble at school and with his parents. The appellant testified he treated all of the children like his own and often played sports with D.B.

[48] The appellant lived with the family in January and February of 2008 because he had separated from his wife and was unemployed. After getting a job on February 15, 2008, he moved into his own apartment. He testified he did not live with the family in the summer of 2009 and did not babysit in 2008 or 2009.[1] He described the family as "dysfunctional". D.B. in particular often acted out. He looked at things on the computer he should not have. The appellant said he never discussed anything of a sexual nature with D.B. – that was up to his parents. He believed D.B. often sat on his lap to get his father's attention. He said he was never alone with D.B. during the two months he lived in the family's home.

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[1] As noted above, the appellant testified that he babysat the children from October 2008 to January 2009. He said he never babysat them in the summer of either 2008 or 2009.

[49] The trial judge next turned to D.B.'s mother's evidence. The family's former babysitter suggested she should watch the appellant around D.B. She herself had never noticed anything unusual in his behaviour around her children. She also testified that while her son did not lie, he "has an imagination" and she wondered whether she had put the story in his head when she questioned him about the appellant.

[50] Finally, the trial judge reviewed the counsellor's testimony. She confirmed D.B. had problems at school before the summer of 2009. She had seen him two or three times before he disclosed the incidents to her, because he had anger issues. D.B. was having problems at school because of statements from other students about "how [he] looked". The trial judge noted D.B. testified that after he told the counsellor about the incidents he "felt safe".

[51] The trial judge described the defence and Crown theories. The defence submitted the incidents never happened. D.B.'s testimony was inconsistent about the details and the status of the appellant when they occurred (i.e., whether he was living with the family, babysitting or just visiting the house). D.B. fabricated the allegations to deflect attention from his problems at school. His mother admitted D.B. had an imagination. D.B. admitted he lied when he claimed the appellant threatened him. Although he had an opportunity to commit the assaults because he was often at the house, the defence position was that he was never

alone with D.B.[2] The appellant was not evasive, and there was no reason to reject his evidence. There was also no evidence of grooming. The inconsistencies in D.B.'s evidence were not the result of aggressive cross-examination, but were evident from a plain reading of his police statement, preliminary inquiry evidence and direct testimony.

[52] The Crown submitted the court should not be overly critical of the child complainant's evidence, especially about locations and dates. Not only was there no evidence of fabrication, but D.B. explicitly denied fabricating the assaults. The appellant had an opportunity when he was living at the house, when he babysat and when D.B. was alone at his apartment. D.B. recanted his lie about having been threatened by the appellant, which bolstered his credibility with respect to the assaults. The appellant's statements in cross-examination, that he was never alone with D.B., defy common sense. Further, on direct examination, the appellant's response to the question of whether he ever touched D.B. was "not to my knowledge". This was a revealing statement.

[53] Finally, the trial judge began his analysis. He opened this section of his reasons by again noting that, while there were two different versions of what happened, he would not treat the case as a credibility contest. Rather, he could

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[2] This was not the defence position. The appellant testified on cross-examination he was never alone with the children when he lived with the family. However, the defence submissions were clear that the appellant admitted he had an opportunity to commit the assaults because he was alone with D.B. on a number of occasions. The defence simply denied they occurred.

believe some or all of any witness's testimony and give different weight to different parts. He must apply the same scrutiny to both the evidence of the appellant and D.B. This was the third reference to the principles in *W. (D.)*.

[54] The trial judge applied what he described as a "who, what, where and when approach" to the evidence. For the "what," D.B. "had no misconceptions about what happened to him": he had been touched sexually and had fellatio performed on him. He then said:

> Continuing with the acts themselves and *assuming they occurred*, given the location on the body of the touching and the act of fellatio, the Court has no difficulty finding these acts were sexual in nature and that touching an assault. Given [D.B.] was aged nine, or perhaps even eight at the time, consent is not an issue. [Emphasis added.]

[55] There was also no dispute about "who". D.B. unequivocally identified the appellant as the one who touched him. At that point, the trial judge "acknowledge[d] [the appellant] testified he did not perform the acts." For the "where," D.B. identified his house and the appellant's apartment, though he had difficulty about the particular rooms in which some of the incidents occurred.

[56] The more difficult issue was "when" the incidents occurred. The trial judge noted the circumstances of the first alleged incident suggested the appellant was living with the family at the time. This would put the incident in January or February of 2008, which was "not only a time outside of the dates mentioned in the indictment, it is not the summer of 2009 either." D.B. testified the second

incident happened one month later, which would also put it before the indictment period. The trial judge noted that although he could amend the indictment, he was "left with concerns about reliability" regarding those incidents.

[57] In contrast, D.B.'s evidence did not place any of the other incidents temporally, except that incidents three and four were only a few days apart. These incidents could all be within the indictment period and could have occurred in the summer of 2009. The trial judge reasoned that the circumstances of these incidents did not indicate that the appellant was living with the family; they were more in line with him babysitting the children. However, the trial judge had concerns that incidents three and five could be the same incident, "given the introduction 'suck me, suck me'". He also highlighted the inconsistency about how many incidents occurred in D.B.'s sisters' room and whether any fellatio occurred in that room. He noted "[D.B.'s] comment that he couldn't remember if it ever happened." He concluded:

> I have reliability concerns. While I believe [the appellant] probably sexually assaulted [D.B.] as [D.B.] described in the incidents I have identified as one, two, three, and five, probably or likely guilt [*sic*] is not sufficient.

[58] Reliability concerns therefore prevented the trial judge from concluding beyond a reasonable doubt that the appellant assaulted D.B. on four of the six occasions he described.

[59] As to the other two incidents, the trial judge was convinced beyond a reasonable doubt:

> This leaves items four and six. Here I find [the appellant] inappropriately sexually assaulted [D.B.]. [D.B.] disclosed what happened both to [the counsellor] and his mother. He pulled back any embellishment when he told the police he lied about the threats. I am satisfied he knew the difference between a lie and telling the truth. I find it significant he was having problems at home and school, which changed with the disclosure, and I am particularly struck by the phrase he "felt safe after the disclosure". [D.B.] was not a particularly good historian, but his is no different than Wilson J.'s observation in *R. v. B. (G.)*, *supra*, when she commented "while children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it".

[60] After this finding, the trial judge stated that although the appellant denied the allegations throughout the trial, his evidence did not raise a reasonable doubt with respect to those incidents:

> The accused maintained he did not do it, commencing with his plea of not guilty and continuing through his testimony at trial. However, I found it strange that when asked whether he had touched [D.B.] inappropriately his answer was "not that I recall". That comment requires the same standard of scrutiny I applied to [D.B.'s] comment that perhaps incident three did not happen. [The appellant's] answer detracted from his credibility.
>
> All in all, I find that he was not a credible witness. Applying *W. (D.)*, I did not believe the accused, nor was I left with a reasonable doubt about his guilt by his evidence, and finally I am convinced of his guilty [*sic*] by

> the rest of the evidence I did accept. In short, I am satisfied beyond a reasonable doubt of [the appellant's] guilt on incidents four and six. Accordingly, there will be a finding of guilt on counts one and two.
>
> That is my decision …

[61] This fourth reference to *W. (D.)* concluded his reasons for conviction.

D. DISCUSSION

[62] The appellant has raised two grounds of appeal. He alleges the trial judge erred in his application of the principles in *W. (D.)*, and the convictions were unreasonable. As I will explain, I do not accept the appellant's submission that the trial judge erred in his application of the burden of proof. However, the thrust of the appellant's argument on this issue concerned the trial judge's finding that the complainant was credible. I accept the appellant's submission and conclude the trial judge's finding that D.B. was credible was tainted by palpable and overriding errors. Accordingly, I would grant the appellant leave to appeal on a question of fact, allow the appeal and quash his convictions.

[63] Because I cannot know the outcome of a proper credibility analysis, and there was evidence in this case upon which a reasonable trier of fact could have convicted the appellant, I would order a new trial.

(a) Application of the Burden of Proof

[64] The appellant's first ground of appeal challenges the trial judge's application of the principles in *W. (D.)*. As the Supreme Court of Canada noted in *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 23:

> In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.

[65] The trial judge was clearly alive to the requirements of *W. (D.)*. As the respondent has emphasized, he instructed himself as to the burden of proof on four occasions. Of course, simply setting out the *W. (D.)* formula is not determinative. The critical issue is whether the reasons reveal a correct application of the burden of proof: see *e.g.*, *R. v. Wadforth*, 2009 ONCA 716, 247 C.C.C. (3d) 466, at paras. 50-51; *R. v. A.P.*, 2013 ONCA 344, 297 C.C.C. (3d) 560, at para. 39. The respondent submits the reasons as a whole demonstrate its correct application.

[66] In my view, the "who, what, where and when" approach was of limited value as an analytical tool in this case, where the core issue was whether the events described by the complainant actually happened. While the trial judge acknowledged the appellant's denial of the allegations, his analysis accepted

D.B.'s story as true. In fact, his review at this point of his reasons was not analysis of the evidence but a recitation of D.B.'s evidence which was, in summary, "Uncle D. touched my penis and put it in his mouth."

[67] I am also troubled by the trial judge's rejection of the appellant's evidence. While the trial judge alluded to other issues about the appellant's credibility, the only issue he directly addressed was the appellant's answer, "not that I recall", to a single question in his examination in chief. He found this answer "detracted from his credibility."

[68] To understand the appellant's answer requires an examination of the context. The exchange in examination in chief was as follows:

> Q. How close were you with [D.B.]?
>
> A. Oh, he was like my son.
>
> Q. Did [D.B.] ever sit on your lap?
>
> A. Oh, many times.
>
> Q. Many times? Like how many times? Can you …?
>
> A. I couldn't tell you; many, many, many, many times.
>
> Q. All right. And you have told us that his dad would sleep on the couch?
>
> A. Yes.
>
> Q. And you have heard [D.B.] talk about a night that his dad's on the couch and he's on your lap, and you touch him sexually?
>
> A. Yes

> Q. You heard [D.B.] say that, right?
>
> Q. Did that ever happen, [D.T.]?
>
> A. Not to my knowledge; no.
>
> Q. We have also heard … . When you say not to your knowledge …
>
> A. Well, I mean absolutely, no.
>
> Q. You wouldn't forget that?
>
> [objection is made]
>
> Q. … did you ever touch [D.B.] in any way sexually?
>
> A. No.

[69] I do not disagree the appellant's answer is troubling. His counsel conceded as much. To put it in context, however, the question related to an incident when the complainant was sitting on the appellant's lap, which the appellant said had occurred "many, many, many, many times". The witness must have expected the question. His equivocal answer could have been a slip; it could have been nervousness; or it could have been an acknowledgment of culpability. It could be unfair to make an adverse credibility finding against an accused based solely on his equivocal answer to a potentially ambiguous question. "Not to my knowledge" is capable of meaning "I don't know whether, on any of the many times D.B. sat on my lap, I ever touched him in a way he might have interpreted as sexual." While not in entirely the same context, in *R. v. J.S.W.*, 2013 ONCA 593, 301 C.C.C. (3d) 252, this court observed the failure to unequivocally deny a vague

allegation made in a police interview was not a reason to dismiss the entire evidence of the accused.

[70] In this case, the appellant's response resulted in the trial judge finding the answer "detracted from his credibility." While this might have been true, it was the only factor the trial judge specifically identified in support of his finding that the appellant was not credible. Immediately after saying the appellant's answer to this one question "detracted from his credibility", the trial judge stated "[a]ll in all, I find that he was not a credible witness."

[71] However, in spite of my concerns about the trial judge's rejection of the appellant's evidence, I must keep in mind that acceptance of a complainant's evidence may be sufficient explanation for rejecting the evidence of the accused: *R. v. R.E.M.*, 2008 SCC 51, [2008] 2 S.C.R. 3, at para. 66. As Doherty J.A. noted in *R. v. J.J.R.D.* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 53, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 69:

> An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

[72] Appellate courts cannot focus on omitted details, or begin their analyses from "a sceptical perspective"; nor should they assume an accused's denial is

plausible and proceed from that perspective to see if the trial judge has dispelled all reasonable doubt in the reasons: *R.E.M.*, at para. 68.

[73] In light of this deferential approach, recently affirmed by the Supreme Court in *R. v. Vuradin*, 2013 SCC 38, I cannot conclude the trial judge misapplied the burden of proof in this case.

[74] This is not the end of the inquiry, however. A trial judge's credibility findings may be vitiated by palpable and overriding error. This is illustrated by the recent decision of the New Brunswick Court of Appeal in *R. v. J.N.C.*, 2013 NBCA 59, [2013] N.B.J. No. 315. In that case, the court also found the trial judge's reasons demonstrated proper application of the principles in *W. (D.)*. The court held, at para. 12:

> Applying the principles that govern our role as an appellate court, we cannot give effect to [the appellant's] initial ground of appeal [*W. (D.)* error]. We cannot allow our unease or lurking doubt about the verdict, or the fact that we would have reached a different view about the credibility of the complainant, to be the basis for overturning the verdict … Without more, we would be required to uphold the verdict.

[75] The New Brunswick Court of Appeal had further concerns about the reasoning process and factual underpinnings of the trial judge's credibility findings with respect to the complainant. In the next section, I will elaborate on that decision and discuss my concerns in this case.

(b) Assessment of Credibility

[76] Appellate courts must give a very high degree of deference to trial judges' credibility determinations. As Bastarache and Abella JJ. explained in *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at paras. 20-21:

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in [*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401,] that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.
>
> This does not mean that a court of appeal can abdicate its responsibility for reviewing the record to see whether the findings of fact are reasonably available. Moreover, where the charge is a serious one and where, as here, the evidence of a child contradicts the denial of an adult an accused is entitled to know why the trial judge is left with no reasonable doubt.

(See also, *Gagnon*, at para. 10; *Dinardo*.)

[77] The appellant raises five issues he says the trial judge ought to have considered when assessing D.B.'s credibility – these issues were also raised at trial:

- D.B.'s description of the incidents lacked detail and context. The absence of detail casts doubt on the complainant's credibility. He described fleeting contact of between one and three minutes, in language that was, to use the appellant's counsel's expression, "robotic". See *R.*

v. V.Y., 2010 ONCA 544, 334 D.L.R. (4th) 33, at para. 34, affirmed, 2011 SCC 22, [2011] 2 S.C.R. 172.

- The trial judge failed to address the inconsistencies in D.B.'s evidence. Reliability problems led the trial judge to conclude that four of the six incidents could not sustain convictions, but he never considered whether the inconsistencies might impact upon D.B.'s credibility. See: *R v. Burnie*, 2013 ONCA 112, 294 C.C.C. (3d) 387, at paras. 43-48; *R. v. Ezard*, 2011 ONCA 545, 291 C.C.C. (3d) 78, at paras. 17-18.

- The trial judge failed to consider the possibility that D.B.'s mother tainted his evidence by asking him three times whether the appellant touched him: *R. v. J.J.B.*, 2013 ONCA 268, 305 O.A.C. 201, at para. 89.

- The complainant repeatedly broke down when confronted with inconsistencies in his evidence.

- The trial judge never explicitly addressed the evidence supporting the defence theory that D.B. fabricated the allegations for any or all of three reasons: 1) to get attention from his parents; 2) to deflect attention from his problems at home and at school; and/or 3) to prevent the appellant from telling his parents about the sleepover incident in which he may have touched a girl.

[78] Trial judges are not required to expressly consider every issue, discuss all of the evidence, or address every argument made by the defence: *Vuradin*, at para. 17; *Dinardo*, at para. 30; *R.E.M.*, at paras. 32 and 64. While a failure to consider all of the evidence relating to the ultimate issue of guilt or innocence is an error of law (*R. v. Morin*, [1992] 3 S.C.R. 286, at p. 296), there is no obligation on a trial judge to record every aspect of the deliberation process: *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438, at para. 46.

[79] In this case, dealing with these issues would likely have improved the trial judge's credibility analysis. However, I do not accept that the trial judge erred in his conclusion on credibility because of what he did *not* say. My concern is instead with what he *did* say in support of his credibility finding.

[80] An appellate court may only intervene in a trial judge's credibility analysis if that analysis is the subject of a palpable and overriding error. In *Waxman v. Waxman* (2004), 186 O.A.C. 201 (C.A.), at paras. 296-97, leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 291, this court described the palpable and overriding error standard:

> The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: [*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 5-6]. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: [*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at para. 35].

(See also *H.L.*, at paras. 52-56.)

[81] In *J.N.C.*, the New Brunswick Court of Appeal applied this high standard and found the trial judge's credibility finding with respect to the complainant was subject to a palpable and overriding error. In that case, the complainant described an incident of sexual assault by her great-uncle as having occurred on his boat when she was two years old. The appellant testified he did not acquire the vessel until the complainant was four years old and she could not have been on the boat until she was five. He said she had been on it on a number of occasions after age five. Although the trial judge did not believe the incident occurred when the complainant said, he noted that inconsistencies as to times and locations should not be determinative for child witnesses. He proceeded to use the complainant's ability to recall of details about the boat to find her credible. At para. 16 of its reasons, the Court of Appeal quoted his conclusion:

> … [the details about the boat] leave no doubt in my mind as to her credibility of that incident, as to what had happened on that boat as she described it in her testimony.

[82] The New Brunswick Court of Appeal held that the trial judge's use of the complainant's descriptions of the boat to find her credible was a palpable error. The fact she could accurately describe the appellant's boat had nothing to do with her credibility regarding whether the incident occurred, because there was no dispute that she had been on the boat. The court held it was "illogical" to

conclude that because the complainant could describe the boat, “she must have been telling the truth about everything else” (at para. 17). Because the court was convinced the trial judge “anchored his entire credibility findings on the complainant’s description of the accused’s boat”, the palpable error was also overriding (at para. 18).

[83] In spite of the high degree of deference owed to the trial judge’s credibility analysis in this case, I conclude his reasons for accepting D.B.’s evidence suffer from palpable errors of both fact and law, which vitiate his conclusion on D.B.’s credibility.

[84] After his “who, what, where and when” analysis, the trial judge said he had concerns about D.B.’s reliability in relation to incidents 1, 2, 3 and 5 and although he believed the appellant probably assaulted D.B. on these occasions, this was not sufficient for a conviction. The trial judge then came to an abrupt conclusion on incidents four and six, accepting D.B.’s evidence and rejecting the appellant’s.

[85] In the portion of his reasons set out above, at para. 59, the trial judge explained why he accepted D.B.’s evidence. He gave four reasons. I will address each of these, but in summary, all but one was based on an error of law, misapprehension of the evidence or was not logically probative to the issue of whether D.B. was credible. These errors are palpable. Moreover, because the

conclusion on credibility was based on these palpable errors, I consider the finding of credibility vitiated by overriding error.

(i) He disclosed what happened to both the counsellor and his mother

[86] The first reason the trial judge gave for finding D.B. credible was that he disclosed what happened to both the counsellor and his mother. This statement presupposes the truth of the disclosures and is of no value as a credibility finding.

[87] In *Dinardo*, at paras. 37-38, Charron J. explained how prior consistent statements may be used and how they may not be used. They may be admissible as part of the narrative or to explain the context in which a disclosure of sexual assault was made. For those purposes, the evidence about D.B.'s disclosure was admissible in this case. However, Charron J. also cautioned that prior consistent statements cannot be used for the impermissible purpose of confirming the truthfulness of the allegation. See also *R. v. G.C.*, [2006] O.J. No. 2245 (C.A.), at para. 20; *R. v. D.B.*, 2013 ONCA 578, 310 OA.C. 294, at para. 31. There is no indication in the trial judge's reasons that he was using the prior disclosure for the former, limited purpose. The fact of multiple disclosures cannot support D.B.'s credibility. This was an error of law.

(ii) The difference between the truth and a lie

[88] Second, the trial judge refers to D.B. having "pulled back" any embellishment because he told the police he lied about the appellant threatening

him. I have difficulty with the conclusion that having recanted his lie to the police about a very serious matter, the balance of D.B.'s evidence was likely to be more credible.

[89] After making this observation, the trial judge said, "I am satisfied he knew the difference between a lie and telling the truth." While understanding the nature of a promise to tell the truth is not a requirement of testimonial competence,[3] knowledge of the difference between a lie and the truth does not make one statement true and the other false. The fact D.B. recanted one statement and not the other cannot mean the other becomes more believable. This is particularly so where D.B.'s statement revealed *animus* against the appellant. D.B. said he had lied because he wanted to get the appellant "in lots of trouble."

[90] It was open to the trial judge to find that the lie to the police did not negatively affect his credibility. But, an admitted lie did not bolster his credibility. The trial judge's reliance on D.B.'s knowledge of the difference between a lie and the truth in order to find him credible was not logically probative of the credibility of the allegations.

(iii) His problems at home and school changed with the disclosure

[91] The trial judge appears to have concluded that, having unburdened himself, the complaint's behaviour improved, thus confirming his truthfulness.

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[3] See *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at paras. 23-25.

This third reason for finding the complainant credible is based on a misapprehension of the evidence. The counsellor said nothing about D.B.'s behaviour having improved. In fact, she said D.B. was visibly upset after the disclosure and stayed away from school for a few days. When he returned, "he had a very difficult time staying in the classroom and being able to focus on the classroom work … [H]e couldn't stay in the classroom without breaking down." As a result of his emotional needs, she said, her time with him increased. At no point did she say his behavioural problems had resolved themselves.

[92] D.B.'s mother stated that, prior to his disclosure, he was defiant at school, had a temper at home and had anger issues. There was nothing in her evidence to indicate D.B.'s behaviour improved after he disclosed the alleged sexual assaults.

[93] Nor did D.B. himself testify that his behaviour improved after the disclosure.

[94] In summary, there is was no evidence on which the trial judge could find that D.B.'s behaviour improved after the disclosure. This conclusion was a misapprehension of the evidence: see *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 538. Accordingly, it was a palpable error of fact for the trial judge to rely on the complainant's improved behaviour after the disclosure.

(iv) He “felt safe” after the disclosure

[95] The trial judge said he was “particularly struck by” D.B.’s statement that he “felt safe” after telling his counsellor about the incidents. He appears to have taken this as confirmatory of his truthfulness. The transcript suggests D.B.’s statement was, at best, ambiguous. In re-examining D.B., the Crown asked a number of unrelated questions concerning matters raised on cross-examination. Near the end of this questioning, the Crown asked:

> Q. All right. And can you tell His Honour why you were acting up in school in the fall of 2009?
>
> A. Ah, I was frustrated and people were saying stuff about me and the way I look.

After a brief discussion between the trial judge and counsel, confirming D.B.’s answer, the Crown asked:

> Q. How did you feel after you told [the counsellor at school]?
>
> A. I felt like I was safe.

[96] It is not clear from the record whether the statement “I felt like I was safe” was a reference to being safe in relation to the appellant or safe in relation to what people were saying about him at school. It was for the trial judge to determine the meaning of this statement, in the context in which it was made. Standing alone, I would not consider this reason to be unsustainable. Of the four reasons, I do not consider this one to be a palpable error.

[97] The trial judge concluded his credibility analysis by stating that D.B. was not a particularly good historian. In this observation, and his comments following it, the trial judge seems to be saying that his concerns with D.B.'s reliability did not impact his credibility. Indeed, there were some serious issues about D.B. as an historian, including his vague and inconsistent descriptions of the alleged assaults, his uncertainties as to times and places and his repeated emotional breakdowns in the face of cross-examination, revealing problems with his version of events.

[98] Earlier in his reasons, the trial judge had referred to *B. (G.)* in support of the proposition that a flaw or contradiction in a child's testimony should not be given the same effect as a flaw in an adult's. In commenting on D.B. as an historian, he returned to that case, noting Wilson J.'s comment, at p. 55: "[w]hile children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it."

[99] As propositions of law, these comments are unassailable. The problem is the trial judge's failure to analyze *why* his concerns about reliability did not impact his assessment of D.B.'s credibility. His statement was essentially a conclusion, not a reason.

[100] In summary, the trial judge's assessment of the complainant's credibility was based on errors of law and misapprehensions of the evidence that are palpable on the record. All but one of the reasons the trial judge gave for finding the complainant credible was unsupportable in law or on the record, and the single remaining reason is ambiguous. Even accepting that reason, I conclude the three palpably erroneous reasons the trial judge gave for finding the complainant credible were overriding and vitiate his finding. Accordingly, the trial judge's finding that D.B. was credible cannot stand.

(c) Unreasonable Verdict

[101] The appellant has also argued the trial judge's convictions were unreasonable. He makes this submission on two separate bases. First, he submits the trial judge's finding of reasonable doubt with respect to four of the incidents is logically inconsistent with his conclusions on the other two, especially because the case was argued at trial on the basis the incidents either happened or they did not: *R. v. McShannock* (1980), 55 C.C.C. (3d) 53 (Ont. C.A.), at p. 56; *R. v. Pittiman*, 2006 SCC 9, [2006] 1 S.C.R. 381, at para. 7. Although I see no reason why this inconsistent verdicts analysis could not apply to multiple incidents underlying one or more counts, I cannot accept this submission in this case. Despite my conclusion that the trial judge's credibility analysis was tainted by palpable and overriding errors, the trial judge articulated a rational basis for

accepting two incidents while rejecting four incidents, which was grounded in reliability concerns.

[102] Second, the appellant says it was simply unsafe to found convictions on the evidence at trial. I do not accept this argument. Like the New Brunswick Court of Appeal in *J.N.C.*, I cannot know the outcome of a credibility analysis free of factual and legal errors. I am not prepared to say that no trier of fact, acting reasonably, could have convicted the appellant: *R. v. W.H.*, 2013 SCC 22, at para. 26; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 10.

E. DISPOSITION

[103] For these reasons, I would allow the appeal, set aside the convictions and order a new trial.

Released: January 21, 2014 (“MR”)

“G.R. Strathy J.A.”
“I agree. Marc Rosenberg J.A.”
“I agree. Paul Roueau J.A.”