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), (2.1), (2.2), (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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (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 victim of the right to make an application for the order; and
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, 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); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18.

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. C.S., 2020 ONCA 752
DATE: 20201127
DOCKET: C61147

Watt, Harvison Young and Coroza JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

C.S.

Appellant

Alexander Ostroff, for the appellant

Eric. W. Taylor, for the respondent

Heard: June 23, 2020 by video conference

On appeal from the conviction entered on October 23, 2008, and the sentence imposed on January 21, 2015, by Justice John R. Sproat of the Superior Court of Justice.

Coroza J.A.:

A. BACKGROUND

[1] On October 23, 2008, after trial by judge alone in Superior Court of Justice, the appellant was found guilty of sexually assaulting and sexually interfering with his girlfriend's daughter, A.P., contrary to ss. 271 and 151, respectively, of the

Criminal Code, R.S.C. 1985, c. C-46. He was also found guilty of assaulting his girlfriend's other two daughters, C.M. and E.M., contrary to s. 266.

[2] The incidents occurred between November 2006 and January 2007, when the appellant, P.M. (the appellant's girlfriend at the time, and the mother of A.P., C.M. and E.M.), and the children lived together in a house in Brampton, Ontario. The appellant's sister L.S., her husband W.B., and their daughter K. also lived in the home during this time period.

[3] On January 9, 2007, the police were contacted by the Children's Aid Society ("CAS") in connection with allegations that the appellant or P.M. physically assaulted P.M.'s children. The same day, A.P. was interviewed by the police. The focus of the interview was on discipline in the home. At the end of the interview she was asked if anyone had done anything to make her uncomfortable and she said, "No". The next day, A.P. disclosed to K. that the appellant had touched her. K. disclosed this to L.S. and they contacted the police. A.P. was brought back for a second interview on January 11, 2007.

[4] During the second interview A.P. was upset that K. had disclosed their conversation. A.P. reluctantly told the police that the appellant had touched her in her private parts a few times. She also recounted one specific incident where the appellant asked her to stay home from school, removed her clothes, showed her

a book of pornography, and licked her vagina. This police statement was a vital part of the Crown's case.

[5] L.S. and K. testified at trial and provided direct and circumstantial evidence that the appellant had hit the children by slapping them in the face sometime in December 2006.

[6] After the trial, the Crown instituted dangerous offender proceedings pursuant to s. 753. The appellant was not a first offender. For example, in 1990, he pled guilty to several charges of sexual abuse of his step-daughter.

[7] The dangerous offender proceedings were delayed because the appellant fired his trial counsel and suffered a debilitating stroke in 2013. At the hearing, the appellant argued that his severe disabilities following his stroke demonstrated that he was not a significant threat to the community. He suggested that he should not be designated a dangerous offender but that he be designated a long-term offender under s. 753.1. Alternatively, he argued that if he was designated a dangerous offender, he should receive a fixed sentence with a period of long-term supervision pursuant to s. 753 (4)(b).

[8] The trial judge released written reasons on January 21, 2015. The trial judge was satisfied beyond a reasonable doubt that the appellant met the criteria for a dangerous offender designation, and he imposed an indeterminate sentence.

B. GROUNDS OF APPEAL

[9] The appellant appeals his convictions and seeks a new trial. He advances five grounds of appeal. He contends that the trial judge erred by:

(i) failing to give sufficient reasons on the sexual assault count;

(ii) using A.P.'s initial police statement to bolster the credibility of the sexual abuse allegations that she made in her second police statement;

(iii) failing to consider evidence with respect to A.P.'s credibility, in particular evidence supporting the defence theory of her motive to fabricate;

(iv) relying too heavily on the demeanour of A.P.; and

(v) improperly taking judicial notice of the knowledge and behaviour of children in the context of sexual abuse absent expert evidence.

[10] Should his appeal from conviction fail, the appellant also argues that the trial judge improperly imposed an indeterminate sentence. The appellant submits that the trial judge completely ignored the vast majority of the expert evidence regarding his risk of re-offending given his physical disabilities. According to the appellant, this evidence supported a determinate sentence and a long-term supervision order.

[11] For the reasons that follow, I would dismiss both appeals.

C. SUMMARY OF FACTS

[12] In order to place the appellant's arguments in context, I will provide a brief summary of the material facts. The Crown case consisted of evidence from L.S., W.B., K., and A.P.[1] The defence called no evidence.

(1) The Living Arrangements

[13] L.S. and her family lived with the appellant, P.M., and P.M.'s children, for two months (November 2006 to January 2007). A.P., who was ten years of age, slept in her own room upstairs.

[14] P.M. did not work and looked after the three children. L.S. worked during the day. K., who was 14 at the time, was not attending school. The appellant worked nightshifts at Walmart.

[15] The adults in the home were all aware that the appellant had previously been convicted of sexual assault.

(2) The Christmas Concert Incident of December 18, 2006

[16] L.S. testified that during the morning of a Christmas concert on December 18, 2006, she heard the appellant shout at the children in the kitchen. She also heard a sound that she described as a "smack". She heard the children crying and

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[1] A.P.'s evidence consisted of her testimony and two statements that were admitted under s. 715.1.

saw that C.M. and E.M. were both bleeding from the mouth and the appellant was wiping the blood away.

[17] K. also witnessed this event. She testified that the appellant hit the children because he had found empty cups of pudding and the children had denied consuming the pudding. She testified that the appellant slapped C.M. and E.M. in the face.

(3) The Incident of December 27, 2006

[18] On December 27, 2006, the appellant confronted P.M. and W.B. (L.S.' husband) because he believed that they had slept together. The confrontation turned physical, and P.M. called the police. It was around this time that the appellant left the home. By January 4, 2007, P.M. asked L.S. and her family to leave. It was not disputed that A.P. was very upset about this decision because she had become close to K. According to A.P., she looked up to K. as an older sister.

(4) The Disclosure of January 2007

[19] In January 2007, the police were contacted by CAS to investigate an allegation that either the appellant or P.M. had physically assaulted P.M.'s children.

[20] On January 9, 2007, A.P. was interviewed by a police officer in response to that allegation. At the time of the interview she was ten. During her interview, she told the police officer that she was afraid of the appellant because he barged into

her room. She also disclosed that she saw him slap her sisters, C.M. and E.M. When asked by the police officer if the appellant had touched her private parts, and whether the appellant had done anything to make her feel uncomfortable, she answered “No”.

[21] The following day, during a phone call, A.P. told K. that the appellant had touched her inappropriately. K. told her mother and they contacted the police.

[22] On January 11, 2007, A.P. was brought back to the police and interviewed a second time. The interviewing officer advised A.P. that K. had advised her mother about the phone call. A.P. expressed displeasure at K. revealing that she had spoken to her.

[23] During this interview, A.P. disclosed that the appellant had touched her private parts a few times including one day when he asked her to stay home from school. According to A.P., she stayed home from school and the appellant showed her pornography and licked her vagina. He also showed her his private parts. A.P. said that the appellant had given her a product called “EY” jelly and directed her to hide this item between the mattresses of her bed. At the time her mother was not home and had gone to the mall.

[24] A.P. told the officer that her mother was not home all the time because she would go to the mall. A.P. also stated that the appellant would come to her at night and in the morning.

[25] A.P. acknowledged during cross-examination that she wanted to live with K. and that she was angry with the appellant because she believed he had stolen a camera that he gave her as a gift.

[26] A.P. was also confronted about her failure to disclose the allegations during her first interview and she acknowledged that she lied to the officer during the first interview when she was confronted about whether or not anyone had made her feel uncomfortable.

(5) The School Records

[27] On consent, A.P.'s school records were admitted for the truth of their contents. The records included an entry that disclosed that A.P. had signed out of first period on December 4 at 9:05 a.m. A telephone call was made by the school to her home and the records noted that a male said A.P. could come home.

D. POSITIONS OF THE PARTIES AT TRIAL

[28] The Crown argued that A.P had to have been telling the truth about the assaults because she provided specific and lurid details about the sexual activity that were well beyond what a ten-year-old child could possibly have known.

[29] The Crown relied on this court's decision in *R. v. Khan* (1998), 42 C.C.C. (3d) 197 (Ont. C.A.), aff'd [1990] 2 S.C.R. 531. In *Khan (ONCA)*, Robins J.A. observed, at p. 210, that young children are generally not adept at "fabricating tales of sexual perversion" and are manifestly "unlikely to use their reflective powers to

concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken." The Supreme Court of Canada reiterated that the fact that the young complainant in that case "could not be expected to have knowledge of such sexual acts imbue[d] her statement with its own peculiar stamp of reliability.": *Khan* (*SCC)*, at p. 548.

[30] The Crown argued that the inconsistency between the two video statements was understandable because A.P. was reluctant to say anything to the police in the first statement out of fear that her mother would punish her. There were parts of that first statement that clearly showed that A.P. was holding back evidence and wanted to say more.

[31] Defence counsel at trial argued that that the inconsistency between the first and second statement was significant and could not be reconciled. She submitted that A.P. had decided to fabricate her allegations during the telephone call with K. According to defence counsel, A.P. did so for the purpose of living with K. However, once A.P. realized that K. had disclosed their conversation to the police she was stuck with this lie and was forced to maintain the lie.

E. THE TRIAL JUDGE'S REASONS

[32] The trial judge found that A.P., L.S. and K. were credible and reliable witnesses.

[33] The trial judge found that while the household may have been very busy, the appellant did have an opportunity to periodically commit acts of sexual touching and the acts described by A.P. on the day she stayed home from school. First, he found that while P.M. had young children, that did not mean that she never went out of the home. Second, he found that although K. may have often been at home in the morning did not mean that she was home each and every morning.

[34] In assessing A.P.'s credibility, the trial judge observed that A.P. gave every indication of being a truthful witness in the first statement. However, in the second statement, A.P. was very reluctant to divulge evidence and was upset that K. had disclosed their conversation.

[35] The trial judge also highlighted that during the second statement A.P. disclosed the following specific details in connection with the sexual activity:

- the appellant had shown her a book of pornography;
- the appellant had given her "EY" jelly as a sexual lubricant;
- she described the appellant licking her private parts; and
- the appellant was holding his penis and asking for 5 more minutes.

[36] The trial judge viewed A.P.'s description of the sexual activity as credible and reliable because there was no evidence that such lurid description of sexual activities would have been planted in A.P.'s mind. He noted that there was no evidence that A.P. had ever been previously exposed to any sexually explicit material. He found that there was also no evidence that A.P. ever discussed sex

with K. Finally, while the trial judge accepted that while there may have been knowledge in the household that the appellant had been in jail or had a criminal record, A.P. appeared to be genuinely surprised when it was revealed that the record related to sexual assaults and the trial judge rejected the suggestion that she knew about this prior to her disclosure.

[37] The trial judge acknowledged that there was an inconsistency between the first and second statements. However, from his perspective, there were aspects of this first statement that were significant only with the benefit of hindsight. After reviewing specific portions of the first statement, he found that A.P. was not trying to get her mother in trouble in the statement and that the focus of the first statement was on the means by which A.P. and the other children in the home were disciplined. He found that A.P. had told her mother that the appellant had asked her to stay home from school and that her mother did not believe her. This may have made A.P. reluctant to disclose what had happened during the first statement.

[38] He addressed the inconsistency in the following way:

> [A]s I said, there are references in the January 9th transcript which only, with the benefit of hindsight, indicate quite clearly that A.P. had something else to say and specifically indicate that there was something she wanted to say about the day she was asked by the accused to stay home. So I take that into account not as a prior consistent statement somehow enhancing

> credibility, but explaining what was said to be an inconsistency that diminished credibility.

[39] In the end, he found A.P. was a credible and reliable witness and he was satisfied beyond a reasonable doubt that: sexual touching had taken place on more than one occasion; and that the appellant had asked A.P. to come home from school and sexually assaulted her.

[40] With respect to the counts of assault involving the other two children, C.M. and E.M., the trial judge was satisfied that appellant had assaulted them based on the circumstantial evidence provided by L.S. and the direct evidence of K.[2] Accordingly, he found the appellant guilty of the two counts of assault, in addition to the counts of sexual assault and sexual interference in relation to A.P.[3]

F. DISCUSSION

[41] The appellant and the respondent agree that the core issue at trial was the credibility of A.P.'s allegations.

[42] Indeed, each ground of appeal advanced by the appellant is really a complaint about how the trial judge dealt with the credibility and reliability of A.P.'s evidence. In my view, the appellant is asking this court to re-visit the trial judge's careful credibility findings in the absence of any overriding and palpable error.

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[2] Although the appellant's Notice of Appeal seeks a new trial on all counts, there were no submissions made by counsel for the appellant in relation to the two counts of assault in his factum or during oral argument.

[3] The Crown did not proceed with Count 3 of the indictment.

Respectfully, I see no basis to interfere with the trial judge's credibility assessment. Very high deference is owed to his credibility findings: *R. v. Vuradin*, 2013 SCC 38, [2013] S.C.R. 639, at para. 11; *R. v. Aird*, 2013 ONCA 447, 307 O.A.C. 183, at para. 39; and *R. v. George*, 2016 ONCA 464, 349 O.A.C. 347, at para. 35.

Ground #1: The Trial Judge Failed to give Sufficient Reasons on Count 1

[43] Count 1 on the indictment alleged that the appellant sexually assaulted A.P. between November 2006 and January 2007. After noting that A.P. was a credible and reliable witness, the trial judge found the appellant guilty of this count because he was satisfied that A.P. "very clearly" testified to sexual touching in addition to the incident when she returned home from school.

[44] The appellant argues that the trial judge provided insufficient reasons in connection with the first count. He advances two submissions.

[45] First, the appellant contends that the trial judge failed to resolve contradictory evidence regarding whether there were opportunities for him to commit the offence. On the one hand, A.P.'s evidence was that the sexual assaults would occur when he would sneak into her room in the evening and touch her while she wore a nightdress. On the other hand, L.S. and K. testified that the appellant worked a night shift at Walmart. The appellant submits that the trial judge did not explain how this evidence could be reconciled.

[46] I see nothing in this submission. The trial judge recognized that the appellant worked a night shift. However, this did not mean he did not have the opportunity to commit the offence.

[47] A.P. told the police that the appellant had touched her a “few times” in addition to the incident when she returned home from school and her mother was not home. The trial judge accepted her evidence. In my view, the trial judge’s finding that there were opportunities to commit sexual assault in addition to the incident when A.P. returned home from school was firmly anchored in the evidence. That evidence included the following:

- A.P. told the police officer in the second interview that the appellant “used to come out at night” and “come out in the morning”; and
- K. testified that the appellant worked most times at night but when he arrived home the appellant would wake the girls up to go to school.

[48] The appellant also submits that the trial judge failed to resolve a contradiction between evidence of the appellant’s work schedule and evidence provided by K. who testified that A.P. told her that the abuse took place almost every night when A.P. would go to bed. I disagree. The trial judge expressly noted and reviewed K.’s evidence on this point in his reasons:

> When A.P. told her what the accused had been doing, A.P. said it was over the whole time she lived at Ashurst. The accused never behaved inappropriately to [K.] and in re-examination [K.] said that when A.P. reported it happened over the whole time, she did not say that it happened every night.

[49] The trial judge resolved the evidence. He was entitled to accept that K. had clarified her evidence in re-examination: *R. v. Candir*, 2009 ONCA 915, 250 C.C.C. (3d) 139, at para. 148, and it is obvious from his reasons that he found that there was no contradictory evidence. Furthermore, I note that this apparent contradiction was of limited value because A.P. was never confronted during cross-examination with her prior statement to K. about how often and at what time of day the sexual assaults took place.

Ground #2: The Trial Judge Improperly Used A.P.'s Police Statements

[50] A.P.'s second statement to the police was not consistent with her first statement, in which she denied that the appellant touched her private parts. The appellant argues that the trial judge erred by finding that the significance of the inconsistency was reduced or explained based on his finding, "with the benefit of hindsight", that A.P. had more to say during the first statement. The appellant submits that this error led the trial judge to improperly use the absence of any sexual abuse allegation in A.P.'s first statement to bolster her credibility when assessing the second statement.

[51] I agree with the appellant that the trial judge's comment that "A.P. had something else to say" in the first statement is speculative. Although the trial judge set out several examples of what he believed were instances of A.P. wanting to say more about the appellant, the fact is that A.P. acknowledged in her cross-examination that she was "sort of lying" to the police in the first statement. Further,

there was no direct evidence that she wanted to say more about the assaults during her first interview.

[52] That said, if this was an error, it was of no great moment. The trial judge expressly stated that he was not using these two statements as prior consistent statements, to bolster A.P.'s credibility. Instead, what the trial judge found is that because the first statement was not complete, the significance of the inconsistency was reduced. Although the underlying premise for that finding is problematic, I am satisfied that the trial judge's impugned comments were made to simply respond to the defence argument that there was an inconsistency that could diminish the weight of her testimony and he did not use it to add to her credibility.

[53] A fair reading of the trial judge's reasons reveals that his reasoning process was focused on squarely dealing with defence counsel's submission that A.P. was motivated to fabricate all the allegations for the purpose of living with K. and because she disliked the appellant. The trial judge explained in detail why he accepted what A.P. was saying in her second statement. In his view, it was A.P.'s ability to recount lurid and specific details of sexual activities and the absence of any prior exposure to explicit sexual information that would plant ideas in her mind that made A.P.'s allegations credible and reliable. The trial judge noted:

> In the second statement she was quite emphatic that she was telling the truth. I have considered the defence theory of this but there is no evidence that she was exposed to explicit sexual information or material that

> would assist her to come up with this fabrication. I agree she had a very strong motive to dislike or even hate the accused. She wanted him in jail but I think if this motivation was animating A.P., I would have expected her to be a lot more forthcoming about her allegations against the accused and I would have expected the complaint to have described acts that would be much more straightforward than the complaint that was made.

[54] In the end, the trial judge dealt specifically with the defence theory, and provided several cogent reasons as to why he found A.P. to be credible and reliable. The trial judge's comments in relation to his finding that A.P. had more to say in her first statement, to find that the impact of the inconsistency between the two statements was reduced, occasioned no prejudice.

[55] I would not give effect to this ground of appeal.

Ground #3: The Trial Judge Failed to Consider Evidence with respect to A.P.'s Credibility

[56] The appellant argues that the trial judge failed to consider other significant evidence with respect to A.P.'s credibility.

[57] Specifically, the appellant says the trial judge ignored K.'s testimony that, one week before the A.P. disclosed the sexual assaults, A.P. told K. that she would call the police if the appellant returned home to reunite with P.M. The appellant states that the trial judge erred by not addressing this evidence in his credibility assessment.

[58] It is well established in the jurisprudence that a trial judge does not have to mention every piece of evidence that could diminish the credibility of a witness. Nor does a trial judge have to respond to every argument advanced by counsel and provide an entire treatise on their reasoning process: *R. v. A.M.*, 2014 ONCA 769, 123 O.R. (2d) 536, at paras. 13-14; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 17-18.

[59] From my review of his reasons, the trial judge noted that defence counsel had "elicited that A.P. wanted to live with [K.], talked about going to live with them". K.'s motivation to live with K.'s family was the primary submission advanced by defence counsel. As long as the trial judge grappled with the substance of the live issues at trial, failure to mention each and every inconsistency or piece of evidence does not constitute error: *R.E.M.*, at para. 64.

[60] The following exchange between the trial judge and defence counsel during closing submissions highlights that the trial judge was alive to the live issue raised by defence counsel:

> THE COURT: [Defence Counsel], let me just ask you a question, just so I make sure I've got this straight. So, what you're saying is, she lied to [K.]. And, but your theory is she was genuinely surprised that [K.] had reported to the police, but once she did she was stuck with the lie and, therefore, she followed through?
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> [Defence Counsel]: Yes.

> THE COURT: All right. So, your theory, in effect is, by telling [K.] it would get back to [L.S.] and arrangements would be made sort of for her to be able to go and live with them without the police being involved?
>
> [Defence Counsel]: Yes.
>
> THE COURT: Okay.
>
> [Defence Counsel]: Spot on. Where was I, Your Honour?

[61] Against this backdrop, when the reasons are read in their entirety the trial judge covered the evidence with respect to A.P.'s credibility. From my review of the reasons, the trial judge exhaustively dealt with several arguments advanced by defence counsel as to the factors that impacted on A.P.'s credibility.

[62] I would reject this ground of appeal.

Ground #4: The Trial Judge Improperly Used Demeanour Evidence

[63] The appellant argues that the trial judge improperly relied on demeanour evidence to enhance A.P.'s credibility. First, he takes issue with the trial judge's observations that there was nothing in A.P.'s demeanour that suggested to him that she was not attempting to be truthful and that A.P. was "quite emphatic" that she was telling the truth in the second statement.

[64] I do not accept this submission.

[65] First, there is nothing wrong with a trial judge expressing an impression of how a young witness has testified in assessing their credibility: see *R. v. J.J.B.*,

2013 ONCA 268, 305 O.A.C. 201, at para. 112. Read fairly, the trial judge's reasons reveal that he was referencing A.P.'s age (ten years old) when she provided her two videotaped statements. She was a child, and the trial judge was entitled to assess her ability to perceive and recall as a child: *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at pp. 54-55.

[66] Second, the trial judge cautioned himself that he should not place undue reliance on demeanour in his credibility assessment and stated that he did not attach too much significance to it. This caution belies any suggestion that he was using demeanour evidence improperly.

[67] The appellant also argues that the trial judge unfairly made no reference to A.P.'s hostile testimonial demeanour or her reluctance to speak about her dishonesty or other events that presented her in a negative light. He submits that the trial judge unfairly ignored the hostile nature of A.P.'s presentation during cross-examination and was uneven in his assessment.

[68] While I agree with the appellant that testimonial demeanour can be a proper consideration in the evaluation of a witness's credibility, the trial judge's silence on this point does not amount to reversible error. It is difficult for this court to assess this submission because this court does not have the benefit that the trial judge did in viewing the demeanour of A.P. during the critical exchanges with defence counsel. Even assuming that the demeanour of A.P. was hostile to counsel during

cross-examination, the testimonial demeanour of A.P. certainly was not a material issue raised by defence counsel. Indeed, the silence of defence counsel on this point during closing submissions fortifies my conclusion that A.P.'s testimonial demeanour during cross-examination played no or at best, a peripheral role in this trial.

[69] I would reject this ground of appeal.

Ground #5: The Trial Judge Improperly took Judicial Notice

[70] The appellant complains that the trial judge improperly took judicial notice on two occasions in his reasons.

[71] First, he takes issue with the trial judge relying on *Khan (ONCA)* for the point that young children are generally not adept at "fabricating tales of sexual perversion". The appellant argues that this led the judge to undermine the defence theory by making findings about the knowledge and behaviour of children in the context of sexual abuse without any expert evidence.

[72] Second, the appellant complains that the trial judge improperly undermined the defence theory that it was incredible that A.P. would lie and stay home from school if she was in fact a victim of repeated sexual abuse and disliked the appellant. The trial judge did so by stating that "it is common knowledge that very often victims subject themselves to repeated assaults", and that "[y]ou only need to look at the Law Reports to see that that is a common occurrence where assaults

take place over a period of time and complainants simply find themselves unable to make a report".

[73] I disagree with these submissions.

[74] Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict*: R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48.

[75] Turning to the first submission, the trial judge was not taking judicial notice of how young children behave; he was simply noting this court's comments in *Khan (ONCA)*, that young children are generally not adept at "fabricating tales of sexual perversion" and comparing the observation made by Robins J.A. in that case with the evidence in this case. The following passage from the trial judge's reasons shows that he was not taking judicial notice. After citing *Khan (ONCA)*, the trial judge stated:

> I did a computer search to look at cases that quoted this passage. All of the cases I found involved children much younger than ten years old. I make this point because as far as I am concerned, the rationale that Justice Robbins [*sic*] has referred to, continues to have application, although with less force as a child grows older.
>
> <u>But in every case it is important to consider the evidence in the particular case.</u> There is no evidence here of A.P.

> being exposed to sexually explicit material. There is no discussion with [K.] about sex. [Emphasis added.]

[76] In this case, the trial judge reasoned that A.P.'s account was credible and reliable because there was no evidence that A.P. had been exposed to sexual literature; she did not know what he had been charged with; and there was no evidence that she knew what a lubricant was. The trial judge was not dispensing with facts. I agree with the respondent's submission that the trial judge was instead, through a reasoned process, drawing on *Khan (ONCA)* as a roadmap for determining whether A.P.'s evidence was credible and reliable.

[77] The appellant's second submission is also unpersuasive. In my view, the trial judge was responding to the questionable assertion advanced by defence counsel during her closing address that A.P. would not have decided to stay at home from school to be with the appellant if she had previously been abused by him or disliked him. Although it was not put exactly in these terms, I view the trial judge as expressing his disagreement with this submission because there are several reasons why, even if sexual abuse occurred, A.P. would have stayed home from school. As the Supreme Court of Canada has noted "there is no inviolable rule on how people who are the victims of trauma like sexual assault will behave": *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 65. The Supreme Court expressed its opinion that trial judges should routinely instruct juries with this common sense proposition. Indeed, juries are typically instructed about this fact

without the need for expert evidence. A trial judge cannot be faulted for expressing the same proposition in reasons for judgment on a judge alone trial. I view his comments as nothing more than an alternate way of expressing this proposition and he did not require expert evidence as a foundation for his observations.

[78] I would dismiss this ground of appeal.

G. APPEAL FROM INDETERMINATE SENTENCE

[79] Pursuant to s. 759, the appellant appeals the trial judge's determination that he should serve an indeterminate sentence. The appellant was not a first offender. Significantly, his record includes several convictions from 1990 when he pled guilty to several charges involving the sexual abuse of his step-daughter, including sexual intercourse with a female under 14 years of age. The abuse had occurred over multiple years.

[80] Following the appellant's conviction for the offences with respect to A.P., C.M., and E.M., the Crown sought a dangerous offender designation pursuant to s. 753.1. The hearing began in 2010 and continued over a span of four years. The hearing was delayed for a number of reasons including the appellant suffering a stroke that left him visually impaired and impacted on his mobility.

[81] At the hearing the Crown relied on the assessment of Dr. Wilkie, a staff psychiatrist at the Centre of Addiction and Mental Health ("CAMH"). The defence

called Dr. Gojer (a psychiatrist) and relied on two additional reports from Dr. Lipson (a physiatrist) and Dr. Ranalii (a neuro-ophthamologist).

[82] In comprehensive reasons released in January 2015, the trial judge declared the appellant to be a dangerous offender and imposed an indeterminate sentence of detention in the penitentiary.

[83] Dangerous offender proceedings are sentencing proceedings and involve a two-stage process – a designation stage and a penalty stage: *R. v. Spilman*, 2018 ONCA 551, 362 C.C.C. (3d) 415, at paras. 24-28.

[84] No issue is taken with the trial judge's decision, at the first stage, to designate the appellant as a dangerous offender.

[85] During the penalty stage, the hearing judge is required to consider imposing one of three options for sentencing as set out in s. 753 (4), namely:

> a) impose a sentence of detention in a penitentiary for an indeterminate period;
>
> b) impose a sentence for the offence for which the offender has been convicted – which must be a minimum punishment of imprisonment for a term of two years – and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
>
> c) impose a sentence for the offence for which the offender has been convicted.

[86] Section 753 (4.1) also provides the hearing judge guidance as to how to exercise his discretion. That provision requires a hearing judge to examine the evidence adduced at the hearing to determine whether there was a reasonable expectation that a lesser measure – a conventional fixed-term sentence or a fixed-term sentence of at least two years followed by a long-term supervision order – will adequately protect the public against the risk that the offender will commit murder or a serious personal injury offence: *Spilman*, at para. 30.

[87] In his reasons for judgment, the trial judge made the following findings:

> In this case, my discretion not to declare C.S. a dangerous offender depends on whether I am satisfied that the stroke-related consequences have so diminished C.S.'s functional abilities that the risk he presents can be reduced to an acceptable level through the long term offender provisions. The vague, impressionistic evidence regarding the extent to which the stroke has impaired C.S.'s functions falls far short of satisfying me that there is a reasonable possibility of eventual control in the community of the risk proposed by C.S. [Emphasis added.]

[88] The appellant's appeal as to sentence pursuant to s. 759 is a narrow one. He submits that the trial judge erred in finding that there was no reasonable possibility of eventual control in the community by ignoring the expert evidence that suggested he was left severely disabled as a result of his stroke. The appellant argues that the evidence pointed to only one reasonable conclusion—that he was no longer a significant threat to the community.

[89] In my view, the findings set out above were clearly open to the trial judge and his credibility and factual findings made in determining the appropriate sentence are entitled to deference. The submissions advanced on this sentence appeal repeat what was argued at the dangerous offender hearing. While the standard of review on a s. 759 appeal is “somewhat more robust” than other sentence appeals, it is not a hearing *de novo*: *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 26.

[90] The trial judge correctly identified that the only real issue at the hearing was whether the appellant’s stroke had left the appellant so disabled that he would lack the capacity to reoffend based on the need for constant care and supervision within the community, at a location where he would have to reside with little to no access to children. He decided this issue in favour of the Crown. In my view, there was ample evidence to support the trial judge’s conclusion.

[91] First, Dr. Wilkie found him to be highly exploitive, callous and manipulative. Dr. Wilkie’s opinion was also that the appellant met the diagnostic criteria of having antisocial personality disorder and pedohebephilia—a sexual preference for pre-pubescent aged females. In relation to the issue of whether, from a psychiatric perspective, the appellant was treatable and whether treatment offered any reasonable possibility that his risk could be managed within the community, Dr. Wilkie concluded that his prognosis was extremely poor.

[92] Second, Dr. Wilkie addressed the appellant's stroke and the impact it may have had on her conclusion that the appellant's risk could not be managed. She testified that pedohebephilia is a persistent trait that would not be affected by stroke related impairments, although it may affect his ability to act on his preferences and drives. While she acknowledged that the appellant required some assistance in daily living, the nature and extent of the required assistance was not clear. She could not discount his ability to enter into a domestic relationship by reason of his stroke.

[93] Third, while Dr. Gojer questioned whether the appellant was at a high risk to reoffend, Dr. Gojer agreed that he was not an expert on functional abilities and was relying on Dr. Lipson's report. The trial judge made strong findings against Dr. Lipson's report and found that it was almost boilerplate. The trial judge concluded that the report was not a "comprehensive assessment of [the appellant's] functional abilities or a report regarding his future residential care needs". In his view, Dr. Lipson's report only gave him a vague idea of the appellant's functional abilities.

[94] In my view, the trial judge carefully balanced all the relevant considerations including the appellant's antecedents, his ongoing needs, and the paramount objective of the protection of the public from his high risk to reoffend against children. There is no basis to interfere with the trial judge's decision to impose an indeterminate sentence.

[95] I would dismiss the sentence appeal.

H. DISPOSITION

[96] For these reasons I would dismiss the appeals.

Released: “D.W.” November 27, 2020

“S. Coroza J.A.”
“I agree. David Watt J.A.”
“I agree. Harvison Young J.A.”