



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. D.R.*, 2022 NLCA 2

Date: January 7, 2022

Docket Number: 202001H0011

Restriction on Publication: By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the person described in this judgment as the complainant or a witness shall not be published in any document or broadcast or transmitted in any way.

AND:

Restriction on Publication: By court order made under subsection 539(1) of the *Criminal Code*, the evidence taken at the preliminary inquiry shall not be published in any document or broadcast or transmitted in any way until the accused is discharged after the preliminary hearing, or, if the accused is committed to stand trial, until the end of trial.

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

D.R.

RESPONDENT

Coram: White, Hoegg and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201704G0254
(2020 NLSC 1)

Appeal Heard: April 13, 2021

Judgment Rendered: January 7, 2022

Reasons for Judgment by: Hoegg J.A.

Concurred in by: Butler J.A.

Dissenting Reasons by: White J.A.

Counsel for the Appellant: Shawn Patten

Counsel for the Respondent: Derek J. Hogan

Corrected decision: The text of the original judgment was corrected on December 13, 2021. A description of the correction is appended.

Authorities Cited:

Hoegg J.A.:

CASES CITED: *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.); *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.); *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.); *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. A.R.D.*, 2017 ABCA 237, aff'd 2018 SCC 6, [2018] 1 S.C.R. 218; *R. v. Lacombe*, 2019 ONCA 938; *R. v. L.M.*, 2019 ONCA 945; *R. v. Steele*, 2021 ONCA 186; *R. v. B.(G)*, [1990] 2 S.C.R. 57 (S.C.C.); *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. W.P.*, 2018 NLSC 113; *R. v. Friesen*, 2020 SCC 9.

ARTICLES CONSIDERED: Lisa Dufraimont, “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44:2 Queen’s LJ 316.

OTHER: Janine Benedet, Case Comment on *R. v. Lacombe*, 2019 ONCA 938 (2019 CarswellOnt 19397).

White J.A. (dissenting):

CASES CITED: *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218; *R. v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.); *R. v. Cooke*, 2020 NSCA 66; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 629; *R. v. A.A.*, 2015 ONCA 558; *R. v. Sullivan*, 2020 NLCA 5.

STATUTES CONSIDERED: *Criminal Code*, RSC 1985, c. C-46, section 676(1)(a).

Hoegg J.A.:

INTRODUCTION

[1] DR was acquitted by a Supreme Court Judge of sexual touching, invitation to sexual touching and sexual assault respecting ABR, a person under the age of 16 years. The Crown appeals, arguing that the Judge erred in assessing the complainant's credibility by engaging in impermissible stereotypical reasoning, and that his error had a material bearing on DR's acquittal.

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

BACKGROUND

[3] ABR alleged that she was sexually abused by DR, who is her grandfather, in a small Newfoundland community, when she was between 7 and 10 years old. ABR was 12 years old when she testified at trial. In the same trial, the Judge acquitted DR of the same three charges respecting each of ABR's two older sisters. The Crown appeals only DR's acquittal of the charges involving ABR.

[4] The Judge began his decision respecting the charges involving ABR by saying:

[113] In my assessment, ABR was the most credible of the three complainants to testify at this trial. Her evidence causes me to strongly suspect that the Accused had inappropriate contact of a sexual nature with ABR... .

[5] However, the Judge went on to acquit DR of the charges involving ABR, giving the following reasons:

[113] ...The evidence satisfies me that ABR had a strong and normal relationship with the Accused and M.R. up to the time [her sisters] first came forward with their allegations in late 2016. This was confirmed by P.R. [ABR's mother] in her evidence and I note as well that in ABR's statement to the police from December of 2016 when she was asked by the police whether she was happy when she saw the Accused, she answered "I'm happy when I see him". Yet in her trial testimony she suggested this was before the incidents involving the Accused which are alleged to have occurred while she still lived in ... which would have put the time frame in the years 2014 and earlier. Thus, she was essentially saying she was only happy to see the Accused back in 2014 and before. This is inconsistent with the testimony of P.R. and, in my view, inconsistent with ABR's own answer in her statement to the police given in December of 2016. It is my conclusion from the questions and answers that when ABR told the

police she was happy when she saw the Accused, she was describing how she felt at the moment she gave her answer; however, by the time of trial, she was suggesting she did not have a normal, strong relationship with the Accused going back to 2014 and before. I am left to wonder why she would say that at trial when her mother's testimony and her own statement to the police in December of 2016 indicted she did have a normal, strong relationship with the Accused up to the time [her older sisters] made their allegations.

[114] I am also concerned about what and how much was said to ABR by P.R., ALR, and ASR regarding the Accused before she spoke to the social worker and subsequently to the police. ...

[6] The Judge then referred to discussions which ABR had overheard or participated in regarding the allegations against her grandfather:

[115] ...there had been discussions with or in the presence of ABR regarding the Accused prior to her speaking with the social worker. P.R. testified that she did not speak with ABR about the allegations prior to going to see the social worker; however, ABR in cross-examination said that P.R. had told her the Accused had touched [one sister's] private parts prior to her going to see the social worker. ABR also said that her mother, P.R., had told her that this was the reason she was going to talk to the social worker.

[116] I note as well that ABR testified that neither of her sisters ever tried to talk to her about the Accused and the allegations; however, [one sister] testified she did try to talk to ABR about them but did not tell her what happened to her.

[7] The Judge also commented on ABR's memory:

[117] In addition, while ABR by her demeanor appeared to be a credible witness, her evidence of what happened contained largely what I would characterize as general allegations and a lot of answers indicating she could not remember.

And then qualified his remarks in that regard, saying:

[118] The fact she could not remember a lot of details in and of itself is not necessarily problematic given her age; however, when I consider the entirety of the evidence, including the evidence of the Accused and the foregoing issues I have identified, I am left with a lingering uncertainty about exactly what happened. ...

[8] He then added:

[119] ... I wish to emphasize that a finding of not guilty does not mean that nothing inappropriate occurred. Instead, it simply means that I am not satisfied beyond a reasonable doubt of the guilt of the Accused in respect of these Counts. ...

The Crown's Position

[9] The Crown submits that the Judge engaged in impermissible stereotypical reasoning in assessing ABR's credibility and finding it wanting on that basis, and in acquitting DR. The Crown argues that the Judge inferred, from ABR saying in 2016 that she was happy when she saw her grandfather, that her relationship with him at that time was strong and normal, and therefore she could not have been sexually abused by him as she alleged at trial.

[10] ABR said she was happy when she saw her grandfather during a videotaped statement that she gave to a police officer in December 2016. She was 10 years old at that time. The pertinent part of the statement is as follows:

- Q. Why don't you tell me a little bit about you and your relationship with your pop?
- A. What do you mean?
- Q. Why don't you tell me a little bit about your relationship say with Poppy like? Are you close to your pop? Are you not close to your pop? Are you happy when you see him, you know?
- A. I'm happy when I see him.
- Q. Okay.
- A. Cause like ah every time he comes up here, he buys me something.
- Q. Does he?
- A. At Walmart.

(Transcript of ABR's statement, at 9-10)

[11] At trial, ABR testified that she did not think anything of the sexual activity with her grandfather up until she was 9 or 10 years old. Around that time she said she started to feel disgusted by it. This was a short while before she gave her statement to the police.

[12] On cross-examination, ABR was questioned about her statement that she was happy when she saw her grandfather. The exchange with defence counsel was as follows:

Q. ...So, when you were just answering some questions from my friend, you said that a little while before you gave your statement to the police, is when you began feeling disgusted about what your Pop, you say was doing to you. If you look at line 23, on that page, okay, you'll see that the officer says, (*as read*) "Why don't you tell me a little bit about your relationship say, with Poppy, like? Are you close to your Pop? Are you not close to your Pop? Are you happy when you see him, you know?" And your answer is, "I'm happy when I see him." Is that what you said? That's what you told the police, right?

A. Yes.

Q. Okay. So, at that time when you gave the statement, you told the officer, "I'm happy when I see him."

A. Yes.

Q. Okay. So you were not feeling disgusted at that time?

A. Well, what I meant is like before.

(Transcript, Vol. VII, March 20, 2019, at 25)

[13] The Crown argues that the Judge's finding that ABR's relationship with her grandfather was strong and normal was based on the stereotypical assumption that an abused child could not be happy to see her abuser if she had truly been abused. The Crown says that reasoning based on this stereotype is impermissible, and that the Judge erred in law by relying on it to support his reasonable doubt about DR's guilt.

DR's Position

[14] DR submits that the Judge's reasonable doubt was not based on stereotypical reasoning. He says that the Judge's reasonable doubt was based on two inconsistencies he found in the evidence respecting ABR's relationship with her grandfather; the first being an inconsistency within ABR's own evidence, and the second an inconsistency between ABR's evidence and that of her mother. DR argues that the Judge was entitled to find inconsistencies in the evidence in assessing ABR's credibility, and to rely on them as a basis for his reasonable doubt that DR committed the offences charged.

[15] DR also says that the Judge gave other reasons for his reasonable doubt, like ABR not giving a lot of detail in her evidence and his concern that ABR's mother and sisters may have talked to her about allegations that her grandfather had sexually abused her sisters.

ISSUES

[16] The central issue in the Crown's appeal is whether the Judge engaged in impermissible stereotypical reasoning in acquitting DR of the charges. However, given DR's position on appeal, it is also necessary to consider whether the evidentiary inconsistencies that the Judge relied on, as well as his concern about discussion of other abuse by DR with or around ABR, could provide a basis for his reasonable doubt.

STEREOTYPICAL REASONING

[17] Stereotypical reasoning in sexual assault cases is well known to the law. It generally rests on assumptions or preconceived notions about how victims of sexual assault are expected to act. Reliance on stereotypes about how victims of sexual assault are expected to act in the assessment of a complainant's credibility is an error of law (*R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218, at para. 2).

[18] In *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), L'Heureux-Dubé J., in her concurring decision, discussed stereotypes or myths that arise in sexual assault cases respecting how victims of sexual abuse are expected to behave or react to abuse. Justice L'Heureux-Dubé explained that reasoning based on stereotypes or myths negatively impacts the truth-seeking function of the courts, and added that such stereotypes are often simply illogical or untrue (*Seaboyer*, at 693).

[19] The negative impact of stereotypical reasoning was further addressed by the Supreme Court of Canada in *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), wherein McLachlin and Iacobucci JJ. said:

[119] As has frequently been noted, speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences...

[20] L'Heureux-Dubé J. again addressed reasoning based on stereotypes in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.). In concurring with the majority to allow the Crown's appeal, she analyzed the lower courts' reasoning that women who engaged in prior sexual activity were less worthy of belief or more likely to have consented to the sexual activity in issue than women who had not engaged in prior sexual activity, described the assumptions behind the reasoning, now

known as the twin myths, as stereotypes, and declared reasoning based on them to be impermissible.

[21] The Supreme Court of Canada considered assumptions about how victims of sexual assault react in *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275. In *D.D.*, the trial judge acquitted a stepfather of sexually abusing his 15-year-old stepdaughter because of her delay in disclosing the abuse. The judge reasoned that the delay suggested that the abuse did not occur. In debunking the stereotype that delayed disclosure of sexual abuse suggests that it did not occur, Major J. stated that a complainant's failure to exhibit avoidant behavior or make timely complaint "must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse" (para. 63). Justice Major explained that people react differently to trauma, saying:

[65] A trial judge should recognize and so instruct a jury that there is no inviolable rule how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. ...

[22] In *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, the Supreme Court of Canada considered whether jurors would be able to be impartial in a case involving an accused charged with multiple sexual offences against children. In deciding that the offences charged did not give rise to a strain of bias capable of eluding the cleansing effect of trial safeguards (*Find*, at para. 107), the Court addressed the negative effects of myths and stereotypes that pervade public perceptions of sexual assault, noting that some favour the accused and others favour the Crown. In referencing myths and stereotypes involving the actions of complainants, McLachlin C.J.C. said:

[103] These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

[23] More recently, stereotypical reasoning was the issue on appeal in *R. v. A.R.D.*, 2017 ABCA 237, aff'd 2018 SCC 6, [2018] 1 S.C.R. 218. The stereotype in play was the notion that a complainant would display avoidant behavior or react negatively in the presence of her abuser if she had truly been abused. The complainant alleged that she had been sexually abused by her

stepfather. She testified that she did not react negatively around him in the presence of others because she was embarrassed and “didn’t really want anyone to know about it” (*A.R.D.*, at para. 16). In assessing the complainant’s credibility the trial judge stated his expectation that “a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behavior such as avoiding the perpetrator” (*A.R.D.*, at para. 4), and because there was no evidence of the complainant exhibiting avoidant behavior, the judge found that the relationship between the complainant and her stepfather was normal and therefore inconsistent with the complainant’s evidence that she had been abused. He acquitted the stepfather on that basis.

[24] The Alberta Court of Appeal allowed the Crown’s appeal, ruling that:

[47] There is no juridical foundation upon which a trial judge could correctly conclude that, as a matter of sound legal principle, child sexual assault survivors will demonstrate avoidant behavior in relation to their sexual assault perpetrators...

And went on to explain that:

[58] ...absence of avoidant behaviour or a change in behaviour as a generalization is logically irrelevant and as such, cannot form the basis of a credibility assessment leading to reasonable doubt – because we know that all sexual assault victims behave differently. This is all the more so when dealing with child victims who often fail to make early disclosure and may attempt to normalize behavior for any number of reasons. This record speaks to those reasons – the complainant resided in the home of the alleged perpetrator and in her words, it “changes everything...[w]hen people know”. While it might appear logical to suggest that a victim of sexual assault will choose to run away or distance themselves from an assailant, relying on failure to do so, particularly when dealing with a child complainant, is simply incorrect.

The Court reiterated Justice Major’s words from *D.D.* that “there is no inviolable rule how people who are the victims of trauma like a sexual assault will behave” and that a complainant’s failure to exhibit avoidant behavior or to make a timely complaint “must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse” (*D.D.*, at paras. 65 and 63, respectively).

[25] The appellate Court’s decision was affirmed by the Supreme Court of Canada, which ruled that the trial judge had erred by judging “the complainant’s credibility based solely on the correspondence between her behavior and the expected behavior of the stereotypical victim of sexual assault” (*A.R.J.D.*, at para. 2).

[26] The Ontario Court of Appeal addressed stereotypical reasoning in *R. v. Lacombe*, 2019 ONCA 938. In *Lacombe*, the trial judge had acquitted the defendant of sexual assault, reasoning that the complainant's dress, her absence of immediate reporting, and her overall conduct was not what he would expect (paras. 36-45). He did this without giving any consideration to the complainant's evidence of her fear of the defendant (paras. 43-45).

[27] The Crown's appeal to the Summary Conviction Appeal Court was dismissed, but its appeal of the Summary Conviction Appeal Court's decision to the Ontario Court of Appeal was allowed, and a new trial was ordered. The Court of Appeal ruled that the stereotypes relied on by the judge were anchored in assumptions that failed to reveal anything about the complainant's credibility and reliability. The Court rejected the trial judge's professed reliance on common sense and life experience to justify his findings, saying:

[52] The trial judge's ultimate reliance on "common sense and life experiences" [to justify his stereotypical reasoning] did not cleanse his assessment as his common-sense inferences reflected stereotypical sexual and myth-based reasoning. They infected his consideration of the complainant's evidence and his assessment of reasonable doubt. His conclusions were the product of legally flawed reasoning. Again, "reasonable doubt is not a shield for appellate review if that doubt is informed by stereotypical and therefore prejudicial reasoning": *A.R.D.*, at para. 9.

[28] Professor Janine Benedet from the Allard School of Law, University of British Columbia wrote a case comment on *Lacombe*, found at 2019 Carswell-Ont 19397. The following words from Professor Benedet's comment are worth repeating:

The conclusion that genuine victims always attempt to avoid all further contact with their abusers is not accurate. The reality is more complex and varied than this blanket "common sense" statement would admit. It can take some time for a person who has been victimized to understand what has happened to them and admit it to themselves.

[29] The Ontario Court of Appeal also ordered a new trial in *R. v. L.M.*, 2019 ONCA 945, where the trial judge had relied on the teenage complainant's interest in and knowledge of sexual matters in assessing her credibility (the alleged assault took place when the complainant was 11 years old and she was 15 when she testified at trial). The appellate court was critical of the judge's reliance on his assumption that the complainant's interest and knowledge of sexual matters (four years after the offence) made her less worthy of belief.

[30] The Ontario Court of Appeal again addressed stereotypical reasoning in *R. v. Steele*, 2021 ONCA 186. In *Steele*, the trial judge assessed the complainant's credibility according to his expectations of how she should have reacted to a telephone call she received from her father in the course of the assault. The judge said that her response to her father was "not the response of someone who had just been sexually assaulted and has been kept in the trailer against her wishes" (para. 11). The appellate court found this reasoning stereotypical, and that it, along with another instance of stereotypical reasoning, had materially affected the judge's acquittal of the accused. A new trial was ordered.

[31] In summary, stereotypical reasoning in judicial decision-making rests on preconceived notions, assumptions or expectations, in other words, stereotypes or myths, about how people behave or ought to behave in given situations. The stereotype is essentially used as a standard against which a complainant's behavior is measured and judged, and if the behavior does not conform to the stereotype, the complainant's evidence can then be regarded as suspect, incredible, unreliable, or cause for reasonable doubt.

[32] Many factors influence how judges and courts reach their conclusions. Fundamental to our judicial system is that decisions in any given case are to be made by applying the relevant law to the admissible relevant evidence. When judges and courts measure or judge a complainant's actions or inactions in relation to a stereotype in the course of a credibility analysis, they are measuring or judging a complainant's behaviour against their preconceived assumptions about human behavior based on speculation (*Mills*, at para. 119). These preconceived assumptions may be simply untrue (*Seaboyer*, at 693), or have no basis in fact or experience (*D.D.*, at paras. 63-65). Moreover, such reasoning is often logically irrelevant to the matter at hand (*A.R.D.*, at para. 58). Also, reliance on them in assessing a complainant's credibility generally causes decision-makers to be diverted away from consideration of the actual evidence in the case (*A.R.D.*, at para. 43, and *L.M.*, at paras. 50-56).

[33] While judges and courts must be able to take a broad view of the evidence in their search for the truth in any given case, they must take care to ensure that the inferences they draw from the evidence are rooted in the evidence, and not in stereotypes or myths about how victims should or should not act. They must also make sure that their reasoning logically relates to the issues in the case. Professor Lisa Dufraimont explained these challenges in her article entitled "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44:2 Queen's LJ 316, saying that judges and courts must remove reasoning based on myths

and stereotypes from their adjudication of sexual assault cases while ensuring that all relevant evidence respecting an alleged sexual assault is able to be considered. This approach is consistent with Justice L'Hereaux-Dubé's oft-quoted statement from *Ewanchuk* that "Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions" (para. 95).

ANALYSIS

Stereotypical Reasoning

[34] In this case the Judge rested his reasonable doubt on his conclusion that ABR had a strong and normal relationship with her grandfather up until she gave her statement in December 2016 and that their strong and normal relationship meant that her grandfather could not have been sexually abusing her.

[35] The Judge then supported his conclusion with his finding that ABR's mother's evidence indicated that ABR and her grandfather had a strong and normal relationship.

[36] The question on appeal therefore is whether the Judge's conclusion that ABR's relationship with her grandfather was strong and normal and therefore not abusive was based on impermissible stereotypical reasoning. In my view, it was, for the reasons that follow.

[37] I first observe that whether ABR's relationship with her grandfather was strong and normal was not the issue the Judge had to decide. The issue was whether ABR had been sexually abused by her grandfather as alleged in the indictment, regardless of ABR's own perception of the strength and normality of her relationship with her grandfather, and regardless of how strong and normal their relationship appeared to others, like her mother. The Judge's introduction of the strength and normality of ABR's relationship with her grandfather as a step in his analysis of whether DR committed the offences as charged is obfuscating and diversionary. It has no place in determining whether alleged sexual abuse has occurred.

[38] The Crown argues that the Judge's conclusion that ABR's relationship with her grandfather was strong and normal and therefore not abusive was based on the Judge's assumption that because ABR was happy when she saw her grandfather up to the time she gave her statement in 2016, she could not have

been abused by him. The Crown maintains that this reasoning is impermissible stereotypical reasoning.

[39] I agree that the Judge's reasoning was based on a stereotype. The stereotype is that a victim cannot be happy to see her abuser if she is being abused by him. The stereotype is based on the assumption that a victim is unable to have any kind of "normal" relationship with her abuser respecting other interactions and activities unrelated to the abuse because the sexual abuse pervades all aspects of the relationship in a negative way, leaving no room for any positive, tolerant, or other feelings a victim may have about her abuser. The assumption fails to recognize the circumstances of the relationship between the particular victim and abuser. It also fails to recognize that a victim may take time to appreciate that what is happening is abuse (Benedet, at para. 28 above) or that a victim may deliberately act normally around the abuser, due to embarrassment, guilt, or denial (*D.D.*, at para. 65), so as not to alert others to the abuse. Moreover, the stereotype has not been shown to have any foundation in evidence or principle.

[40] Reliance on this stereotype when assessing the credibility of a complainant is particularly concerning when the sexual abuse is alleged to have taken place within a family or other close relationship that typically involves love and trust, and even more concerning when the complainant is a young child. Victims of sexual assault in these situations often attempt to normalize the sexual activity so as to be able to continue to cope within the family or other close relationship. Victims young and old may experience confusion and conflict between their feelings of discomfort with the abuse and dislike of their abusers, and their feelings of love and trust for their abusers. The stereotype is particularly invidious when the victim is a young child, who may not appreciate that the sexual activity is abuse.

[41] ABR alleged she was abused when she was between 7 and 10 years old. She was 12 years old when she testified at trial. ABR had lived much of her young life in close proximity to, if not with, her grandparents. It is clear from the record that ABR, her siblings, and their mother had a close relationship with ABR's grandfather, and that the children were in the temporary custody of her grandparents for several months during 2014-2015.

[42] When the police officer asked ABR if she was happy when she saw her grandfather, she said that she was, and immediately added that every time he visited he bought her something at Walmart. Her evidence was that the sexual activity with her grandfather always took place in his bedroom (away from the

watchful eyes of others), and that her grandfather told her that it was their secret. ABR said that she thought nothing of the sexual activity with her grandfather and only began to have feelings of disgust toward him shortly before she was interviewed about the abuse. On cross-examination, ABR explained her statement about being happy when she saw her grandfather to refer to “before”.

[43] Evidence that a child victim thinks nothing of sexual activity with a close family member can suggest that the victim does not realize that what is happening is sexual abuse. As Major J. noted in *D.D.*, lack of knowledge and understanding of what is happening can explain delay in complaining (para. 65). Likewise, lack of knowledge and understanding that what is happening is abuse, and not knowing and understanding what to do about it, can inform a 10-year-old child’s perception of her relationship with her abuser. While the nature of a victim’s relationship with her abuser does not determine whether abuse occurred, it can affect how a victim feels about it or deals with it.

[44] Judging the credibility of a young child who alleges that she is being sexually abused by her grandfather, whom she loves and trusts, who buys her things and frames his sexual activity with her as their secret, against the stereotype that a victim could not be happy to see her abuser if she were truly being abused, is stereotypical reasoning. In this case, the Judge found that ABR’s “happiness” when she saw her grandfather was inconsistent with the above-described stereotype, and on this basis he concluded that ABR’s credibility about having been sexually abused was impugned. The Judge not only relied on a stereotype which had no evidentiary foundation, but in so doing did not take into consideration ABR’s actual evidence of abuse or her circumstances. It is an error of law to fail to consider the evidence as a whole (*R. v. B.(G)*, [1990] 2 S.C.R. 57, at 73-74 (S.C.C.), and *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 31). The Judge also took no account of the close family relationship of care and trust inherent in ABR’s relationship with her grandfather, and how unhappiness could be slow to take root in such a situation. In this regard, see *R. v. W.P.*, 2018 NLSC 113, where the court considered the complainant’s trust and high regard she had for her grandfather, and accepted that her delayed disclosure of sexual abuse at his hand was due to her own feelings of shame and guilt, and “the weight of the world having to keep such a disturbing secret” (para. 34).

[45] In assessing whether ABR’s evidence was credible and reliable, the Judge isolated ABR’s single comment about being happy when she saw her grandfather, and judged it against the stereotype that she could not have been happy to see her grandfather if she were truly being abused, without considering

ABR's evidence of explanation for why she said she was happy, without considering her age and circumstances, and without considering her significant direct and sufficiently detailed evidence of abuse. That was both stereotypical reasoning and a failure to consider the evidence as a whole.

[46] The Judge's finding that ABR's mother's evidence supported the conclusion that ABR's relationship with her grandfather was "strong and normal" and therefore not abusive was also the product of stereotypical reasoning. The stereotype in play, closely related to the assumption that a victim of sexual abuse cannot be happy when she sees her abuser, assumes that if a victim is truly being abused, she would exhibit avoidant or negative behaviour around her abuser that would be discernable to a third party. Reliance on the assumption that all victims of sexual assault will react negatively in the presence of their abusers if the abuse is truly happening is stereotypical reasoning (*A.R.D.*, at paras. 61-62).

[47] During cross-examination, ABR's mother was asked whether she noticed if her father were sexually abusing her children. ABR's mother stated that she had not noticed that her children were being abused by her father. She said that her father's relationship with her children appeared normal to her, and that it came as a shock when a social worker conveyed information to her that one of her older daughters disclosed that she had been sexually abused by her grandfather. At no point did ABR's mother maintain that her father did not abuse ABR or any other of her children, or say that ABR had a strong and normal relationship with her grandfather.

[48] The Judge inferred from ABR's mother's evidence that ABR's relationship with her grandfather was strong and normal and therefore not abusive. The Judge's reasoning respecting ABR's mother's evidence assumed that ABR would have acted in a way that would have caused ABR's mother to suspect something was wrong if she were truly being abused. This reasoning was based on the assumption that ABR would not be able to be happy around her grandfather. The Judge accepted the stereotype that ABR's lack of avoidant behavior meant that ABR could not have been abused — if she had been, she would have exhibited avoidant behavior noticeable to her mother. That is stereotypical reasoning.

[49] Something more must be said about the Judge's stereotypical reasoning respecting ABR's mother's evidence. Sexual abuse is rarely committed in the presence of witnesses or in circumstances that lead third parties to suspect wrongdoing. This is especially true when the abuse takes place within a family,

where love and trust are generally the dominant dynamics. Disclosure of sexual abuse perpetrated by a family member has huge repercussions for the family involved, and places a heavy burden on a victim who may not want to feel responsible for dissension within the family, or even its break-up. Even a young child who may not appreciate that what is happening is abuse can intuit negative fallout from disclosing a secret that could lead to suspicion or suggest to others that all is not as it seems. These dynamics that are in play when children are alleged to be abused by family members were recognized and discussed by the Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9, at para. 60.

[50] I therefore agree with the Crown that the Judge engaged in impermissible stereotypical reasoning when assessing ABR's credibility. Simply put, he concluded that ABR's evidence was not credible by relying on the stereotypes that a victim could not be happy to see her abuser regardless of her age and circumstances, and that a victim will exhibit avoidant behaviour around her abuser if she were truly being abused to support his reasonable doubt about DR's guilt.

The Inconsistencies

[51] DR argues that the Judge relied on two inconsistencies in the evidence to support his reasonable doubt. The first was inconsistency within ABR's own evidence. According to the Judge, ABR being happy when she saw her grandfather in 2016 conflicted with her explanation at trial that her statement about happiness pertained to "before". Her explanation was interpreted by the Judge to mean before 2014 when ABR moved from the small community with her family to Corner Brook. The transcript does not indicate what ABR meant by "before", whether it was before she moved to Corner Brook, before the sexual abuse was disclosed, or before she realized that she was being sexually abused.

[52] Regardless of what period of time ABR was referring to, ABR's explanation does not conflict with her evidence of abuse. The entirety of ABR's evidence, in her December 2016 videotaped statement and in her *viva voce* testimony at trial in 2018, was that her grandfather began sexually abusing her when she was very young and that it continued through the summer of 2016. Until she was interviewed in December 2016, first by a social worker and then by a police officer, ABR had kept the sexual abuse a secret as her grandfather had instructed.

[53] As discussed above, ABR saying she was happy when she saw her grandfather, or being happy when she saw her grandfather, does not mean that he did not abuse her. There is no inconsistency between ABR's statement about happiness and her evidence of abuse. The inconsistency the Judge found was based on his finding of no abuse which was a product of his stereotypical reasoning.

[54] The second inconsistency was between ABR's evidence of abuse and the Judge's finding that ABR's mother's evidence was that ABR's relationship with her grandfather was strong and normal and therefore not abusive. There was no inconsistency between ABR's mother's evidence that she did not notice any abuse and ABR's evidence of abuse.

[55] The inconsistency the Judge found between ABR's evidence and that of her mother was based on his inference from ABR's mother's evidence that ABR had a strong and normal and therefore not an abusive relationship with her grandfather. As indicated above, this inconsistency resulted from the Judge's stereotypical reasoning that if ABR were being abused, she would have exhibited avoidant behavior which her mother would have noticed. ABR's mother's evidence was not inconsistent with ABR's evidence of sexual abuse. Again, the inconsistency the Judge found was based on his stereotypical reasoning.

[56] Furthermore, ABR's mother's evidence that she did not notice that her children were being sexually abused by her father is not evidence that ABR had a strong and normal, and therefore not abusive, relationship with her grandfather, let alone evidence that conflicts with ABR's evidence of abuse. It does not follow from ABR's mother not noticing that her father was sexually abusing her children that he was not sexually abusing ABR. While avoidant behavior may indicate that abuse is occurring, it does not follow that lack of avoidant behavior means there is no abuse.

[57] In the result, there was no inconsistency within ABR's evidence and no inconsistency between ABR's evidence and that of her mother. The inconsistencies the Judge found resulted from his stereotypical reasoning and are not supported by the evidence.

[58] Something must be said about the Judge's concern that there had been discussions with or in the presence of ABR regarding other allegations of abuse against her grandfather. The intimation from the Judge's stated concern is that

ABR may have been influenced to exaggerate or even fabricate her evidence to make it accord with what she had heard.

[59] The evidence respecting the extent of discussions with or around ABR respecting the other allegations was clear. The mother testified that the topic was discussed with ABR in only a limited way, and the evidence of ABR and her sisters was the same. There was no evidence of inappropriate communication with ABR, any attempt to influence her evidence, or any collusion between ABR and other family members. In these circumstances there was no basis for the Judge's intimation that the credibility or reliability of ABR's evidence was concerning because of what she may have heard. As well, the Judge's stated concern seems to be based on an expectation that parents and children in a family would not overhear or discuss allegations of abuse involving other family members. To expect family members not to talk about a family situation, police investigation, and legal proceedings like those of this case, over the course of years, is neither reasonable nor justifiable. Moreover, it is especially unreasonable to expect a mother of a young child to be unavailable to the child for support and discussion in such circumstances.

[60] I must also say that the Judge's strong suspicion that "the accused had inappropriate contact of a sexual nature with ABR" (para. 113), his positive comments about ABR's credibility (paras. 113 and 117), and his comment that his decision did not mean that nothing inappropriate occurred between ABR and her grandfather (para. 119), are difficult to reconcile with his acquittal of DR respecting the charges involving ABR.

Did the stereotypical reasoning have a material effect on the Judge's acquittal of DR?

[61] While a judge's credibility assessment is always entitled to deference, an assessment of evidence based on a wrong legal principle, like a stereotype, is an error in law. More particularly, a credibility assessment based on impermissible stereotypical reasoning is wrong in law (*A.R.J.D.*, at para. 2, and *J.M.H.*, at para. 29). In this case, the Judge's acquittal of DR was based principally on his impermissible stereotypical reasoning respecting how ABR ought to have reacted if she were truly being abused by her grandfather. Accordingly, his decision must be set aside.

[62] In the result, I would allow the Crown's appeal and order a new trial.

L. R. Hoegg J.A.

I concur, _____

G. D. Butler J.A.

Dissenting Reasons by White J.A.:

[63] DR was acquitted of sexual offences following a judge-alone trial in Supreme Court. I am unable to agree with my colleague's conclusion allowing the Crown's appeal and ordering a new trial. I would dismiss the appeal.

BACKGROUND

[64] DR was charged with three sexual offences involving his granddaughter ABR who was born in 2006. The Crown alleges that the offences took place between January 1, 2014 and September 1, 2016. The trial also involved allegations of sexual offences involving two other of DR's granddaughters. DR was acquitted of all charges. The Crown appeals only the acquittals involving ABR.

ISSUE

[65] At the commencement of the appeal hearing, the Crown abandoned various issues raised in its factum. Hence, the only ground of appeal to be considered is whether the trial judge, when assessing ABR's credibility, erred in law by placing reliance on impermissible stereotypes of victims of sexual abuse.

ANALYSIS

[66] A Crown appeal of an acquittal in an indictable offence is limited to an error of law - s. 676(1)(a) of the *Criminal Code*.

[67] In a sexual assault trial, judging a “complainant's credibility based solely on the correspondence between [their] behaviour and the expected behaviour of the stereotypical victim of sexual assault” is an error of law (*A.R.J.D.*, at para. 2). (Underlining added).

[68] The Crown argues that the trial judge, when assessing ABR’s credibility, erred in law by placing reliance on impermissible stereotypes of victims of sexual abuse.

[69] The respondent argues that stereotypes and myths did not come into play in the trial judge’s analysis of the complainant’s credibility. Rather, that the trial judge, when assessing the credibility of ABR, focused on what he determined to be an inconsistency between the complainant’s police statement and trial testimony, as well as inconsistency between the complainant’s testimony and that of her mother.

[70] Furthermore, the respondent highlighted that the trial judge stated that the complainant’s testimony of what happened contained largely what the trial judge characterized as “general allegations and a lot of answers indicating that she could not remember” (para. 117). The trial judge goes on to state:

[118] The fact that she could not remember a lot of details in and of itself is not necessarily problematic given her age; however, when I consider the entirety of the evidence, including the evidence of the Accused and the foregoing issues I have identified, I am left with a lingering uncertainty about exactly what happened. ...

[71] The respondent argues that it was the proper role of the trial judge to determine if there were inconsistencies in the complainant’s testimony and to use such inconsistencies in assessing the complainant’s credibility. The respondent’s counsel stated during the appeal hearing “that’s permissible, that’s perfect, that’s standard that if there is an inconsistency in a person’s evidence that can be used to impeach credibility”.

[72] The inconsistencies at issue are described in the trial judge’s decision as follows:

[113] ...I note as well that in ABR’s statement to the police from December of 2016 when she was asked by the police whether she was happy when she saw the Accused, she answered “I’m happy when I see him”. Yet in her trial testimony she suggested this was before the incidents involving the Accused which are alleged to have occurred while she still lived in ... which would have put the time frame in the years 2014 and earlier. Thus, she was essentially saying that she was only happy to see the Accused back in 2014 and before. This is inconsistent with the testimony of P.R. and,

in my view, inconsistent with ABR's own answer in her statement to the police given in December of 2016. It is my conclusion from the questions and answers that when ABR told the police she was happy when she saw the Accused, she was describing how she felt at the moment she gave her answer; however, by the time of trial, she was suggesting she did not have a normal, strong relationship with the Accused going back to 2014 and before....

[73] As the trier of fact, it is the judge's role to assess and weigh the evidence and identify inconsistencies. In this case, the trial judge acted within the parameters of his judicial role and properly identified inconsistencies that became important factors when assessing credibility.

[74] It is my view that the trial judge did not rely on any myth or stereotype about sexual assault when assessing the complainant's credibility. The trial judge acquitted on the basis of the Crown's case failing to meet the requisite standard of proof beyond a reasonable doubt resulting partly from an inconsistency between the complainant's police statement and that of her testimony at trial, as well as an inconsistency between her evidence and that of another Crown witness. Furthermore, the trial judge stated that he considered the entirety of the evidence leading to his ultimate conclusion that the burden of proof had not been met. It is not for this Court to displace credibility findings and a reasoned conclusion as to reasonable doubt, barring the most exceptional of circumstances.

[75] The trial judge properly instructed himself on the principles set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.) and was not satisfied beyond a reasonable doubt that the Crown had proven the charges.

[76] The trial judge states in his decision as follows:

[113] In my assessment, ABR was the most credible of the three complainants to testify at this trial. Her evidence causes me to strongly suspect that the Accused had inappropriate contact of a sexual nature with ABR; however, after much deliberation and based on the entirety of the evidence, including the evidence of the Accused and ABR, I have arrived at the conclusion that I am not satisfied beyond a reasonable doubt of the guilt of the Accused in respect of the Counts involving ABR. I will explain some of the issues that gave rise to this reasonable doubt....

[77] The trial judge stated that he considered the entirety of the evidence leading to his ultimate conclusion that the burden of proof had not been met. While troubled by the case, he did not allow mere suspicion to displace his essential role of upholding the imperative that underpins our system of criminal

law – guilt beyond a reasonable doubt. The trial judge thoroughly assessed credibility and expressed and applied the proper standard.

[78] *R. v. Cooke*, 2020 NSCA 66, a decision from the Nova Scotia Court of Appeal, provides a very helpful overview of the dangers of allowing fear of making an impermissible inference to overpower the obligation to thoroughly assess credibility. The appellant, Mr. Cooke, appealed a conviction of sexual assault. At trial, the judge found the complainant to be a credible witness, despite contradictions within her own evidence and that of another witness. The trial judge invoked several cautions against stereotypical reasoning to support her conclusions. The Nova Scotia Court of Appeal allowed the appeal and found that the trial judge erred in her consideration of evidence relating to the complainant's credibility and did not address inconsistencies and contradictions in the complainant's evidence.

[79] The Court in *Cooke* concluded that the trial judge's overemphasis on prohibitions against stereotypical thinking, to the detriment of the task of assessing credibility, combined with unsupportable positive credibility findings, amounted to errors of law. Beaton J.A. states that “[t]he record illustrates the judge focused on avoiding impermissible inferences rather than scrutinizing certain aspects of the evidence to properly assess the complainant's credibility” (para. 27). There was no indication the trial judge in *Cooke* considered or resolved the inconsistencies and contradictions in the complainant's evidence in assessing credibility.

[80] The Crown asserts that the trial judge erred by assessing ABR's credibility based on the expected behavior of a stereotypical victim of sexual assault because he noted that ABR was in a strong and normal relationship with the respondent at a time after the dates of the alleged offences. As noted in the respondent's factum, the trial judge actually questioned the veracity of ABR's allegations because her testimony that her normal relationship with the respondent ended in 2014 “was inconsistent with the testimony of P.R. and, (in the view of the trial judge) inconsistent with ABR's own answer in her statement to the police given in December of 2016”. Unlike the judge in *Cooke*, in the judgement under appeal the trial judge properly considered the evidence relating to the complainant's credibility and fully addressed inconsistencies and contradictions in the Crown's evidence. He did not make an error of law based on an impermissible inference, he made a credibility assessment based on the evidence before him.

[81] A high degree of deference should be given by appellate courts to credibility determinations made by a trial judge (*R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 629; *R. v. A.A.*, 2015 ONCA 558). A trial judge is in the best position to observe witnesses on the stand, consider the evidence, and make credibility findings. Further, even where there are deficiencies in the trial judge's reasoning, this Court grants latitude as most recently explained by Goodridge J.A. in *R. v. Sullivan*, 2020 NLCA 5, at para. 26.

[82] While a credibility assessment that is tainted by an error of law may displace the deference afforded to a trial judge's credibility assessment and warrant appellate intervention, in this case there was no such error of law. Accordingly, I would defer to the trial judge's credibility assessment of ABR.

SUMMARY AND DISPOSITION

[83] This is a case which is limited to one ground of appeal. Specifically, the Crown's position is that when assessing ABR's credibility, the trial judge erred in law by placing reliance on impermissible stereotypes of victims of sexual abuse. In my view, the trial judge made no such error. He did not rely on any myth or stereotype about sexual assault when assessing the complainant's credibility in this case.

[84] I would dismiss the appeal as the trial judge, having considered the entirety of the evidence and having applied the proper tests, acquitted on the basis of the Crown's case failing to meet the burden of proof beyond a reasonable doubt.

C. W. White J.A.

Correction Notice

Correction made on December 13, 2021:

1. On page 2, under Articles Considered, the spelling of Professor Lisa “Dufraiment” was replaced with “Dufraimont”.
2. On page 11, paragraph 33, the spelling of Professor Lisa “Dufraiment” was replaced with “Dufraimont”.