IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Lawlor*, 2025 NLCA 2
Date: January 15, 2025
Docket Number: 202201H0056

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BETWEEN:

MITCHELL LAWLOR

APPELLANT

AND:

HIS MAJESTY THE KING

RESPONDENT

AND:

BRIAN WENTZELL

INTERVENOR

Coram: L.R. Hoegg, F.J. Knickle and D.M. Boone JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador, St. John's 0120A02975 (2021 NLPC 0120A02975)

Appeal Heard:	September 18 and 19, 2024
Judgment Rendered:	January 15, 2025
Reasons for Judgment by:	D.M. Boone J.A.
Concurred in by:	L.R. Hoegg and F.J. Knickle JJ.A.
Counsel for the Appellant:	Rosellen Sullivan K.C.
Counsel for the Respondent:	Shawn I. Patten
Counsel for the Intervenor:	Jonathan E. Noonan K.C.

Authorities Cited:

CASES CITED: *Browne v. Dunn*, 1893 CanLII 65 (FOREP); *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. White*, 2022 SCC 7, [2022] 1 S.C.R. 64; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696; *R. v. Fiorilli*, 2021 ONCA 461; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Sullivan*, 2020 NLCA 5; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. L.M.*, 2019 ONCA 945; *R. v. Kruk*, 2024 SCC 7; *R. v. Gerrard*, 2022 SCC 13; *R. v. D.R.*, 2022 NLCA 64; *R. v. P.H.*, 2022 NLCA 37; *R. v. Dove*, 2022 NLCA 6; *R. v. Barnes*, 2021 NLCA 15; *R. v. S.O.*, 2019 NLCA 42; *R. v. K.P.*, 2019 NLCA 37; *R. v. Hiscock*, 2016 NLCA 74; *R. v. Mehari*, 2020 SCC 40, [2020] 3 S.C.R. 782; *R. v. M.A.*, 2022 NLCA 41.

STATUTES CONSIDERED: *Criminal Code*, RSC 1985, c. C-46, section 686(1); *Canadian Charter of Rights and Freedoms*, section 11(f).

D.M. Boone J.A.:

[1] The Appellant was tried before a Provincial Court judge on one count of sexual assault on the Complainant. The Appellant and the Complainant both testified that the Appellant had vaginal intercourse with the Complainant on a November night in 2017. The issue at trial was whether the Complainant had consented. The trial judge found that the Complainant had not consented and, therefore, convicted the Appellant.

[2] The Appellant appeals from that conviction. He relies on three grounds of appeal. The first ground is that his former counsel provided him with ineffective assistance and that his conviction was therefore based on a miscarriage of justice.

The remaining grounds allege that the trial judge erred in law by giving insufficient reasons and by applying different standards of scrutiny in assessing the evidence of the Complainant and that of the Appellant.

[3] I would dismiss the appeal.

BACKGROUND

[4] The Appellant and the Complainant had been close friends for several years before the night in question. They went to the same party that night. The Complainant left the party and went home to her family house. She was accompanied by two friends. Her friends went to sleep, in the same room, soon after they arrived. The Complainant stayed up and, by text message, she invited the Appellant to sleep at her house too.

[5] The Appellant and the Complainant ended up in a bed together. Although they each told different versions as to how this came about, the trial judge decided that he did not need to decide between these versions and his reasons for that conclusion were not in issue on appeal. The Complainant and the Appellant both testified that once in bed they kissed, and that then the Appellant asked the Complainant to perform oral sex and she refused. Their descriptions of events diverged from that point.

[6] The Complainant testified that the Appellant attempted several times to force her to perform oral sex but that she resisted. The Appellant testified that he asked the Complainant to perform oral sex but that she refused and he accepted her refusal immediately.

[7] The Complainant testified that the Appellant asked her to have vaginal intercourse and that she agreed to do so. The Appellant testified that the Complainant suggested vaginal intercourse. They both said that the Complainant initially consented to have intercourse.

[8] The Complainant said that she changed her mind and withdrew her consent before she was completely undressed. Nevertheless, she says that the Appellant removed her underwear, physically forced her legs apart and inserted his penis into her vagina, and engaged in intercourse for several minutes. The Complainant testified that the Appellant plugged her nose and spit in her face during those minutes, that he stopped intercourse and yelled at her because he had blood on his

penis and hands, and then demanded a towel. She lay in the bed crying. She realized that she was bleeding from her vagina. The Appellant went to the bathroom and then returned to the bedroom. He said something about her crying and then he left the bedroom and went downstairs.

[9] The Appellant said that the Complainant never told him that she withdrew her consent. He stopped intercourse after a minute because he felt blood. He turned on the light and the Complainant became upset when she saw the blood. He got her a towel. He went to the bathroom to clean up. He felt awkward about the bleeding and the failed attempt at intercourse, and he called his mother to come pick him up. He returned to the bedroom and told the Complainant that he was leaving. She became upset because she wanted him to stay. He went downstairs to wait for his mother. As he left the bedroom, he heard the Complainant say, "[a]ct like you don't remember" (Transcript, Vol. 4, at 690).

[10] The Complainant testified that she went to the bathroom and saw bloody handprints on her face, blood on her body and blood on the sink and floor. She urinated and it hurt, and she passed blood. She went to the bedroom where her friends were sleeping and woke them. She was naked and crying and there was blood on her body. Her friends cleaned her up.

[11] The Complainant's friends both testified that she was naked and had blood on her stomach and hands when she woke them. One described the Complainant as hysterical and frantic. They went to the bedroom where the Complainant and the Appellant had intercourse and they stripped the bed. They observed a lot of blood on the pillows and bed.

[12] The Complainant says she wanted to be sure that the Appellant had left her house, so she texted him asking "where the fuck r u?". The Appellant acknowledged receiving that text but says that he thought it was from his mother, so he answered that he was at the Complainant's house.

[13] The Complainant and her friends testified that they went downstairs and found the Appellant on a couch where, they believed, he was feigning sleep. The Complainant told him to get out of her house. He spoke in reply but did not make any sense. The Complainant's friends testified that one of them also confronted the Appellant, telling him to leave.

[14] The Complainant and her friends testified that they then went back upstairs and called a friend of the Appellant to come and get him (this friend refused to do so). The Complainant said that she then observed the Appellant's mother's Mini Cooper arrive to pick him up. Her friends said that they did not see the car but did see headlights and heard a car in the driveway.

[15] The Appellant told a different story about what happened after he left the bedroom. He says that he went downstairs and waited for his mother. He never interacted with anyone while he waited. He denied that the Complainant and her friends confronted him or told him to get out of the house. He left the house when his mother arrived.

[16] The Appellant's mother testified that she picked him up at the Complainant's house that night. However, she was not driving her Mini Cooper, which she stated at that point had been in storage for more than a year.

THE TRIAL DECISION

[17] In his Decision, the trial judge recounted the evidence and discussed legal principles that either guided his evidentiary rulings and fact-finding (the collateral fact rule, credibility, the avoidance of myths and stereotypes in fact-finding, and the rule in *Browne v. Dunn*, 1893 CanLII 65 (FOREP)) or his ultimate decision-making task (the meaning of reasonable doubt and the application of the directions in *R. v. W.(D.)*, [1991] 1 S.C.R. 742). He set out the submissions of the Crown and Defence.

[18] The trial judge decided that the testimony of the Complainant's friends regarding her condition when she came to their bedroom supported the Complainant's version that intercourse was forced. He also found support for the Complainant's version in the evidence from the Complainant and her friends about the confrontation with the Appellant. He found that the version of this confrontation offered by the Complainant and her friends was entirely inconsistent with the Appellant's version of what happened after he left the bedroom, finding that "[s]omeone is not telling the truth". He concluded:

> [139] … Considering all the evidence, in its totality, including the texts, I do not find the testimony of the accused as to what happened from the time [the Complainant] agreed to intercourse until the time he left her house, credible. As regards whether the intercourse was consensual, I do not believe him. His evidence does not raise a reasonable doubt and based on the evidence which I do accept, including the testimony of the complainant and what was observed and experienced by the two other occupants

> of the house that night, I am satisfied that the Crown has proven the charge beyond a reasonable doubt. She told him she changed her mind, she resisted in that he forced her legs apart and pinned her down. Once a complainant has expressed an unwillingness to engage in sexual contact, the accused must make sure she has truly changed her mind before proceeding with any further intimacies. This is not a case (nor was it argued) of honest but mistaken belief.
>
> [140] For clarity sake, the finding of sexual assault includes only the allegations of intercourse. I do not find that the allegation of attempted forced oral sex was proven beyond a reasonable doubt as the events could have played out exactly as they did, without that ever happening.

ANALYSIS

ISSUES

1. Has the appellant demonstrated that he received ineffective assistance of counsel resulting in a miscarriage of justice?

2. Did the trial judge err in law by providing insufficient reasons for conviction?

3. Did the trial judge err in his credibility assessment?

Ineffective Assistance of Counsel

[19] All accused persons represented by counsel have the right to effective assistance from that counsel. "[T]hat right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, s. 650(3) of the *Criminal Code* of Canada and ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*" (*R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 24).

[20] "Ineffective assistance has a 'performance component' and a 'prejudice component': for such a claim to succeed, the appellant must establish that (1) counsel's acts or omissions constituted incompetence; and (2) that a miscarriage of justice resulted" (*R. v. White*, 2022 SCC 7, [2022] 1 S.C.R. 64, at para. 6). Further, "[i]n those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis....If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow" (*G.D.B.*, at para. 29).

[21] In *White*, the Supreme Court affirmed that the "right to elect the mode of trial is an important right that should be exercised by the accused" (*White*, at para. 5). The right to choose a trial by jury in respect of offences that carry a maximum punishment of imprisonment for five years, or a more severe punishment, is protected by section 11(f) of the *Canadian Charter of Rights and Freedoms*.

[22] *White*, at paragraph 8, also says that the veracity of a claim rooted in ineffective counsel regarding mode of trial can be assessed on the principles outlined in *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696.

[23] In *Wong*, the appellant pleaded guilty but later asserted that his decision to do so was uninformed because he was unaware that his immigration status would be affected by his conviction. He sought to withdraw that plea on appeal. The majority adopted this test for assessing the credibility of that claim:

> [6] …accused persons who seek to withdraw their guilty plea on the basis that they were unaware of legally relevant consequences at the time of the plea must file an affidavit establishing a reasonable possibility that they would have either (1) opted for a trial and pleaded not guilty; or (2) pleaded guilty, but with different conditions. To assess the veracity of that claim, courts can look to objective, contemporaneous evidence. The inquiry is therefore subjective to the accused, but allows for an objective assessment of the credibility of the accused's subjective claim.

[24] The onus on the appellant who alleges ineffective assistance of counsel is to establish the facts underpinning the claim on a balance of probabilities. In assessing whether the appellant has met that onus, the appellate court must be mindful that there is a presumption of competence on the part of counsel, and also "of the incentive there may be for a convicted appellant to make false allegations, particularly in light of the ease with which false allegations can be made, and the potential unreliability that can arise when events are recalled "through the bars of a jail cell"" (*R. v. Fiorilli*, 2021 ONCA 461, at para. 51).

[25] The Appellant claims that his former counsel provided him with ineffective assistance by failing to explain to him that he could elect a trial by judge and jury, and, instead, elected the mode of trial without instruction. The Appellant says that he was consequently denied the right to control his own defence in this essential manner and his conviction therefore is based on a miscarriage of justice.

[26] The Appellant's former counsel says that he discussed the modes of trial available depending on whether the Crown proceeded by summary or indictable

process. He also says that the Appellant had researched the trial process prior to this first meeting. He said that the Appellant was a final year engineering student who already had a plan to attend graduate school. He said that the Appellant was focused on disposing of the criminal charges as soon as possible and was concerned about avoiding publicity. He also said that it was obvious from the time of the first meeting that the Appellant had conducted his own research on criminal procedure. The Appellant conceded on cross-examination that he had done so, but only regarding possible sentences he was facing.

[27] Former counsel also said in his Affidavit that the Appellant was already aware before their first meeting that a Provincial Court trial would take place much sooner than a jury trial in Supreme Court and that a jury trial would attract more publicity than a Provincial Court trial.

[28] The Appellant asserts in an affidavit that he would have chosen a trial by judge and jury if he had been advised, and that he will do so on a re-trial if he is successful in this appeal.

[29] The Appellant did not explain how he has been prejudiced by the loss of choice of mode of trial.

[30] The "objective, contemporaneous evidence" (*Wong*, at para. 6) does not support the Appellant's claim that he would have chosen a jury trial if he had known that he had that option. The record supports his former counsel's evidence that not only was the Appellant advised of the availability of a jury trial, but because the Appellant wanted as little publicity as possible and to get the trial completed as quickly as possible, the Appellant preferred the option of a trial in Provincial Court. The record supports that the Appellant took an active role in the conduct of his defence. In total, the evidence presented does not support the Appellant's claim that he was not informed of the availability of a jury trial, or that he would have chosen a jury trial.

[31] Whether or not the Appellant was given the choice of a jury trial, the Appellant has not demonstrated how his loss of the choice to a jury trial resulted in a miscarriage of justice in this case. As stated in *White*, at paragraph 7, the loss of a choice, standing alone, does not amount to a miscarriage of justice.

[32] The Appellant's bare assertion that he would have chosen a different mode of trial does not, in this case, meet the standard of proof required to demonstrate that his conviction resulted from a miscarriage of justice.

[33] I therefore would dismiss this ground of appeal.

Sufficiency of Reasons

[34] An appellate court may allow an appeal from a conviction only on specified grounds: that the conviction was unreasonable or cannot be supported by the evidence; that it was based on an error of law; or that there was a miscarriage of justice (*Criminal Code*, RSC 1985, c. C-46, at s. 686(1)).

[35] An alleged insufficiency in reasons for conviction is not a free-standing ground of appeal. Rather, the appellant must demonstrate that the reasons are inadequate, assessed on a functional basis, because they do not fulfill the purposes of informing the accused and the public as to why he was convicted, or permit meaningful appellate review (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; and *R. v. Sullivan*, 2020 NLCA 5, at para. 12). Reasons that are so unintelligible that they frustrate appellate review amount to an error of law (*Sheppard*, at para. 28).

[36] The task of an appellate court is not to "finely parse the trial judge's reasons in a search for error" (*R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, at paras. 13, 33). The task is much narrower: it must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain, in a manner that permits effective appellate review, what the trial judge decided and why. As McLachlin C.J. put it in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, "[t]he foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded" (at para. 17). And as Charron J. stated in *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues" (at para. 31; and *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 69).

[37] Moreover, in assessing the functional sufficiency of reasons, an appellate court should look to the record, including the evidence and the submissions of counsel along with the reasons "to determine the 'live' issues as they emerged during the trial" and examine "whether the logical connection between the verdict and the basis for the verdict is established" (*R.E.M*, at para. 35).

[38] The Appellant argues that the Decision was insufficient in two significant aspects. First, the Appellant says that because the trial judge said that he considered text messages in formulating his conclusions, he ought to have identified the specific text messages on which he relied and the conclusions he drew from those specific messages. Second, the Appellant says that the Decision was incongruous because the trial judge found that the Crown had proved non-consensual vaginal intercourse but that he could not conclude beyond a reasonable doubt that the Appellant had attempted to force the Complainant to perform oral sex. The Appellant says that the Complainant's descriptions of non-consensual vaginal intercourse and attempted forced oral sex were inextricably intertwined and it was incumbent on the trial judge to explain how he had accepted the version of the Complainant regarding one allegation but rejected the other.

[39] In this case, the Decision meets the requirement for functional sufficiency, and it speaks for itself.

[40] First, the trial judge sufficiently explains the text messages to which he was referring, and the use he made of them. In his summary paragraph 139, the trial judge refers to text messages in assessing the credibility of the Appellant: "Considering all the evidence, in its totality, including the texts, I do not find the testimony of the accused as to what happened from the time [the Complainant] agreed to intercourse until the time he left her house, credible." Numerous text messages were entered into evidence. These included messages sent before the Appellant arrived at the Complainant's house and in the days following these events, and the trial judge referred to some of those earlier in the Decision. In paragraph 139, the trial judge was referring to events in the time between intercourse and the Appellant leaving the house. In particular, at paragraph 135, during his discussion of which version of events happened after intercourse and before the Appellant left the house, he considered the text from the Complainant asking the Appellant where he was and the Appellant's reply. It is clear from the context that these are the text messages to which he was referring, and the import he took from those messages was also clear.

[41] Second, the trial judge sufficiently explained why he convicted the Appellant of engaging in vaginal intercourse with the Complainant without her consent, while stating that he could not determine beyond a reasonable doubt whether the Appellant had attempted to force the Complainant to perform oral sex. The Decision accurately set out the law regarding credibility and reasonable doubt, and the relationship between them. The judge understood that he could accept some, all, or none of a witness's evidence. The key to understanding his different decisions regarding the non-consensual intercourse and attempted forced oral sex is the phrase, in paragraph

140, that I have highlighted: "I do not find that the allegation of attempted forced oral sex was proven beyond a reasonable doubt as the events could have played out exactly as they did, without that ever happening." It is clear from reading paragraphs 133 to 140 that the trial judge considered the events that occurred after the Complainant and the Appellant engaged in intercourse and before the Appellant left the house. The trial judge concluded that he accepted the version of these events proffered by the Crown through the testimony of the Complainant and her friends. He found the friends' description of the Complainant's physical and apparent mental condition consistent with the Complainant's testimony. He did not believe the Appellant's testimony regarding anything that happened after the Complainant initially consented to intercourse and found that this testimony did not raise a reasonable doubt. He accepted the testimony of the Complainant.

[42] The trial judge considered the evidence of the Complainant and the Appellant regarding the alleged attempts to force oral sex. The evidence of events and the condition of the Complainant after intercourse and before the Appellant left the house did not assist the trial judge in determining whether the attempted oral sex was proved beyond reasonable doubt. It was not necessary for the trial judge to say that he was not convinced beyond a reasonable doubt that attempted oral sex was not proved; attempted oral sex was not the subject of a separate charge.

[43] There is no inconsistency between the finding beyond a reasonable doubt that non-consensual intercourse occurred, and the finding that the same determination could not be made regarding attempted forced oral sex. The trial judge explained the reasons for his decision at paragraph 140: "the events could have played out exactly as they did, without that ever happening."

[44] The record in this case supports that the Decision meets the test of functional adequacy. The Appellant was charged with one count of sexual assault. The trial judge found that charge had been proven on the basis of his conclusion at paragraph 139 that the Appellant had engaged in non-consensual intercourse with the Complainant. His reasons could have concluded there. The finding at paragraph 140, regarding the attempted non-consensual oral sex, was superfluous to the finding of guilt, although it may have had some relevance to sentencing.

[45] Further, the submissions of counsel provide context for the trial judge's finding at paragraph 140. All that the Crown attorney said in final submissions about the allegation of non-consensual oral sex was that this was "itself…a sexual assault" but that she would "focus [her submissions] on what follows after that". Both counsel in final submissions referred the trial judge to the evidence of what happened

after intercourse occurred as supportive of their witnesses' respective versions of events, but neither made any submissions about the plausibility or inherent credibility of their witnesses' recounting of their interaction regarding oral sex. The question as to whether the Appellant had committed sexual assault by trying to force non-consensual oral sex was not a focus of the evidence or the submissions of counsel. The trial judge "does not have to answer every question raised in the case, but only those matters that are essential to say whether the crime has been proven beyond a reasonable doubt: David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015), at p. 231" (*R. v. L.M.*, 2019 ONCA 945, at para. 42).

[46] I would dismiss the appeal that is based on the ground that the trial judge erred in law by failing to give sufficient reasons.

Credibility Findings

[47] Appellate courts, including the Supreme Court of Canada (*R. v. Kruk*, 2024 SCC 7, at paras. 80-85; *G.F.*, at para. 99; and *R. v. Gerrard*, 2022 SCC 13, at para. 3) and this court (*R. v. D.R.*, 2022 NLCA 64, at para. 16; *R. v. P.H.*, 2022 NLCA 37, at paras. 14-17; *R. v. Dove*, 2022 NLCA 6, at paras. 18-19; *R. v. Barnes*, 2021 NLCA 15, at para. 44; *R. v. S.O.*, 2019 NLCA 42, at para. 16; *R. v. K.P.*, 2019 NLCA 37, at para. 26; and *R. v. Hiscock*, 2016 NLCA 74, at para. 17), have repeatedly stressed that credibility and reliability findings are the province of the trial judge due to their unique position to observe witnesses.

[48] Appellate courts, on the other hand, "are comparatively ill-suited to credibility and reliability assessment, being restricted to reviewing written transcripts of testimony and often focusing narrowly, even telescopically, on particular issues as opposed to seeing the case and the evidence as a whole" (*Kruk*, at para. 83).

[49] Consequently, credibility findings are not lightly disturbed on appeal and may only be set aside on a showing of palpable and overriding error, or in rare cases when credibility findings depend upon recognized errors of law. Appellate courts reviewing credibility findings also "must be mindful of the acute practical difficulties trial judges face in articulating why a particular witness was believed or disbelieved, tasked as they are with interpreting the various impressions and inferences that arise from the evidence...[and] should examine a trial judge's reasons as a whole and refrain from parsing their 'individual linguistic components', as such

an invasive approach would 'undermine the trial judge's responsibility for weighing all of the evidence'" (*Kruk*, at para. 84).

[50] The Appellant says that the trial judge erred in law by underemphasizing contradictions in the Complainant's evidence while overstating similar contradictions in the Appellant's testimony. He says that the trial judge underemphasized or ignored that other evidence contradicted the Complainant's testimony concerning: the car that the Appellant's mother drove to pick him up; the noise level in the house before and after the Complainant and the Appellant had intercourse; and the reason that the Complainant had invited the Appellant to stay at her house.

[51] The Appellant argues that, in contrast, the trial judge overemphasized the inconsistency between the testimony of the Complainant and that of the Appellant regarding the events following intercourse. The Appellant says that the trial judge either did not pay enough attention to them or too readily discounted their significance, especially relative to the significance he ascribed to the inconsistent evidence of post-intercourse events in the testimony of the Appellant compared to that of the Complainant and the other witnesses to those events.

[52] The question whether uneven scrutiny is an independent or free-standing ground of appeal has not been definitively determined (*R. v. Mehari*, 2020 SCC 40, [2020] 3 S.C.R. 782, at para. 1; and *G.F.*, at paras. 100-101). In *G.F.*, at paragraph 100, Karakatsanis J., speaking for a majority of the court, said:

> [100] I have serious reservations about whether "uneven scrutiny" is a helpful analytical tool to demonstrate error in credibility findings. As reflected in the submissions here, it appears to focus on methodology and presumes that the testimony of different witnesses necessarily deserves parallel or symmetrical analysis. In my view, the focus must always be on whether there is reversible error in the trial judge's credibility findings….

[53] The Appellant in this case did not demonstrate any error of law impacting the trial judge's credibility assessment. In *Kruk*, the Supreme Court reminded appellate courts that credibility findings made by trial judges are entitled to deference:

> [82] The governing standard of review applicable to findings of credibility and reliability is well established: absent a recognized error of law, such findings are entitled to deference unless a palpable and overriding error can be shown (*Gagnon*, at para. 10, citing *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 74).

> Credibility and reliability findings typically do not engage errors of law, as at their core they relate to the extent to which a judge has relied upon a particular factor and how closely that factor is tied to the evidence. Although such findings may be overturned on correctness if errors of law are disclosed, in most cases it is preferable to review them using the nuanced and holistic standard of palpable and overriding error — which defers to the conclusions of trial judges who have had direct exposure to the witnesses themselves.

[54] The trial judge attended to each aspect of the Complainant's evidence that the Appellant says involved contradictions.

[55] The Complainant testified that the Appellant's mother drove a Mini Cooper to pick up the Appellant. The Appellant's mother said that she did not, and there was evidence that the car was in storage at the time. The trial judge recognized, at paragraph 60 of the Decision, that the Complainant's memory in this regard was unreliable. However, he did not find that this undermined the reliability and credibility of "her evidence on essential elements".

[56] The trial judge recognized that the question of the make of car that the Appellant's mother was driving was clearly a collateral issue. It was not necessary to decide that issue to determine the essential elements of the case (*R. v. M.A.*, 2022 NLCA 41, at para. 10). It was open to the trial judge to disbelieve the Complainant's evidence on this issue and yet believe her evidence on the essential elements. Viewed in context it is understandable that the Complainant's memory regarding which car the Appellant's mother drove would not undermine her credibility regarding essential events.

[57] The Appellant says that the question of noise was significant because it related to the question as to the motivation behind the Complainant inviting the Appellant to spend the night at her house and should have been considered more thoroughly by the trial judge in assessing her credibility. The Complainant had testified that the Appellant arrived at her house in the company of other young men, and that they had made so much noise that it woke her sister who called to them to keep it down. The Complainant's friends did not remember the other young men being in the house. However, one of them had testified that the Complainant had told her that others were coming with the Appellant, and that she could "remember a bit of a commotion, so I feel as though I heard the door open downstairs" (Transcript, Vol. 3, at 513). The trial judge recognized that the witnesses had given conflicting evidence on the noise level in the house and said, at paragraph 132, that he was "somewhat puzzled" by the Complainant's friends not hearing much noise. Ultimately, the trial judge decided that the failure of the friends to not report the noise was due either to their

being “sound sleepers as well, or perhaps after all this time had passed, they forgot to mention it, if it happened”.

[58] The trial judge also determined, at paragraphs 123 to 126, that the respective original motivations of each of the Appellant and the Complainant regarding the Appellant spending the night were not important, and therefore whether the Appellant arrived alone in a cab or in a car with others was not important.

[59] The Appellant argues that the trial judge overemphasized the significance of the contradictions in the evidence regarding the confrontation in the basement. The Appellant testified that he never encountered anyone else in the house after he left the Complainant in the bedroom. The Complainant and her friends testified that there was a dramatic confrontation in the basement during which the Complainant and one of her friends yelled at the Appellant while insisting that he leave the house. The Appellant says that the trial judge too heavily weighted this contradictory evidence in assessing his credibility, in contrast to the manner in which the trial judge considered the evidence that contradicted the Complainant’s evidence regarding the Mini Cooper, the noise levels in the house, or whether the Appellant arrived alone or in company of others.

[60] The trial judge more than adequately explained the significance of the contradictory evidence regarding the confrontation in the basement:

> [137] This is not a matter of forgetting something happened, which did happen. Or honestly believing something happened which didn’t. Someone is not telling the truth.

[61] The trial judge decided that it was the Appellant who was not telling the truth, and he explained his reasons for this at paragraphs 134-136. The trial judge decided that the contradictory evidence regarding the events after the Appellant left the bedroom could not be explained by faulty memory as could inconsistencies or contradictions in evidence regarding the Mini Cooper, the noise levels, or whether the Appellant arrived at the Complainant’s house in the company of others. The Appellant did not show any basis on which this Court could or should disturb these findings of the trial judge.

[62] The Appellant therefore has not demonstrated that there was an error in the way the trial judge dealt with the credibility of the witnesses.

[63] I would dismiss this ground of appeal.

DISPOSITION

[64] I would dismiss the appeal.

_____
D.M. Boone J.A.

I concur : _____
L.R. Hoegg J.A.

I concur : _____
F.J. Knickle J.A.