IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Barnes*, 2021 NLCA 15
Date: March 18, 2021
Docket Number: 201901H0089

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of the *Criminal Code*, information that may identify the person described in this judgment as the complainant shall not be published in any documents, broadcasted, or transmitted in any way.

BETWEEN:

BENJI BARNES — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Green, Hoegg and O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
St. John's

Appeal Heard: September 18, 2020
Judgment Rendered: March 18, 2021

Reasons for Judgment by: O'Brien J.A.
Concurred in by: Green and Hoegg JJ.A.

Counsel for the Appellant: Jason Edwards
Counsel for the Respondent: Sheldon Steeves

Authorities cited:

CASES CONSIDERED: *Johnson v. The Queen*, [1977] 2 S.C.R. 646, 75 D.L.R. (3d) 118 (S.C.C.); *R. v. Chanyi*, 2019 ABCA 133; *R. v. Hussein*, 2019 ABCA 480; *R. v. R.M.S.*, 2015 NWTCA 5; *Holland v. R.*, 2013 NBCA 69; *R. v. Proudlock* (1978), [1979] 1 S.C.R. 525, 24 N.R. 199; *R. v. Fontaine*, 2020 ABCA 193; *R. v. Mehari*, 2020 SCC 40; *R. v K.P.*, 2019 NLCA 37; *R. v. Best*, 2016 NLCA 10; *R. v. Radcliffe*, 2017 ONCA 176; *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 3 C.R. (4th) 302 (S.C.C.); *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. Biniaris*, 2000 SCC 15; *R. v. Beaudry*, 2007 SCC 5; *R. v. Sinclair*, 2010 SCC 40; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746; *R. v. W.H.*, 2013 SCC 22, [2012] 2 S.C.R. 180; *R. v. Hiscock*, 2016 NLCA 74; *R. v. W.(R.)*, [1992] 2 S.C.R. 122; *R. v. Wheeler*, 2013 NLCA 36.

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 348, 350, 686(1)(a)(i).

O'Brien J.A.

Overview

[1] Mr. Benji Barnes was charged with committing *Criminal Code* offences with respect to his former intimate partner, who is the complainant in this matter.

[2] Specifically, Mr. Barnes was charged with breaking and entering into the complainant's residence with the intent to commit an indictable offence therein; sexually assaulting the complainant; overcoming resistance to the commission of an offence by choking the complainant; uttering threats to cause death or bodily harm to the complainant and her children (three counts); unlawfully confining the complainant; and assaulting the complainant.

[3] Following a trial in the Provincial Court of Newfoundland and Labrador, Mr. Barnes was convicted on all charges. He is appealing the convictions.

[4] For the reasons that follow, I would conclude that the judge did not err in the analysis or in the conclusions reached with respect to these convictions. Accordingly, I would dismiss the appeal.

Background

[5] Mr. Barnes and the complainant had been in an intimate partner relationship that ended approximately one week before the incident that led to the charges. He had been living at the complainant's residence until the relationship ended, at which time he ceased living there.

[6] The complainant testified that, on the evening of October 26, 2018, Mr. Barnes broke into her residence. Her evidence was that she was lying on her bed watching television with her two young children, who were both under six years old, when Mr. Barnes suddenly appeared in her bedroom. She stated that he then assaulted her, unlawfully confined her, choked her, and threatened her and her children. She testified that Mr. Barnes dragged her from the bedroom to the bathroom and then back to the bedroom, where he sexually assaulted her.

[7] He then directed her to go to the basement where, she testified, he smoked a cigarette and made her snort what she understood to be cocaine. She stated that Mr. Barnes ordered her to call his cellphone and leave a message, ostensibly to invite him to come to her residence later that evening. The complainant testified that Mr. Barnes then left her residence and she immediately contacted a neighbor who notified the police. The police attended at the residence, and several hours later Mr. Barnes was located and arrested.

[8] The complainant's evidence was that she could not say how, exactly, Mr. Barnes entered her residence. She assumed he entered through a basement window. There was evidence at trial, from the complainant and from police witnesses, that a basement window appeared to have been tampered with and was damaged, as the window screen had been removed and was found on the ground nearby, along with a piece of the window frame that had been broken off. The complainant's evidence was that she had made it clear to Mr. Barnes, before this incident, that he was not welcome at her residence. She testified that she had not invited Mr. Barnes there on the evening in question, that she had not let him into the residence, and that she was shocked when he appeared in her bedroom that evening.

[9] The complainant further testified that, a few days before this incident, (which was a day or two after their relationship had ended) she had been startled to find Mr. Barnes inside her residence, hiding behind a curtain, at which time she directed him to leave and he did so. She testified that she then had the door locks changed at her residence, as she was not sure whether Mr. Barnes had retained a key.

[10] The judge summarized the complainant's evidence about what happened at her residence on the night of October 26, 2018 as follows:

> … Then on the night in question, she was in bed with her two youngest children watching TV, and she closed her eyes. She felt a hit, I think is the word she used, on her leg. She opened her eyes, and the--she says, and this is her testimony, now, the accused was standing above her. She jumped up and asked him what he was doing there. She's not sure how he got in; she thinks through a basement window, as there was one damaged. He told the children to go to their rooms. They were both under the age of 6, I believe, at the time, pretty young, and she thinks he then locked the bedroom door. I don't know if she was as certain on that as she could have been, and asked her, and I'm summarizing here now, if she had cheated on him. She tried to get away, and he held her there. She said she screamed. He then led her to the bathroom by the throat. They struggled in the bathroom, she hit her head. She thinks the shower curtain fell, but she can't remember how; presumably in the struggle. She was screaming and fighting to get out of there, and he held his hand to her mouth and told her to shut up if she did not want the kids to die tonight.
>
> He then took her to her bedroom; there was another struggle. The closet door ended up on the floor. He started choking her. He said, "Don't fight it. Just fall asleep, and you'll wake up in the morning." She pretended to pass out or to be asleep, and he took off her pants. At first, she said she was uncertain if there was penetration. She said he put his lips to her breast. At some point, she asked him if he was going to kill her, and he said, "Yes, probably."
>
> After this, he said he wanted to have a cigarette. She asked to change her clothes, as she had wet her pants. They went to the basement. It was then she noticed the broken window. She said he made her leave a message on his phone asking him to come over for a booty call. She said he made her do a line of coke, or what he said was a line of coke. She said she did it, she was scared. She was afraid her older son would come home and find Benji there. After the coke, he left. He told her not to call the police, or he would come back with a gun. There was some suggestion he would come back later in any event. She called a neighbour, who called the police. And she cannot say with any accuracy how long he was in her house.

[11] Mr. Barnes testified that the complainant had invited him to her residence that evening and that she had let him in through the front door. He indicated that, after he entered the residence, he brought the complainant's children to another room, and went into the complainant's bedroom and joined her in bed. He testified that, while engaged in consensual sexual activity, he noticed a mark on her neck which he described as a "hickey", and made some derogatory comments to the complainant about this, which triggered an argument. Mr. Barnes testified that the complainant yelled at him and shoved him. He testified: "I shoved her back, just to get her away from me so I could open the door, and then I went down to the basement to have a cigarette before I left."

[12] Mr. Barnes denied breaking into the house, assaulting, choking, confining or sexually assaulting the complainant or threatening her or the children. Mr. Barnes further testified that there was an arrangement between the two parties, whereby he would provide money or groceries in exchange for sexual relations, and that such an exchange was occurring on the night of the incident in question. The judge summarized Mr. Barnes's evidence as follows:

> Mr. Barnes admits to being in the home, but says he was invited there. …
>
> … As regards Mr. Barnes, and again, this is a summary, he said they arranged to meet. He called her ahead of time to confirm it. He arrived around 9 or 9:10 p.m. He came straight from the bar. They had foreplay, he sucked on her nipple; he was wearing his boxers. She said she wanted money before they went any further, and when the lights were turned on, he saw a hickey on her neck. He made an obscene comment, she shoved him, he shoved her, and he left. He said there was no penetration. He did go to the basement to have a cigarette before he left. He said the window was not broken then. He said he wasn't there 20 minutes. After he left, he noticed he had a missed call from [the complainant]. He called her back, and she asked him to come back to her house at 11:30, but he did not. On the way home, after going to a couple of other places, he got a call from the police. Eventually, they came and got him.
>
> …
>
> On cross, he said he could not understand how she could leave him for a loser with no job. He said he was not angry; however, he did feel betrayed. …

[13] Mr. Barnes had provided a statement to police before trial in which he denied being at the complainant's residence on the evening in question. At trial, he admitted that he had lied in the statement. He testified at trial that he had been at the residence but he denied that he had committed any of the offences. He further testified that he had lied to the police when giving the initial statement because he was embarrassed about paying for sex, and knew that it was illegal.

[14] The judge also heard evidence from 14 other Crown witnesses. These included police officers who had investigated the incident, experts in DNA evidence and electronic evidence, and a nurse who conducted a sexual assault examination of the complainant. The judge concluded that the evidence from these witnesses, and the physical evidence, was consistent with the complainant's account of what had occurred:

> Various officers who attended the scene that night also testified. They confirmed the damage to the home evident in the photos and the marks on [the complainant], at least some of them. Officer McCarthy thought a full grown man could get through the

> damaged window; other officers could not say for sure. Jody Nolan, a sexual assault nurse examiner, testified as to what she did and saw on the night in question. Swabs were taken from different parts of [the complainant's] body and sent to the lab. She also noticed injuries to the complainant's neck, face, inner thigh, shoulder, forearm, chest, shin, kneecap, elbow, and upper arm. …
>
> …
>
> As a result, there was a fair amount of physical evidence or evidence obtained independently of the principal statements. Dealing again in summary with these, as regards the photos, these confirm, at least visually, injuries of the complainant consistent with [the complainant's] version of events. Her testimony and the testimony of the police and the nurse, particularly the photographs of the bruising on her neck. The photos also show a damaged basement window, and officers testified as to seeing the damage and metal rods they found corresponding to the indentations indicative of someone trying to force the window. The photos also show the disarray in the bedroom and the bathroom. We also have a photo of the pants an officer said smelled of urine and a torn T-shirt. …
>
> … DNA of the accused was found in two instances around the nipple of the complainant and on her shirt. …

[15] Further, the judge reviewed evidence of electronic messages exchanged between Mr. Barnes and the complainant on the day of the incident and the days leading up to it. The judge noted that, in these messages, Mr. Barnes had stated his intention to go to the complainant's residence, and that the complainant had made it clear to him that he was not welcome:

> Those messages … show that they were written by someone who is desperately trying to patch up the relationship, someone who is jealous of [the complainant's new boyfriend], someone who threatens to call, or says he has called, Child Protection, someone who says on the day of October 26th that he is coming by over the objections of the complainant…
>
> Those messages which the complainant [identified] as hers include when she receives a message saying that, "I'm coming up to talk tonight," October the 26th, around noon. Reply, "No, you're not. I'm getting an order so you can't call me off the hook or come near me and my kids. Now stop calling and get off my FB account," which I assume is Facebook. "Leave me alone." And that last is dated 6:21 p.m. on the day in question. And of course, she said that she sent the, among others, "You are a thief" message. "You are a thief, and honestly, I never thought you were capable of breaking into my house and hiding in a closet. You know that's my fear. Leave me alone…" referencing, apparently, when she found him behind the curtain.

[16] The judge concluded that the messages were inconsistent with Mr. Barnes's testimony that the complainant had invited him over to her residence

on the night in question and had let him in the door, and that they were consistent with the complainant's position that Mr. Barnes had not been invited:

> These messages, reading them, are all consistent with her desire for him to stay away and his wish to see her again…
>
> Having reviewed those messages, I believe that these messages … give a fairly accurate picture of the complainant's state of mind at the time. Just as the accused's messages are indicative of his state of mind, which, I have to say, is not consistent with his testimony. These messages date from the hours immediately before and after the allegations. They are, in other words, a snapshot of the mindset or the position of the principals at that time: he desperate to get back, she insisting he stay away.

[17] Having considered all the evidence, the judge rejected Mr. Barnes's version of events, and his assertion that he had been invited to the complainant's residence and that he had participated in consensual sexual relations with the complainant. The judge accepted the testimony of the complainant regarding what had occurred when Mr. Barnes came to the residence, and noted that her testimony was consistent with the physical evidence. Based on the totality of the evidence, the judge determined that all charges had been proved beyond a reasonable doubt, and Mr. Barnes was convicted on all charges:

> In the context of the entirety of the evidence referred to, I do not find the accused's testimony to be credible, and I do not believe he is telling the truth when he says he was invited to the complainant's residence and participated in consensual foreplay, nor does his evidence raise a reasonable doubt. As regards the evidence which I do accept, I find that on the date in question, the accused, unwilling to walk away from the relationship, as evidenced by the messages, went to the home of the complainant against her wishes, as evident from the messages, broke into her home, and sexually assaulted, and assaulted her, as she described, and as is consistent with the physical evidence. Whether he obtained entry through the window or some other way, I know not. But I find he entered without the consent of the complainant and remained there without her consent in order to assault her.

Issues

[18] Mr. Barnes advanced three arguments on appeal. First, he maintains that the trial judge erred by convicting him of breaking and entering, because the Crown did not establish that he actually broke into the complainant's residence. Second, he contends that the judge erred in assessing credibility by unevenly scrutinizing his evidence and the evidence of the complainant. Third, he submits that the judge's errors in assessing credibility resulted in unreasonable verdicts pursuant to section 686(1)(a)(i) of the *Criminal Code*.

[19] As such, the following issues will be considered on this appeal:

1. Did the judge err in convicting Mr. Barnes of breaking and entering with the intent to commit an indictable offence?

2. Did the judge err in assessing credibility by unevenly scrutinizing the evidence of Mr. Barnes and the complainant?

3. Were the verdicts unreasonable?

Analysis

Issue 1: Breaking and entering into the complainant's residence

[20] Mr. Barnes argues that the judge erred by convicting him of breaking and entering into the complainant's residence because, he contends, the Crown failed to prove beyond a reasonable doubt that he committed this offence.

[21] This argument is premised on the fact that the judge made no factual finding as to how Mr. Barnes actually entered the complainant's residence. While there was evidence that a basement window had been damaged on the night of the incident, and that this was a possible means by which Mr. Barnes entered the residence, the judge made no factual finding that the basement window was the point of entry. Rather, the judge stated: "Whether [Mr. Barnes] obtained entry through the window or some other way, I know not".

[22] As a result, Mr. Barnes submits that the offence of breaking and entering with intent to commit an indictable offence was not proved, and that the judge erred in convicting him in these circumstances.

[23] However, due to the operation of section 348 and section 350 of the *Criminal Code*, I would conclude that this argument cannot succeed.

[24] Section 348(1) sets out the offence and penalty for breaking and entering a place with intent to commit an indictable offence. In this context, section 348(3)(a) states that a "place" means a dwelling house.

[25] The relevant provisions of section 348(1) are as follows:

> 348 (1) Every one who
>
> > (a) breaks and enters a place with intent to commit an indictable offence therein, [or]

> (b) breaks and enters a place and commits an indictable offence therein,
>
> …is guilty
>
> (d) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life …

[26] Section 348(2) presumes an intent to commit an indictable offence (unless there is evidence to the contrary) in circumstances where there is evidence that an accused broke and entered into a place:

> 348 (2) For the purposes of proceedings under this section, evidence that an accused
>
> (a) broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein; …

[27] Section 350 of the *Criminal Code* is also relevant in this context. It describes what is referred to as a deemed or constructive break and entry and states that, for the purposes of section 348, a person entering without lawful justification shall be deemed to have broken and entered. The pertinent provisions of section 350 are as follows:

> 350 For the purposes of sections 348 and 349,
>
> …
>
> (b) a person shall be deemed to have broken and entered if
>
> …
>
> (ii) he entered without lawful justification or excuse by a permanent or temporary opening.

[28] The effect of section 350 is significant in this case because the judge made factual findings, based on all the evidence, that Mr. Barnes had entered the complainant's residence without consent, and that the complainant had not invited him in nor consented to him being there. The judge stated his findings as follows:

> As regards the evidence which I do accept, I find that on the date in question the accused … went to the home of the complainant against her wishes, broke into her home, and sexually assaulted and assaulted her as she described, and as is consistent with the physical evidence. Whether he obtained entry through the

> window or some other way, I know not. But I find he entered without the consent of the complainant and remained there without her consent in order to assault her.

[29] In this context, the absence of consent meant there was no lawful justification or excuse for Mr. Barnes's entry into the complainant's residence, making it a deemed break and entry under the provisions of section 350(b)(ii).

[30] The Supreme Court of Canada considered the deemed break and entry provision of the *Criminal Code* in *Johnson v. The Queen*, [1977] 2 S.C.R. 646, 75 D.L.R. (3d) 118 (S.C.C.). The Court (considering section 308, which is the present section 350) determined that, as the accused had no lawful justification for entering the building in question, there was what the Court referred to as a "constructive" break and entry. The Court noted in *Johnson*, at page 652, that the *Criminal Code* provisions altered the common law in this context:

> Parliament has extended the limits of constructive breaking. Parliament, for the purpose of the *Criminal Code*, has given the word "break" an artificial construction that would not otherwise prevail. … It is within Parliamentary competence to extend constructive entry … These are plain words which must be given effect according to their ordinary meaning.

[31] In *R. v. Chanyi*, 2019 ABCA 133, at paragraph 23, the Alberta Court of Appeal referenced *Johnson* in deciding that, as an accused had no lawful justification or excuse for being in the complainant's home, "the concepts of both 'actual breaking' and 'constructive breaking' apply, the latter of which is defined as including entry by way of an accessible opening without lawful excuse or justification".

[32] Similarly, in *R. v. Hussein*, 2019 ABCA 480, at paragraph 9, it was held that a trial judge had erred because he had "erroneously found that evidence of an actual 'break' was required to convict of the offences of break and enter, having otherwise determined that they were in the apartment 'uninvited' (i.e. without lawful justification or excuse as per s. 350(b)(ii))".

[33] Further, in *R. v. R.M.S.*, 2015 NWTCA 5, in a fact scenario very similar to the present case, the trial judge had found that the accused entered the complainant's residence without permission and had sexually assaulted her. There was no factual finding about how the accused had entered the residence. The Court of Appeal noted that, in the circumstances, "the trial judge did not have to find precisely how the appellant got in" (at para. 28). The lack of consent meant that there was no lawful justification or excuse for the accused

being in the residence, resulting in a deemed break and entry per section 350(b)(ii).

[34] Returning to the present case, while the judge did not make any factual determination as to how exactly Mr. Barnes gained entry into the complainant's residence, this is not fatal to the conviction. Nor is it fatal that there is no specific reference in the judgment to section 350(b)(ii).

[35] What is important is that, having considered the totality of the evidence, the judge found that the complainant had not invited Mr. Barnes to the residence and that there was no consent to him being there. Additionally, there was no evidence to support any other potential legal justification or excuse for Mr. Barnes's presence there, and no suggestion that any other legal justification was in play.

[36] The judge specifically rejected Mr. Barnes's evidence that he was invited to the residence and that the complainant had opened the door and let him in. Had Mr. Barnes's evidence been accepted, a legal justification would have existed for his presence in the residence, and there would have been no deemed break and entry under section 350. However, this was not what the judge found.

[37] Pursuant to section 348(2)(a), evidence that Mr. Barnes broke and entered into the complainant's residence is (in the absence of evidence to the contrary) proof that he did so "with intent to commit an indictable offence". As the judge rejected Mr. Barnes's evidence that he was invited to the residence and was there with the complainant's consent, there was no evidence to the contrary to rebut the statutory presumption of intent to commit an indictable offence.

[38] This presumption was discussed in *Holland v. R.*, 2013 NBCA 69. The New Brunswick Court of Appeal, at paragraph 12 in *Holland*, referenced the Supreme Court of Canada's decision in *R. v. Proudlock* (1978), [1979] 1 S.C.R. 525, 24 N.R. 199, and noted that "it is wrong to say that there is an onus on the accused to rebut the presumption on a balance of probabilities. The presumption applies unless there is any evidence, not expressly disbelieved, that would negate it. All the accused has to do is point to evidence to the contrary that could reasonably be true". (See also *R. v. Fontaine*, 2020 ABCA 193 for a similar interpretation of the presumption). In the present case, there was no such evidence, so the presumption applied.

[39] In light of the judge's factual findings, and by operation of the relevant statutory provisions in sections 348 and 350 of the *Criminal Code*, there would

have been a deemed or constructive break and entry into the complainant's residence in this context that constituted proof of intent to commit an indictable offence.

[40] Accordingly, I would conclude that the judge made no error in convicting Mr. Barnes in these circumstances, and I would dismiss this ground of appeal.

Issue 2: Uneven scrutiny of the evidence and credibility assessments

[41] Mr. Barnes contends that the judge erred when assessing credibility, by unevenly scrutinizing his evidence and the evidence of the complainant.

[42] In *R. v. Mehari*, 2020 SCC 40, the Supreme Court of Canada raised, but did not resolve, the issue of whether uneven scrutiny of evidence can be a stand-alone ground of appeal. The Supreme Court stated (at para. 1):

> This Court has not decided whether uneven scrutiny, if it exists, can amount to an independent ground of appeal or a separate and distinct error of law. In any event, we see no error in respect of this argument that would have warranted intervention on appeal.

[43] Nothing in *Mehari* suggests that it is presently inappropriate to consider an allegation of uneven scrutiny as a separate ground of appeal. Therefore, the issue of uneven scrutiny will be considered, in the context of the judge's credibility determinations of Mr. Barnes and the complainant, without determining whether this can constitute an independent ground of appeal or a separate error of law.

[44] As noted by this Court in *R. v K.P.*, 2019 NLCA 37, a claim of uneven scrutiny of evidence by a trial judge is difficult to establish when attacking a trial judge's credibility assessments. As the trial judge hears the evidence and assesses the witnesses, credibility findings generally attract a high level of deference on appeal:

> [24] KP argues that the judge erred in unevenly scrutinizing the evidence by subjecting evidence favourable to the accused to a much greater degree of scrutiny than evidence favourable to the complainant. KP's argument that the judge unevenly scrutinized the evidence relates directly to the judge's credibility findings.
>
> [25] In *R. v. Radcliffe*, 2017 ONCA 176, at paragraph 23, Justice Watt of the Ontario Court of Appeal considered an argument relating to uneven scrutiny of evidence by a trial judge, and observed that this is a "difficult argument to make successfully", as ultimately this argument often involves credibility assessments which are "the province of the trial judge", attracting "significant appellate deference".

> [26] This Court has also noted that findings of credibility are "within the purview of the trial judge" and are not to be lightly interfered with on appeal (see, for example, *R. v. Hiscock*, 2016 NLCA 74, at paragraph 17).

[45] This Court has also confirmed that it is a trial judge's duty to consider the evidence of each witness and determine whether all, some or none of the evidence is to be accepted or rejected (see, for example, *R. v. Best*, 2016 NLCA 10, at para. 6).

[46] In *R. v. Radcliffe*, 2017 ONCA 176, at paragraph 24, the Ontario Court of Appeal discussed what must be shown in order to prove that a judge's scrutiny of the evidence was so uneven as to require appellate intervention:

> …an appellant must do more than show that a different trial judge assigned the same task on the same evidence could have assessed credibility differently. Nor is it enough to show that the trial judge failed to say something she or he could have said in assessing credibility or gauging the reliability of evidence…

[47] The high bar to establish uneven scrutiny, described in *Radcliffe*, was noted by this Court in *K.P.*:

> [51] Rather, the bar is higher. The Court in *Radcliffe* noted (at paragraph 25) that "the appellant must point to something, whether in the reasons of the trial judge or elsewhere in the trial record, that makes it clear that the trial judge *actually* applied different standards of scrutiny in assessing the evidence of the appellant and complainant…" (Emphasis in original.)
>
> [52] Further, as stated in *Radcliffe*, the fact a judge accepts the evidence of a complainant and rejects an accused's evidence "does not move the yardsticks on an argument based on uneven scrutiny" (paragraph 28).

[48] In the present case, Mr. Barnes argues that the judge's uneven scrutiny of the evidence led him to reject Mr. Barnes's evidence while accepting the complainant's evidence. Mr. Barnes further submits that the judge erred in overlooking or downplaying inconsistencies and problems with the complainant's evidence.

[49] Mr. Barnes alleges various issues with the complainant's testimony that, he argues, should have led the judge to reject it. For example, he alleges that her evidence was inappropriately influenced by discussions with her young (four-year-old) daughter about what had occurred on the evening in question, that her testimony about the extent of penetration during the sexual assault was inconsistent, and that she had lied about her drug history and use.

[50] It is clear from the decision that the judge, in his assessment of the complainant's evidence and credibility, was alive to the issues and concerns raised by Mr. Barnes:

> She was cross-examined about inconsistencies between her testimony and her statement, the most glaring being she said her daughter told her some of the things she saw which may have influenced her testimony. Although the Crown points out the children would not have seen the choking or the sexual assault. She said there was some penetration with the top of the penis, but no further, as he did not have a full erection. That was a slight change from what she'd said earlier. …

And later he states:

> I also believe that she attempted to minimize her drug use; however, she did reluctantly admit the same on cross. She also admitted to the rather irregular relationship between the two; I refer to the money and sex.

[51] On the issue of the complainant's daughter influencing her testimony, the record indicates that the complainant testified that she discussed what had happened with her daughter, who advised the complainant that she had seen her "being dragged". The record also reflects that some of the events would have occurred in the bedroom, outside the presence of the children. The complainant was obviously present throughout the entire incident and would have had her own recollection of events, to which she testified. In this regard, on cross-examination, when asked specifically whether her testimony was influenced or based on what her daughter had told her, the complainant replied: "No I'm not basing it all on what my daughter told me. I experienced it. I was there".

[52] The judge appreciated that the complainant's testimony was not always consistent. However, while identifying potential inconsistences and issues in her evidence, the judge determined that "the details of her testimony which differ from her statement are not regarding an element of the offence" and that "the discrepancies, unlike the accused's, are not on material points". He described the complainant's evidence and his assessment of her credibility as follows:

> And not that this is a credibility contest, because no trial is, but I'd be remiss if I did not address the problems with the complainant's testimony raised by Defence. The complainant has not always been consistent either. On cross, Defence pointed out a number of instances where she either added to her statement or said something different. However, I would state that the details of her testimony which differ from her statement are not regarding an element of the offence, and involve recounting what she says was a traumatic and violent episode while her children were present to listen. If her testimony was letter perfect in those circumstances, I would be very surprised

> indeed. I would also note that the discrepancies, unlike the accused's, are not on material points.

[53] Regarding the assessment of Mr. Barnes's evidence and credibility, the judge identified a major inconsistency on a material issue. That is, Mr. Barnes had initially denied being at the complainant's residence at all. He admitted at trial that he had lied, and testified that he had in fact been at the residence, but stated that the complainant had consented both to his presence there and to the sexual activity. The judge rejected Mr. Barnes's evidence that he had been invited to the residence, and that the complainant had consented:

> Originally, the accused lied to the police. … His explanation, given the serious investigation, appears rather thin. But I have to take into account that sometimes people panic. Nevertheless, he gave an entirely false story about not having been at the complainant's residence that night, which is something I have to take into account. During the statement, when asked if forensics would turn up something to show he was there that night, he said, "No, it shouldn't," but we know that it did. Now, after the fact, his testimony complies with the DNA samples, but admits nothing beyond that. I find that he has given two completely inconsistent accounts.
>
> …
>
> In the context of the entirety of the evidence referred to, I do not find the accused's testimony to be credible, and I do not believe he is telling the truth when he says he was invited to the complainant's residence and participated in consensual foreplay, nor does his evidence raise a reasonable doubt.

[54] Mr. Barnes submits that the judge specifically erred in two respects when assessing his credibility. First, it is alleged that the judge erred "in finding that [Mr. Barnes] was less credible because he had a motive to lie to avoid conviction". Second, he alleges that the judge suggested Mr. Barnes "shaped his testimony to accord with the disclosure".

[55] However, the record does not support the allegations that the judge erred in these respects. The first allegation appears to arise from the judgment. The judge, while directing himself in general terms before reviewing the evidence, discussed the need to be careful in terms of assessing a witness's possible motive to lie or absence of a motive to lie, whether that witness be a complainant or an accused. His comments were general in nature, and not specifically anchored in the context of the case:

> Now where a witness has a motive to lie, that witness's credibility requires close scrutiny, and may be weakened as a result. However, a lack of motive to lie or an absence of motive to lie of a complainant cannot be used necessarily to bolster the

> complainant's credibility. It does not logically flow that because there is no apparent reason to lie, a witness must be telling the truth. …
>
> … In fact, an accused cannot be asked on cross-examination why the complainant would lie, nor is it proper for a trial judge to ask the accused's counsel why a complainant would lie. …
>
> …As regards the accused's credibility, a trial judge has to be careful about assessing the accused's credibility on the basis that he or she clearly has an interest in not being convicted. This cannot be the primary reason for a rejection of the accused's testimony. Isolating the issue of the accused's interest in the trial outcome again tends to undermine the Crown's burden and the presumption of innocence.

[56] There is no further reference in the judgment to a motive to lie, either in general terms or specifically with respect to Mr. Barnes. After this passage in the judgment, the judge went on to discuss, again in general terms, the Supreme Court's decision in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 3 C.R. (4th) 302 (S.C.C.), and the Crown's burden to prove an accused's guilt beyond a reasonable doubt.

[57] On a fair reading of the judgment, and contrary to the assertion that the judge erred "in finding that [Mr. Barnes] was less credible because he had a motive to lie to avoid conviction", there is nothing to suggest that the judge made such a finding.

[58] While there are circumstances when an appellate court must intervene in light of an erroneous and impermissible proposition by a trial judge that an accused will lie to secure his or her acquittal (as discussed, for example, in *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397), this is not such a circumstance.

[59] The judge noted Mr. Barnes's own admission that he did in fact lie about not being at the complainant's residence, but this is different than finding, as a starting proposition, that he had a motive to lie. Similar to the conclusion reached in *Laboucan*, in the present case "when the reasons are read in their entirety and in the light of the context of the trial as a whole, they reveal that the trial judge properly assessed and weighed the evidence of all the witnesses, including the accused, without undermining the presumption of innocence or the burden of proof" (at para. 23). I would conclude that the judge made no error in this respect.

[60] Second, it is alleged that the judge erred by suggesting Mr. Barnes "shaped his testimony to accord with the disclosure". This allegation appears to arise from the judgment, wherein the judge compared Mr. Barnes's pre-trial statement, that DNA evidence would not prove he was at the residence, with his

testimony at trial that was consistent with the DNA evidence placing him at the residence:

> During the statement, when asked if forensics would turn up something to show he was there that night, he said, "No, it shouldn't," but we know that it did. Now, after the fact, his testimony complies with the DNA samples, but admits nothing beyond that. I find that he has given two completely inconsistent accounts.

[61] The final sentence in the quote above, in which the judge states "I find that he has given two completely inconsistent accounts", indicates the judge was highlighting the inconsistency in Mr. Barnes's testimony in the context of his admission of having lied earlier on this material issue. The judge was entitled to consider this as part of the credibility assessment, and I would conclude that no error was made in doing so.

[62] Ultimately, in the present case, the judge made credibility findings regarding Mr. Barnes and the complainant based on their evidence and in the context of the overall evidentiary record, taking into consideration the testimony of all witnesses and the physical evidence. He was alive to the issues which might negatively impact findings of credibility with respect to the complainant and Mr. Barnes, and was entitled to make these findings in light of the evidence.

[63] I would conclude that the record does not support the argument, made on appeal, that there was an uneven scrutiny of the testimony of Mr. Barnes and the complainant. The judge reviewed all the evidence and provided reasons for accepting the testimony of the complainant while rejecting Mr. Barnes's evidence. The judge's findings on credibility were anchored in the evidence, as illustrated by the record, and cannot be said to be the consequence of applying an incongruous or unequal standard of scrutiny. The high threshold required to demonstrate uneven scrutiny of the evidence, as outlined in cases such as *Radcliffe* and *K.P.*, has not been met in this instance.

[64] As such, I would dismiss this ground of appeal.

Issue 3: Were the verdicts unreasonable?

[65] Mr. Barnes argues that the appeal should be allowed under section 686(1)(a)(i) of the *Criminal Code* because the verdicts were unreasonable.

[66] Section 686(1)(a)(i) states:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence, …

[67] The interpretation of this section has been developed through a series of Supreme Court of Canada decisions, with the Court's later decisions building upon and occasionally clarifying the principles set out in the earlier judgments (see, for example, *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. Biniaris*, 2000 SCC 15; *R. v. Beaudry*, 2007 SCC 5; and *R. v. Sinclair*, 2010 SCC 40).

[68] In *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, the Supreme Court referenced several of these decisions and provided a concise statement of the test to determine whether a verdict is an unreasonable one:

> 9 To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168 (S.C.C.), and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 (S.C.C.), at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3 (S.C.C.), at also paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190 (S.C.C.)).

[69] To succeed in establishing unreasonable verdicts then, Mr. Barnes needs to demonstrate that these were not verdicts that a "judge could reasonably have rendered", or alternatively that the judge's factual findings are "plainly contradicted by the evidence" or otherwise "incompatible with evidence that has not otherwise been contradicted or rejected".

[70] In the written submissions on appeal Mr. Barnes accepted that, on the evidence, a judge acting judicially could reasonably have rendered guilty verdicts on all charges, with the exception of the break and enter charge.

[71] On this remaining charge, he asserts that the verdict was unreasonable as it was not proved that he had actually broken into the complainant's residence.

This argument has already been considered above, in the discussion relating to breaking and entering. For the reasons outlined above, the judge's factual finding that Mr. Barnes was in the residence without consent meant that there was a constructive break and entry under section 350, and the offence under section 348 was made out. Accordingly, I would conclude that the verdicts on all counts in this case, including the break and entry verdict, were those which a judge "could reasonably have rendered".

[72] Next to be considered is whether the judge's factual findings were "plainly contradicted by the evidence" or "incompatible with evidence that has not been contradicted or rejected" (*R.P.*, at para. 9).

[73] The judge's credibility findings are at the heart of Mr. Barnes's claim of unreasonable verdicts. Mr. Barnes argues that the judge erred in his credibility assessments and findings, namely in failing to find Mr. Barnes's evidence to be credible, and in finding the complainant's evidence to be credible despite the concerns raised by Mr. Barnes with respect to that evidence.

[74] These errors, Mr. Barnes argues, resulted in unreasonable verdicts. In his written submissions on appeal, Mr. Barnes contends that the judge "arrived at an unreasonable verdict based on several errors he made in assessing the credibility of the complainant and the appellant and that these errors tainted his assessment of the parties' credibility and as a result his verdict was unreasonable".

[75] In *R. v. W.H.*, 2013 SCC 22, [2012] 2 S.C.R. 180, the Supreme Court noted that the "test for an unreasonable verdict applies to cases such as this one in which the verdict is based on an assessment of witness credibility" (at para. 30).

[76] The Supreme Court in *R.P.* confirmed that, where a claim of unreasonable verdict is focused on a trial judge's credibility assessments, in order to succeed it must be demonstrated that the judge's assessments "cannot be supported on any reasonable view of the evidence":

> 10 Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474 (S.C.C.), at para. 7).

[77] Similarly, this Court has frequently stated that credibility findings are "within the purview of the trial judge" and should not be easily disturbed on appeal (see, for example, *K.P.*, at para. 26; *R. v. Hiscock*, 2016 NLCA 74, at para.17).

[78] This is not to say that credibility findings in this context are unassailable, or that appellate deference is absolute. In *Burke*, the Supreme Court referenced the Court's earlier decision in *R. v. W.(R.)*, [1992] 2 S.C.R. 122, in describing the balance between appellate deference and the requirement to intervene, where appropriate, regarding a trier of fact's credibility assessments:

> 5 According to this Court in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, special concerns arise in cases such as this where the alleged "unreasonableness" of the trial court's decision rests upon the trial judge's assessment of credibility. In these cases, the court of appeal must bear in mind the advantageous position of a trial judge in assessing the credibility of witnesses and the accused. As McLachlin J. stated in *W. (R.)*, at p. 131:
>
> > ...in applying the test [under s. 686(1)(*a*)(i)] the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: *White v. The King*, [1947] S.C.R. 268, at p. 272; *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446, at pp. 465-66.
>
> Despite the "special position" of the trial court in assessing credibility, however, the court of appeal retains the power, pursuant to s. 686(1)(*a*)(i), to reverse the trial court's verdict where the assessment of credibility made at trial is not supported by the evidence. As McLachlin J. stated in *W. (R.)*, at pp. 131-32:
>
> > ... as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.
>
> Thus, although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(*a*)(i) of the *Criminal Code* where the "unreasonableness" of the verdict rests on a question of credibility.

[79] The Supreme Court in *Burke*, while acknowledging that "this is a power which an appellate court will exercise sparingly" (at para. 6), concluded that this was "one of those rare instances where the trial court's assessments of credibility cannot be supported on any reasonable view of the evidence", and that "no properly instructed jury acting in a judicial manner could reasonably have accepted the claims of these complainants" (at para. 7).

[80] Returning to the present case, unlike *Burke* the circumstances do not require appellate intervention. A review of the record does not support the allegation that the judge's credibility findings could not be supported by the evidence.

[81] As discussed above, in considering the allegation of uneven scrutiny of the evidence, the judge's reasons illustrate that he was alive to the alleged problems with the complainant's testimony, as identified by Mr. Barnes. The judge concluded that any inconsistencies in the complainant's testimony were not fatal to her credibility, and were not on material points with respect to the offences.

[82] In contrast, the judge found serious problems with Mr. Barnes's account of what had occurred. The judge considered that Mr. Barnes had lied by initially denying that he had been at the residence at all. The judge also found that Mr. Barnes's version of events was inconsistent not only with the testimony of the complainant, but with the evidence of other witnesses and the physical evidence. In this context, it has not been established that the judge's assessments of credibility "cannot be supported on any reasonable view of the evidence" (*R.P.*, at para. 10).

[83] As the judge's credibility assessments have not been disturbed, the present analysis relates to "whether the trial judge's findings and inferences could be supported by the evidence that the trial judge accepted. It does not allow the appellant to rehabilitate evidence that the trial judge rejected" (*R. v. Wheeler*, 2013 NLCA 36, at para. 24).

[84] In this case, the judge rejected Mr. Barnes's evidence and accepted the evidence of the complainant and other witnesses. Having done so, the judge had an evidentiary basis to convict, and the convictions cannot be said to have been "plainly contradicted by the evidence relied on by the trial judge" or "incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge" (*R.P.*, at para. 9).

[85] As a result, there is no basis for this Court to intervene, either in respect of the judge's credibility assessments, or the convictions which followed from these assessments. Accordingly I would dismiss this ground of appeal.

Disposition

[86] For the reasons provided I would conclude that the judge did not err in the analysis or conclusions reached with respect to the convictions entered in this matter, and I would dismiss the appeal.

F. P. O'Brien J.A.

I concur**:** J. D. Green J.A.

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