**W A R N I N G**

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

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

**486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

*(a)* any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

*(b)* two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

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

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

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

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

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

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

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

CITATION: R. v. H.C., 2009 ONCA 56
DATE: 20090120
DOCKET: C45623

COURT OF APPEAL FOR ONTARIO

Rosenberg, Armstrong and Watt JJ.A.

BETWEEN:

Her Majesty the Queen

Respondent

and

H. C.

Appellant

Allan G. Letourneau for the appellant

John Patton for the respondent

Heard: June 10, 2008

On appeal from conviction by Justice R. G. Masse of the Ontario Court of Justice, dated March 17, 2006.

Watt J.A.:

[1] Early one morning while it was still dark outside, K.F. asked her grandfather, H.C., who was making coffee in the kitchen, if she could have a drink. Her grandfather got a drink for K.F., then sat down on a chair in the kitchen. H.C. told K.F. to come over to sit on his lap.

[2] After K.F. sat on her grandfather's lap, H.C. put his hand under K.F.'s pyjamas and underwear, then touched and rubbed her skin between her legs. When H.C. got up to pour his coffee, K.F. left the kitchen and returned to her room.

[3] H.C. abjured K.F.'s account. K.F. did not sit on his lap. H.C. did not put his hand under K.F.'s pyjamas and underwear, nor did he rub his hand over the skin between her legs.

[4] A trial judge was satisfied beyond a reasonable doubt that H.C. did put his hand under K.F.'s pyjamas and underwear and rubbed the skin between her legs. The trial judge found H.C. guilty of sexual exploitation. H.C. appeals.

[5] For the reasons that follow, I would dismiss the appeal.

## A. THE FACTS

### The Principals

[6] K.F. is the eldest of three children of T.F. and her husband, M.F., and the complainant in three of the four counts in the information on which H.C. was tried. K.F. was 10 years old when she testified at trial on a promise to tell the truth.

[7] T.F. is the 35-year-old mother of K.F. and the complainant in the fourth count in the information on which the appellant was tried.

[8] H.C., the appellant, is the step-father of T.F. and step-grandfather of K.F. The appellant married T.F.'s mother after T.F.'s father died and later adopted T.F. and her siblings. H.C. suffered the first of his three heart attacks at age 37 and has received disability benefits since that time.

### The Family Relationship

[9] The manner in which the case was developed at trial requires brief recapture of the nature of the relationship among the principals.

### T.F. and the Appellant

[10] The relationship between T.F. and the appellant began satisfactorily from T.F.'s vantage-point, but soon soured as H.C. became emotionally and physically abusive towards T.F. and her brothers. The appellant's loud and threatening manner continued after the family moved into a new home and T.F.'s grandparents were moved to an assisted care residence.

[11] T.F. took up babysitting and immersed herself in a variety of sports to get out of the house. On one occasion, she attempted suicide. Finally, at age 19, she left home to escape the physical pain associated with the family relationship. Neither her mother nor the appellant seemed at all concerned about T.F.'s emotional problems. T.F. denied having called the appellant names, in particular, having described him as a "welfare bum".

[12] The appellant denied any problems in his relationship with T.F. In particular, he said, he hadn't failed to give her proper recognition, although he acknowledged that he often turned down T.F.'s requests for money, which prompted her to further petition her mother with greater success. The appellant did point out that he paid for a satellite dish for T.F. and her husband (having mistakenly co-signed for it) and, on another occasion, had paid for repairs for their car when it broke down on a trip.

**The M Estate**

[13] A factor advanced by the appellant at trial as underlying these spurious allegations of sexual misconduct laid against him by T.F. and K.F. was T.F.'s belief that the appellant had improperly obtained funds from the M estate to purchase a new home, and had otherwise converted various estate assets into cash for his own personal benefit. The M estate was the estate of T.F.'s grandparents in whose home the appellant, T.F.'s mother, T.F. and her brothers had lived for some time after the appellant married T.F.'s mother.

[14] T.F. acknowledged that she was upset at what she regarded as the improper use of $75,000 from the estate to purchase the new home occupied by the appellant and T.F.'s mother. A further irritant was what T.F. regarded as the irresponsible looting of the assets of the estate and their conversion into cash for the appellant's benefit. T.F. denied ever having discussed the M estate improprieties in the presence of K.F. She was upset about the appellant's conduct, not angry.

[15] The appellant acknowledged that $75,000 from the M estate funded the purchase of the new home he shared with T.F.'s mother. It was T.F.'s mother who held a Power of Attorney in connection with the assets of the M estate, not the appellant. The appellant denied using or selling assets of the estate. So far as the appellant knew, T.F. did not know about the use of estate funds to purchase the house and was unaware of the contents of Ms. M's will.

**The Allegations of T.F.**

[16] The appellant was charged with indecent assault of T.F., an offence alleged to have taken place between January 1, 1980, and January 1, 1982.

[17] T.F. recalled that, when she was nine or ten years old, the appellant invited her to sleep in his bed while T.F.'s mother was out of town on a course. As they lay in bed together, the appellant kissed T.F. good night, sticking his tongue in her mouth as he did so. Sometimes, T.F. would wake up to find the appellant entering her room or in bed with her. T.F.'s mother explained that the appellant had simply gone into the wrong bedroom.

[18] T.F. denied ever having told anyone that the appellant had raped her, although she did describe what had occurred as sexual abuse. She did not tell the police that these abuses were what caused her to attempt suicide. The most important step for her at the time of the police interview was to disclose that the abuse had, in fact, occurred.

[19] The appellant acknowledged that his wife had been away on a course but it was his recollection that there had been a babysitter at their house to look after the children as well as his wife's parents. He did tell T.F. that he missed her mom, but he denied having kissed her and having stuck his tongue in her mouth.

**The Allegations of K.F.**

[20] K.F. provided a video statement to investigators on August 9, 2005, and adopted its contents when she testified on a promise to tell the truth. K.F. was 10 years old when she gave evidence.

[21] K.F. said that H.C., her grandpa, touched her "inappropriately" once when she and her brothers had stayed over at their grandparents' house. K.F.'s mother and father were away at a hockey game. K.F. thought that the touching occurred while she was in school or during Christmas break.

[22] Early one morning, when it was still dark outside and the others were still asleep, K.F. heard H.C. making coffee in the kitchen. K.F. asked her grandfather for a drink. He gave her a glass of water and told K.F. to sit on his lap. H.C. put his arms around K.F. when she sat on his lap, then put his hand down the front of her pyjamas and under her underwear.

[23] K.F. tried to stand up but H.C. held on to her. He touched and rubbed the skin between her legs. K.F. tried to get away. When she succeeded in getting off H.C.'s lap, about five minutes later, K.F. went to her bedroom and sat on her bed. H.C. got up from his chair and poured himself a cup of coffee.

[24] K.F. told police that H.C. might have done the same thing once before when he invited her over to have a drink while the other persons in the house were watching television in another room. This touching happened before H.C. and his wife moved into their new house.

[25] In cross-examination, K.F. said that she had told her "Nana" about H.C.'s touching "a few months" before she gave her videotaped statement in early August, 2005. Her Nana had asked her some questions. K.F. learned the term "inappropriately" at school, not from her mother or her Nana. She did not tell the police that she had spoken to her Nana and mother about the touching, nor was she asked any questions about earlier reports to others by the officer who interviewed her. K.F. had never heard her mother, T.F., say anything bad about H.C. or speak about the M estate. Her mother did speak about K.F.'s grandpa buying a new house, but her mother was not mad about it and said nothing about the source of the money for its purchase.

[26] Neither parent told K.F. what to say at trial. Her mother told K.F. to "be strong" and her father told her to "tell the truth". K.F. acknowledged that "a long time ago" she had seen television shows about girls her age being inappropriately touched. She didn't know what happened to persons who touched young girls inappropriately.

[27] K.F. agreed that when she gave her videotaped statement, she was unsure whether H.C. had touched her inappropriately once or more than once.

[28] T.F. testified that K.F. disclosed the appellant's conduct to her Nana in July, 2005, the month before K.F. made her videotaped statement. The television program that K.F. had watched was about both good and bad touching.

[29] T.F. provided some more specific information about the circumstances of the incidents recounted by K.F. The first incident occurred in her parents' former house as K.F. sat on her grandfather's knee shortly before leaving to return home. The second incident occurred in March when she (T.F.) and K.F.'s father were away at a hockey game.

**The Appellant's Response**

[30] H.C. acknowledged that K.F. had sat on his lap a few times. But this always occurred, H.C. claimed, when her brothers and parents were there, along with the appellant's wife. When the children stayed overnight, K.F., her brothers and the appellant's wife slept in the front room, the appellant in the bedroom on his own. H.C. denied ever being alone with K.F. In the morning when the appellant got up and had his coffee, K.F. was watching television with her grandmother. H.C. denied touching K.F. inappropriately.

[31] In cross-examination, the appellant testified that he had lost his sexual drive after his first by-pass surgery and three heart attacks in 1984. Since then he had no sex drive and was unable to achieve an erection. He got along "fine" with K.F. and her brothers. He pointed out that a person could walk into the kitchen of his home from the living room through a big wide opening between the rooms and easily hear coffee being brewed in the kitchen.

[32] The appellant denied any improper touching of K.F. His denial was followed by this brief exchange with the prosecutor:

> Q. And if you had of done, you wouldn't admit it today anyhow, would you?
>
> A. Well, no.

## B. THE REASONS OF THE TRIAL JUDGE

[33] The trial judge began his reasons for judgment with a recitation of the counts contained in the information, then reviewed the essential features of the evidence given by each witness who testified. Along the way, he interpolated some comments about the implausibility of some aspects of the appellant's evidence and his counsel's failure to adhere to the rule in *Browne v. Dunn* (1893), C.R. 67 (H.L.) in cross-examination of the prosecution's witnesses.

[34] The trial judge began his analysis with the observation that credibility and reliability were crucial to his determination and made specific reference to the principles stated in *R. v. W.(D.),* 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742. He then proceeded to reject the appellant's denial, and to point out that the denial did not raise a reasonable doubt about the appellant's guilt.

[35] The trial judge concluded that the evidence, taken as a whole, established the guilt of the appellant on the counts relating to K.F., but failed to meet the standard of proof required on the count in which T.F. was the complainant. The only conviction recorded was for sexual exploitation of K.F. The trial judge entered *Kienapple* stays on the counts of sexual assault and sexual interference.

## C. THE GROUNDS OF APPEAL

[36] The appellant advanced three discrete yet related grounds of appeal against conviction. Pared to their core, the appellant's grievances are these:

> i. finding guilt on the basis of a favourable conclusion about the complainant's credibility, based on her demeanour as a witness, without proper assessment of the reliability of her evidence;

ii. rejecting the evidence of the appellant on grounds rooted in misapprehensions of his evidence; and

iii. subjecting the evidence of the appellant to a higher standard of scrutiny then that applied to the testimony of the complainant.

## D. ANALYSIS

### Ground I: Guilt Based on Credibility Not Reliability

#### The Alleged Error

[37] The appellant does not challenge the trial judge's favourable finding about K.F.'s credibility, nor his use of demeanour as a factor in the credibility determination. The nub of the appellant's complaint is that the credibility finding was based exclusively on demeanour with the result that the finding of guilt followed directly from the favourable credibility determination without any critical assessment of the reliability of the complainant's deeply-flawed evidence.

[38] The appellant contends that the most prominent feature of the complainant's cross-examination was her failure to recall and uncertainty about several critical features of her testimony, such as the frequency of the appellant's improprieties and when they had occurred. The complainant could not recall what her Nana had asked her immediately before K.F.'s disclosure, or even the drink the appellant had given her before he told her to sit on his lap. Any details she provided were sparse.

[39] The respondent sees it differently. The trial judge considered both the credibility and reliability of K.F. Some factors he mentioned in assessing the testimony of K.F. had to do with demeanour, but many were related to reliability. The trial judge did not proceed directly from a demeanour-based finding of credibility to a finding of guilt, rather considered reliability, found K.F. to be reliable and her evidence, confirmed in several respects, sufficiently persuasive to establish guilt.

#### The Governing Principles

[40] The appellant's reproach does not portend a forced march through the precedents. Nonetheless, a brief reminder of some basic principles will not go amiss.

[41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall; and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514, at 526 (C.A.).

[42] This case required the trial judge to assess the credibility of two mature adults, T.F. and the appellant, as well as of a child of ten, K.F. Credibility requires a careful assessment, against a standard of proof that is common to young and old alike. But the standard of the "reasonable adult" is not necessarily apt for assessing the credibility of young children. Flaws, such as contradictions, in the testimony of a child may not toll so heavily against credibility and reliability as equivalent flaws in the testimony of an adult: *R. v. B.(G.)*, 1990 CanLII 7308 (SCC), [1990] 2 S.C.R. 30 at pp. 54-5; R. v. S.(A.) (2002), 2002 CanLII 44934 (ON CA), 165 C.C.C. (3d) 426 at p. 437 (Ont. C.A.); *R. v. W.(R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122 at pp. 134-6.

**The Principles Applied**

[43] As he began his analysis, the trial judge reminded himself of the crucial importance of both credibility and reliability to his decision:

> The correct disposition of this case is dependant upon an assessment of credibility. An assessment of credibility involves evaluation not only of the honesty of the particular witness, but also the reliability of the evidence of the witness. One should not rely on the testimony of a dishonest witness in the absence of some independent corroborative evidence; however, even honest witnesses can be mistaken. It sometimes happens that a witness will be quite honest and sincere yet his or her evidence may not be reliable due to external factors such as ability to observe, remember, or relate accurately. In the case at bar, the credibility and therefore both the honesty and the reliability of the evidence of [K.F.], her mother, [T.F.], and the accused are crucial to the outcome of the trial.

[44] The trial judge followed up this excerpted reference to credibility and reliability with a repetition of the *W.(D.)* formula for the application of the rule that requires the prosecution to prove its case beyond a reasonable doubt to the issue of credibility. Immediately on the heels of the reference to *W.(D.)*, the trial judge explained why he did not believe the appellant's denials, nor did those denials raise a reasonable doubt about the appellant's guilt. The reasons for his rejection of the appellant's version were many and varied, including but not limited to the implausibility of and inconsistencies in his account.

[45] The trial judge considered first the count of indecent assault on T.F. He noted the nature of the relationship between T.F. and the appellant, in particular, the animosity T.F. felt towards her step-father because of his abusive conduct towards her during adolescence and his receipt of benefits from the M estate. The trial judge's reasons conclude in these terms:

> Even though I feel that the incident that is alleged to have occurred between the accused and [T.] may indeed have happened, I am left with a reasonable doubt in the absence of some corroborating evidence. Consequently, the accused will be found not guilty of count number two, indecent assault on [T.F.].

[46] The trial judge then turned his attention to the counts in which K.F. was the complainant. He considered several factors in reaching the conclusion that the evidence established the appellant's guilt with the required measure of certainty:

i. the manner in which K.F. gave her evidence, including her responses in cross-examination;

ii. K.F.'s intelligence;

iii. K.F.'s knowledge of the distinction between the truth and a lie and her understanding of the necessity of speaking the truth;

iv. the absence of any knowledge of K.F. of the dispute about the handling of the M estate;

v. the lack of any coaching or prompting of K.F. by either parent prior to the video statement and her trial testimony; and

vi. the absence of any improper pre-complaint questioning of K.F. by the recipient of her first complaint, her Nana.

[47] A fair reading of the trial judge's reasons in their entirety does not support the appellant's claim that, satisfied that K.F. was credible, the trial judge simply proceeded to a finding of guilt without any consideration of the reliability of K.F.'s testimony and the extent of its persuasive force when held up against the standard of proof required in a criminal case. The trial judge considered several factors that related to K.F.'s ability to accurately observe, recall and recount the events that she claimed occurred.

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

**Ground II: Improper Rejection of the Defence Evidence**

**The Alleged Error**

[49] The appellant contends that the trial judge improperly rejected the appellant's denial of any inappropriate conduct. The rejection, the submission continues, is flawed because it is rooted in misapprehensions of material parts of the appellant's evidence. The trial judge mischaracterized the appellant's description of the nature of his relationship with T.F. Further, the trial judge lifted part of the appellant's response about kissing T.F. out of its context, colouring it in a hue that was foreign to its origins.

[50] The respondent offers a different perspective. The rejection of the appellant's evidence is not flawed by any misapprehension of his testimony. The trial judge was entitled to reject the appellant's version on the basis of any answers provided by the appellant in cross-examination and reasonable inferences arising from those responses. The basis for the rejection of the appellant's rendition is well-grounded in the evidence and untainted by any misapprehensions.

**The Governing Principles**

[51] A material misapprehension of the evidence may justify an appellate court's intervention. To justify appellate intervention on the ground of misapprehension of evidence, an appellant must meet a stringent standard. The misapprehension must relate to the substance of the material parts of the evidence. Further, the errors must play an essential part in the reasoning process that results in a conviction: *R. v. C.L.Y.*, 2008 SCC 2 (CanLII), [2008] 1 S.C.R. 5 at para. 19; *R. v. Lohrer*, 2004 SCC 80 (CanLII), [2004] 3 S.C.R. 732 at para. 1; *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 at p. 541 (C.A.).

**The Principles Applied**

[52] The trial judge gave several reasons for rejecting the testimony of the appellant. Among those reasons was the rosy-coloured hue the appellant placed on his relationship with T.F. The appellant considered that he had a good relationship with his step-daughter, T.F., yet she described him as emotionally abusive and left home to escape his domineering personality. The M estate was a further sore point. Besides, the appellant was clearly annoyed at T.F. and her husband for leaving him (the appellant) to foot the bill out of his disability income for a $3,000 satellite dish.

[53] One factor in the trial judge's assessment of the appellant's credibility was the following passage in the appellant's evidence-in-chief:

> Q. Did you ever kiss [T.F.] at that time 25 years ago, or so, Sir?
>
> A. Not – no.
>
> Q. Did you ever use your tongue in her mouth?
>
> A. No, Sir.

[54] The trial judge observed that he found it strange that the appellant would deny kissing his step-daughter because "fathers often kiss their children in a normal relationship and in a non-sexual way as a simple manifestation of parental affection." The question that prompted the answer appears to have been directed principally at the incident that founded the subject-matter of the count of indecent assault against T.F. but, apart from its temporal reference, the question could be interpreted more broadly. So too, the appellant's response, especially when taken together with the question that followed next.

[55] The assessment of credibility may not be a purely intellectual exercise. Myriad factors are involved. Some factors may defy verbalization: *R. v. M.(R.E.)* (2008), 2008 SCC 51 (CanLII), 235 C.C.C. (3d) 290 at para. 49 (S.C.C.).

[56] The trial judge directed his mind to the critical question of whether the appellant's unvarnished denial, considered in the context of the evidence as a whole, raised a reasonable doubt about his guilt: *R. v. Dinardo*, 2008 SCC 24 (CanLII), [2008] 1 S.C.R. 788 at para. 23; *M.(R.E.)* at para. 50. For reasons he articulated, the trial judge rejected the appellant's denial. The trial judge did not believe the denial nor did it raise a reasonable doubt about the appellant's guilt. This rejection was not flawed by any material misapprehension of the evidence.

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

**Ground III: The Application of Different Levels of Scrutiny to Prosecution and Defence Evidence**

**The Alleged Error**

[58] The appellant says that the trial judge erred in law by subjecting the evidence of the appellant to a more stringent standard of scrutiny than the evidence of K.F.

[59] The appellant points to several examples to support his claim. The trial judge faulted the appellant for the manner in which he denied having a criminal record: “Not that I know of”. He found implausible the appellant’s assertion that he had never been alone with his granddaughter and had not taken improper advantage of the proceeds of the M estate. He also found wanting the appellant’s statement that he had lacked any sex drive since age 37, and thus, presumably, would not have committed any offence against K.F.

[60] On the other hand, the appellant continues, the trial judge accepted the evidence of K.F., despite its many inconsistencies about material events and the unresponsive answers provided in cross-examination.

[61] The respondent reminds that the trial judge had the authority and the duty to make findings of credibility and to determine whose evidence was reliable. Sometimes, the manner in which questions are answered and evidence is given is important in determining who and how much to believe. The findings here were well-grounded in the evidence and do no reflect the imposition of differing standards of scrutiny to the evidence of the appellant and K.F.

**The Governing Principles**

[62] The parties share common ground about the controlling principles. It is legally wrong for a trial judge to apply a stricter standard of scrutiny to the evidence of an accused than what he or she applies to the evidence of a complainant, or, more generally, to prosecution witnesses. *R. v. Owen* (2001), 2001 CanLII 3367 (ON CA), 150 O.A.C. 378 at para. 3 (C.A.); *R. v. Minuskin* (2003), 2003 CanLII 11604 (ON CA), 68 O.R. (3d) 577 at para. 33 (C.A.).

[63] The credibility controversy in this case, at least so far as the counts relating to K.F. were concerned, involved a child complainant, 10 years old, on the one hand, and a mature adult, testifying about matters that took place during adulthood, on the other. While the standard of proof to be met in a criminal case is a constant, not a variable dependent upon the age or maturity of the prosecution’s witnesses, it is familiar terrain that a trial judge should take a common sense approach in dealing with the evidence of young children and not impose the same exacting standard on them as in the case of adults. *R. v. B.(G.)*, pp. 54-55; *R. v. W.(R.)* at p. 134.

**The Principles Applied**

[64] In this case, as in others, the trial judge was entitled to consider not merely the substance of the appellant’s evidence, but also the manner in which he testified. A relevant factor in assessing the substance of the appellant’s evidence is its inherent improbability or implausibility. A trial judge is entitled to assess evidence through the lens of common sense and everyday experience, in the same manner as juries are instructed to do by trial judges.

[65] In his assessment of the evidence of K.F., the trial judge was not required to apply the same criteria applicable to adult witnesses. As he was obliged to do, he considered K.F.’s evidence in the context of her age at the time of the events. He found her evidence met the standard of proof required, while that of her mother came up short.

[66] This ground of appeal fails.

**E. DISPOSITION**

[67] For these reasons, I would dismiss the appeal.

RELEASED: January 20, 2009 "MR"

"David Watt J.A."
"I agree M. Rosenberg J.A."
"I agree Robert P. Armstrong J.A."