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COURT OF APPEAL FOR ONTARIO

RE:	**HER MAJESTY THE QUEEN (Appellant) – and – DAVID EDWARD HULL (Respondent)**
BEFORE:	**SIMMONS, ARMSTRONG AND ROULEAU JJ.A.**
COUNSEL:	**M. David Lepofsky and Michelle Campbell for the Crown appellant**
	No one appearing for the respondent
HEARD & RELEASED ORALLY:	**July 25, 2006**

On appeal from the acquittals entered by Justice Julia A. Morneau of the Ontario Court of Justice on March 8, 2005.

E N D O R S E M E N T

[1] The respondent did not appear on this appeal. However, based on material filed by the Crown, we are satisfied that he was served personally with the Crown's Notice of Appeal and factum and, as early as April 26, 2006, with a letter from the Crown specifying the hearing date for this appeal. Neither the Crown nor this court has received any communication from the respondent. Given the foregoing circumstances, we proceeded with the appeal in his absence.

[2] The Crown raised four issues on this appeal against the respondent's acquittals on charges of aggravated assault and assault with a weapon. In our view, the first two issues are dispositive of the appeal.

Issue One

[3] In her reasons for acquitting the respondent, the trial judge reviewed the evidence at trial. After doing so, she said:

> To reject Mr. Hull's evidence and or to say that it does not raise a reasonable doubt requires me to cogently explain why I have done this. In this case, it would in large part require me to compare his evidence to [the complainant's]. It would amount to a comparison of 'he says, she says'. That is *not an*

> *appropriate way to assess the evidence* in a criminal trial. [emphasis added]

[4] In our view, this paragraph of the trial judge's reasons indicates that she may have misconstrued the effect of various authorities that address concerns relating to the application of the standard of proof. In addition, it indicates the trial judge failed to carry out her duty to evaluate the respondent's evidence in the context of all of the evidence adduced at trial.

[5] *W. (D.)* [1] and other authorities prohibit triers of fact from treating the standard of proof as a credibility contest. Put another way, they prohibit a trier of fact from concluding that the standard of proof has been met simply because the trier of fact prefers the evidence of Crown witnesses to that of defence witnesses. However, such authorities do not prohibit a trier of fact from assessing an accused's testimony in light of the whole evidence, including the testimony of the complainant, and in so doing comparing the evidence of the witnesses. On the contrary, triers of fact have a positive duty to carry out such an assessment recognizing that one possible outcome of the assessment is that the trier of fact may be left with a reasonable doubt concerning the guilt of the accused.

[6] In our respectful view, in this case, the trial judge concluded erroneously that she was prohibited from comparing the respondent's evidence to that of the complainant in order to assess the respondent's testimony. Further, as a result of her erroneous conclusion, she failed to carry out her duty to assess the respondent's evidence in the context of the whole of the evidence adduced at trial.

Issue Two

[7] Elsewhere in her reasons the trial judge said:

> As Mr. Hull testified, particularly when he was cross-examined, he became more agitated. There were noticeable pauses, some for more than thirty seconds, before he answered questions. On some occasions he challenged the Crown to explain why she was asking the question. He did however answer the questions.
>
> One could reasonably infer from this that Mr. Hull was trying to out-think [the Crown] and come up with an answer that would not hurt him … It could also be said that he was just being careful. It is dangerous to draw conclusions or inferences from demeanour.

[8] As this court said in *R. v. Boyce*, [2005] O.J. No. 4313 at para. 3:

> [T]rial judges are not required to ignore demeanour in their assessment of a witness. They can use it in conjunction with their assessment of all the evidence and in the full context of the trial.

[9] Here, in making the blanket statement that she did concerning the use of demeanour evidence, in our view, the trial judge focussed improperly on the issue of demeanour in isolation and, as a result, overstated the cautions relating to the use of demeanour. In so doing, she erred.

Conclusion

[10] Based on the combined effect of these two errors, we would order a new trial. It is therefore unnecessary that we consider the Crown's remaining grounds of appeal.

[11] In the result, the appeal is allowed, the respondent's acquittals are set aside, and a new trial is ordered.

"Janet Simmons J.A."

"Robert P. Armstrong J.A."

"Paul Rouleau J.A."

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[1] *R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742.