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 486.5(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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 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.

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the

victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

(2) On application of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection 486.2(5) or of the prosecutor in those proceedings, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

. . .

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.

DATE: 20061130

DOCKET: C44774

COURT OF APPEAL FOR ONTARIO

DOHERTY, MACPHERSON and ROULEAU JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	**Richard Posner**
	)	**for the appellant**
Respondent	)	
- and -	)	**Amanda Rubaszek**
	)	**for the respondent**
J.J.R.D.	)	
	)	
Appellant	)	
	)	
	)	**Heard: November 9, 2006**
	)	
	)	

On appeal from the conviction entered by Justice Robert E. Zelinksi of the Superior Court of Justice dated September 2, 2005.

DOHERTY J.A.:

I

[1] The appellant appeals from his conviction on a charge of sexually assaulting A.D., his young daughter. There is one ground of appeal. Counsel for the appellant submits that the reasons of the trial judge are inadequate in that they do not offer any explanation for the total rejection of the appellant's exculpatory evidence. He contends that in the circumstances of this case, where the Crown's evidence was not overwhelming and the appellant's evidence was not obviously unreliable, the trial judge's failure to give any reason for rejecting the appellant's evidence constitutes an error in law or a miscarriage of justice and necessitates a new trial.

[2] I would dismiss the appeal. The real question where an appeal is based on the alleged inadequacy of the reasons is whether those reasons permit effective appellate review of the verdict. The reasons of the trial judge demonstrate a careful consideration of the entirety of the evidence, an appreciation of the potential weaknesses in the evidence of the complainant, A.D., an understanding of the position of the defence and the appellant's evidence, and a proper application of the relevant legal principles, especially the reasonable doubt standard. The trial judge's reasons permit effective appellate review and reveal the path he followed to conviction.

II

[3] The alleged sexual assault took place in February 2003 when A.D. was living with her father and her three brothers. She was nine years old. At that time, A.D. was having little or no contact with her mother. About a year later in the spring of 2004, A.D. started to visit with her mother. In June 2004, she told her mother that she had been sexually assaulted by the appellant. The police were called and the appellant was arrested. He was released on bail shortly after his arrest. A diary belonging to A.D. was found in her bedroom in the appellant's home in the course of a search executed while the appellant was in custody following his arrest. The diary figured prominently in the trial.

[4] The trial took place in September 2005 in the Superior Court. By this time, A.D. was eleven. Prior to trial, A.D. had given the police a videotaped statement and she had testified at the preliminary inquiry. A.D. and the appellant were the only witnesses at the trial. Their evidence took most of one day (about 130 pages of transcript). The next morning, counsel for the appellant and Crown made their closing submissions (twenty-one pages of transcript). Counsel agreed that this was a "she said – he said" case that turned on the credibility of the two key witnesses. Both counsel reviewed the evidence and advanced their respective positions. The trial judge was fully engaged during submissions and directed several questions to both counsel.

[5] The trial judge delivered his reasons for judgment about three hours after hearing oral argument. The reasons are seventeen pages long. On appeal, counsel does not allege any misapprehension of the evidence or any error in the application of the applicable law. Nor does counsel argue that the conviction is unreasonable.[1]

III

The Evidence

[6] A.D. testified that one night after her father had sent her and her brothers to bed, he called A.D. into his bedroom. He told her that he wanted to talk about an incident involving her stepbrother. A.D. had been sexually assaulted by her stepbrother about a year before. According to A.D., her father told her that she was confused about "men's parts" and that he could make her feel good about herself. He had been drinking earlier that evening.

[7] The appellant told A.D. to get undressed and climb on top of him. She took off her pajamas, but not her underwear and got on top of her father. He nudged her off of him and told her to remove her underwear. She removed her underwear and he told her to get on top of him again. She did so and he started "moving up and down as motions of sex". The appellant was nude and A.D. described his "dick" as touching her vagina. She later indicated that it entered her vagina.

[8] A.D. testified that after awhile, her father got up from the bed and left the room. She started to put her clothes on, but he returned to the bedroom and once again told her to get on top of him. She did so and he started moving up and down again. After this second episode, the appellant nudged A.D. off of him and said he wanted to make her feel good. He proceeded to perform oral sex on his daughter.

[9] According to A.D., a third incident followed. Once again, she got on top of the appellant as instructed, and he put his penis into her vagina and moved up and down. A.D. testified that he told her that he was "just about to come and … that it was wrong". He told her to go up to her bed. A.D. said she dressed and went up to her own bedroom.

[10] A.D. testified that the next morning, her father cautioned her against telling anyone about what had happened the prior night, warning her that she would end up in the care of the Children's Aid Society if she told anyone. He also allowed her to stay home from school that day.

[11] A.D. indicated during her cross-examination that the sexual assault occurred in February 2003. She said that she could place the date because she had read an excerpt from her diary that the Crown had given to her the night before she testified. That excerpt was dated February 6, 2003. A.D. had not seen the diary before testifying at the preliminary inquiry. At the preliminary, she indicated that the events occurred in the fall.

[12] In his testimony, the appellant confirmed that A.D. had a diary and made entries in it on a regular basis. He also agreed that the police had seized his daughter's diary from her bedroom in the appellant's home shortly after his arrest. By the end of the trial, the defence accepted that the entries in the diary shown to A.D. during her testimony were written by her.

[13] Excerpts from the diary were marked as an exhibit during A.D.'s cross-examination. Three entries were marked: one for December 5, 2002, one for February 6, 2003, and one for February 8, 2003. The February 6 entry described the sexual assault. The other two entries described other non-criminal events that had apparently taken place in the home.

[14] The February 6, 2003 entry begins with a reference to A.D. missing school because of "what happened last night." A.D. goes on to write in this entry that her father told her he wanted to show her

something and make her feel good by “licking her vagina” (misspelled in the diary) and by “humping my butt” (misspelled in the diary). A.D. also wrote that her father told her that he would make her feel really good, but stopped part way through and told her what they were doing was wrong. A.D. wrote that she told him that she thought it was wrong, but that he started the sexual activity a second time, assuring her that it was not against the law. A.D. wrote that the appellant indicated that he was “just about to come” when he stopped the activity again and sent A.D. out of the room. He told her that what they did was totally wrong and he offered to let A.D. miss school the next day.

[15] A.D. testified that she told her mother about the incident when she started to visit her sometime after the spring of 2004. After A.D. told her mother about the assaults her mother assured her that she could live with her mother and would not have to go back to her father.

[16] In cross-examination of A.D., counsel established that there were many things about living with her father that A.D. did not like. They moved quite often, meaning that A.D. would have to change schools frequently. Her father was a strict disciplinarian and seemed to favour his sons over A.D. He had a bad temper and sometimes hit the children. He also made promises to them that he did not keep. The appellant was also in difficult financial circumstances and could not afford to buy the children many of the things that other children had.

[17] A.D. was cross-examined at length about inconsistencies between her testimony at trial and her testimony at the preliminary inquiry. She acknowledged the inconsistencies and at one stage of the questioning said: “I’m sorry because I’m kind of changing my story, but because I’m remembering things differently … now than before.”

[18] On cross-examination, A.D. conceded that at the preliminary inquiry she had not testified that the appellant’s penis penetrated her vagina. At trial, she said it penetrated her vagina on all three occasions when she sat on top of him. She also agreed in cross-examination that she did not testify at the preliminary inquiry that her father said anything about having an orgasm.

[19] Counsel showed A.D. the diary and asked her about her reference to her father “humping my butt.” Counsel asked her if the appellant had put his penis in A.D.’s behind. A.D. said that her father had done so. This answer given during cross-examination was the first indication by A.D. that her father had placed his penis in her anus during the sexual assault. The trial judge asked A.D. how this had happened and A.D. explained how she was positioned so that the appellant could put his penis in her anus.

[20] The appellant testified that he had separated from his wife, A.D.’s mother, in 1998. Between 1998 and 2004, he had custody of A.D. and her three brothers. Their mother saw the children sporadically during this time. He agreed that when the children were living with him, they had to change schools quite often. He also agreed that he was a strict disciplinarian, hit his children on occasion, and required that they abide by his rules. The appellant acknowledged that money was tight and he was unable to give the children the material things that other children had. The lack of financial resources caused various disappointments for all of the children, including A.D. The appellant did not think that he favoured his sons over A.D., although he did admit on one occasion there was not enough money to permit A.D. to participate in hockey, even though there was enough money to allow her brother to play.

[21] The appellant testified that his stepson from a previous marriage had sexually assaulted A.D. about a year before the alleged incident giving rise to this charge. Subsequent to that assault, the appellant spoke to A.D. about sexual matters. He described sexual intercourse to her and explained how it was part of a normal relationship between men and women. The appellant also talked to A.D. about adults touching children. He told her it was wrong and that she should take precautions to avoid it.

[22] The appellant adamantly denied that he ever had any sexual contact with A.D. He agreed that he had a temper and drank, sometimes to excess, but strongly resisted the suggestion that he may have assaulted his daughter while he was so inebriated that he had blacked out and had no recollection of the assault.

[23] The appellant also denied that he threatened to turn A.D. over to the Children's Aid Society if she told anyone about the assaults. However, he did agree that he occasionally used the Children's Aid Society as a threat with all of his children if they misbehaved.

[24] It was the position of the defence that A.D. fabricated the allegations of sexual abuse so that she could go and live with her mother. The appellant agreed in cross-examination that although A.D. did not have much contact with her mother between February 2003 and May 2004, she did have some contact with her during that time period.

IV

The Reasons for Judgment

[25] As the alleged inadequacy of the reasons is the basis for the appeal, it is helpful to break the reasons down into their component parts:

Paras. 1-14	Sets out the charges and the essential elements of the offences.
Paras. 15-28	Summarizes evidence of A.D.
Paras. 29-36	Summarizes defence evidence.
Paras. 37-38	Gives impressions of the demeanour of both A.D. and the appellant. The trial judge notes that both were articulate, responsive to the questions, and unshaken in cross-examination.
Paras. 39-45, 52	Examines inconsistencies and other alleged frailties in A.D.'s evidence. The trial judge refers specifically to several areas where A.D. provided details in her evidence at trial beyond those given at the preliminary inquiry or in her diary.
Paras. 47-51	Addresses the evidence of the diary and concludes that the diary rebuts the contention that A.D. fabricated the allegation that she was

	sexually assaulted. The trial judge cautions himself against equating consistency with reliability.
Para. 54	Notes the similarities or consistencies between A.D.'s trial evidence and the entry in her diary.
Paras. 55-59	Applies the reasonable doubt standard to his credibility assessments, and specifically goes through the three steps described in *R. v. W.(D.)* (1991), 1991 CanLII 93 (SCC), 63 C.C.C. (3d) 397 at 409.
Paras. 53, 59	Concludes he is satisfied beyond a reasonable doubt that A.D. was sexually assaulted and sexually touched by the appellant, but that he is not satisfied beyond a reasonable doubt that the appellant engaged in anal intercourse with his daughter.

V

The Adequacy of the Reasons

[26] It is one of the peculiarities of the criminal justice system that if an accused is tried by a jury, the law demands a one or two word verdict and forbids any explanation of that verdict. However, if the same accused is tried on the same charge by a judge alone, the same law demands a reasoned explanation for the verdict.

[27] In judge alone trials, the reasons for the judgment are the focus of most appeals. Prior to *R. v. Sheppard* (2002), 2002 SCC 26 (CanLII), 162 C.C.C. (3d) 298 (S.C.C.), and its companion case, *R. v. Braich* (2002), 2002 SCC 27 (CanLII), 162 C.C.C. (3d) 324 (S.C.C.), arguments based on the inadequacies in the trial judge's reasons took either or both of two tacks. In some cases, it was argued that an inadequacy in the reasons demonstrated an underlying or implicit legal error in the trial judge's reasoning process. Perhaps the best example is the argument made in many appeals that the failure to refer to the principles in *R. v. W.(D.)*, *supra*, demonstrates a misapplication of the reasonable doubt standard to credibility determinations: see e.g. *R. v. Strong*, [2001] O.J. No. 1362 (C.A.).

[28] The second approach is to point to the inadequacies in the reasons to support a claim that the verdict is unreasonable within the meaning of s. 686(1)(a)(i) of the *Criminal Code*. In this context, the inadequacies in the reasons are said to reflect errors or gaps in the trial judge's legal analysis or the processing of the evidence and are offered to explain how the judge, presumably a reasonable person, could have arrived at an unreasonable verdict: see e.g. *R. v. Biniaris* (2000), 2000 SCC 15 (CanLII), 143 C.C.C. (3d) 1 at para. 36 (S.C.C.).

[29] Post *Sheppard* and *Braich*, a third genre of argument based on alleged inadequacies in the trial judge's reasons has flourished. On this argument, inadequacies in the reasons are sufficient to justify reversal in their own right without inferring any underlying legal error from those inadequacies and without finding that the verdict was unreasonable. These two cases hold that the absence of reasons (*Sheppard*) or seriously inadequate reasons (*Braich*) can constitute a freestanding error of law justifying the quashing of the verdict and the direction of a new trial.

[30] In *Sheppard*, *supra*, at para. 53, Binnie J. stressed that a claim that reasons for judgment are inadequate and that the inadequacy amounts to an error in law must be tested functionally and in the context of the specific case. He acknowledged, at paras. 18-23, that reasons served various salutary purposes in the criminal justice process, including informing the losing party of why he or she had lost. In the context of appellate review, however, Binnie J., at para. 25, described the function of reasons for judgment in these terms:

> The issue before us presupposes that the decision has been appealed. In that context the purpose, in my view, is to preserve and enhance meaningful appellate review of the correctness of the decision (which embraces both errors of law and palpable overriding errors of fact). If deficiencies in the reasons do not, in a particular case, foreclose meaningful appellate review, but allow for its full exercise, the deficiency will not justify intervention under s. 686 of the *Criminal Code*. [Emphasis added.]

[31] After a review of the cases, Binnie J. returned to what he saw as the crucial question on appellate review of the adequacy of trial reasons at para. 46:

> These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict properly scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function. [Emphasis added.]

[32] The circumstances of the particular case will determine the adequacy of the reasons for judgment and the effect, if any, of the inadequacy of reasons or the outcome of the appeal. Reasons for judgment must be examined in the context of the entire proceeding, especially the nature of the evidence heard and the arguments advanced.

[33] Nor should appellate courts overestimate the complexity of most criminal litigation or underestimate the ability of those involved in the trial process to understand the reasons for the outcome. Most criminal trials, even the difficult ones, are not particularly complicated. Most accused, even those who vehemently disagree with the result, understand only too well why they were convicted. Once again, I return to the words of Binnie J. in *Sheppard*, *supra*, at para. 60:

> [I]n the vast majority of criminal cases both the issues and the pathway taken by the trial judge to the result will likely be clear to all concerned. Accountability seeks basic fairness, not perfection, and does not justify an undue shift in focus from the correctness of the result to an esoteric dissection of the words used to express the reasoning process behind it.

[34] In his submissions, counsel stressed that the trial judge's reasons offered no explanation for his outright rejection of the appellant's evidence. Counsel argued that where the Crown's case cannot be described as overwhelming, and an accused's evidence is not self-evidently unreliable or incredible, the trial judge's failure to give a reasoned explanation for the rejection of the accused's evidence constitutes an error in law.

[35] Certainly, a trial judge owes it to an accused to explain his or her reasons for convicting that accused. Where the accused has testified, this will include an explanation for rejecting the accused's denial. However, where the sufficiency of the reasons is challenged on appeal, the outcome of the appeal must turn on whether there can be a meaningful appellate review of the trial proceedings: see *R. v. G.(L.)* (2006), 2006 SCC 17 (CanLII), 207 C.C.C. (3d) 353 at para. 14 (S.C.C.). This is evident from the observation in *Sheppard*, *supra*, at para. 55:

> Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial.

[36] In focusing on reviewability of the proceedings as the ultimate issue, I do not diminish the significance of the absence of any discernible explanation for the rejection of an accused's seemingly plausible denial. The absence of any explanation may go a long way toward putting the reasons beyond the reach of meaningful appellate review: see *R. v. Maharaj* (2004), 2004 CanLII 39045 (ON CA), 186 C.C.C. (3d) 247 at paras. 26-29 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 340.

[37] In some circumstances, a trial judge's failure to adequately explain the reasons for rejecting an accused's denial will make it impossible for the appellate court to satisfy itself that the conviction was based on an application of the correct legal principles to findings of fact that were reasonably open to the trial judge. There are several examples of circumstances in which this court has linked the absence of clear reasons for rejecting exculpatory evidence with the inability to engage in effective appellate review: see *R. v. Maharaj*, *supra*, at para. 29; *R. v. Lagace* (2003), 2003 CanLII 30886 (ON CA), 181 C.C.C. (3d) 12 at para. 44 (Ont. C.A.); *R. v. D.(S.J.)* (2004), 2004 CanLII 31872 (ON CA), 186 C.C.C. (3d) 304 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 365.

[38] In other cases, the trial judge's failure to explicitly point to factors in the appellant's evidence justifying his or her rejection of that evidence does not foreclose meaningful appellate review: see e.g. *R. v. R.L.*, 2002 CanLII 49356 (ON CA), [2002] O.J. No. 3061 at para. 3 (C.A.); *R. v. S.(A.)* (2002), 2002

CanLII 44934 (ON CA), 165 C.C.C. (3d) 426 at paras. 33-34 (Ont. C.A.); *R. v. Tzarfin*, 2005 CanLII 30045 (ON CA), [2005] O.J. No. 3531 at para. 11 (C.A.).

[39] There is no jurisprudential difference of opinion underlying the different results reached in the cases referred to above. The different results reflect the functional and contextual assessments of the adequacy of reasons dictated in *Sheppard* and *Braich*. On that approach, a deficiency in the reasons will in some cases render the reasons inadequate, but that same deficiency will not have that effect in other cases where the context is different.

[40] For example, in *Maharaj*, *supra*, Laskin J.A., after a review of the entirety of the reasons and the trial record, observed at para. 29:

> Also, the absence of adequate reasons for rejecting the appellant's evidence makes meaningful appellate review problematic. This court cannot be satisfied that the trial judge properly applied either the burden of proof or the principles underlying W.(D.). [Emphasis added.]

[41] As the court could not be satisfied that the fundamental principles applicable to the burden of proof had been followed in *Maharaj*, the reasons did not allow for appellate review and were so inadequate as to amount to an error in law.

[42] *Maharaj* can be compared with *R. v. S.(A.)*, *supra*. Feldman J.A., in the course of considering an argument as to the adequacy of the trial judge's reasons, said at para. 34:

> Based on the totality of the evidence, the trial judge is entitled to believe the complainant and to reject the denial of the accused. Here the trial judge first set out his rejection of the evidence of the accused without a clear explanation for that rejection. However, later in his reasons he explained why he accepted the evidence of the complainant as being true. Nothing in the evidence of the appellant raised a doubt in the mind of the trial judge. He was entitled to make that assessment and those findings based on all the evidence viewed in its totality. [Emphasis added.]

[43] Feldman J.A. and Laskin J.A. both engaged in a contextual and functional analysis of the adequacy of the reasons. Based on the respective records before them, they reached different conclusions. Feldman J.A. could be satisfied that the proper standard of proof had been applied by the trial judge. Laskin J.A. could not be so satisfied. In the case before Feldman J.A., the reasons considered in the context of the entire record did not prevent effective appellate review despite the absence of an explicit explanation by the trial judge for the rejection of the appellant's exculpatory evidence.

[44] I turn now to the reasons for judgment in this case. This is not a case like *Sheppard* where the trial judge did not give any meaningful reasons. The complaint is with the adequacy of the reasons. Like the reasons in *Braich*, *supra*, at para. 20: "There is no doubt what the trial judge decided and how he reached his decision".

[45] The trial judge clearly understood the essential elements of the offence, appreciated the substance of the evidence, and understood how the reasonable doubt standard was to be applied in a "she said – he said" case like the one before him. He specifically acknowledged that the reasonable doubt principle applied to credibility and reiterated the principles in *R. v. W.(D.)*.

[46] The trial judge carefully assessed the evidence of A.D. He was alive to the potential frailties in her evidence, particularly the fact that she had provided many details of the alleged assault in her evidence that she had not given in her earlier statements and testimony. The trial judge expressly alluded to many of the inconsistencies between her testimony and her earlier statements. He also took into consideration the circumstances surrounding her testimony. The trial judge ultimately determined that A.D. was a credible witness. He gave reasons for this conclusion. The basis upon which the trial judge found A.D. credible is readily apparent on the entirety of the record, including his reasons. His assessment of A.D.'s credibility is readily reviewable on appeal by this court.

[47] The trial judge also did not proceed directly from a finding that A.D. was credible to a finding that the allegations were proved beyond a reasonable doubt. To the contrary, the trial judge recognized the distinction between a finding of credibility and proof beyond a reasonable doubt. Despite his finding that A.D. was credible, the trial judge was not prepared to conclude beyond a reasonable doubt that the alleged buggery had occurred, presumably because A.D. did not advert to the buggery until very late in her testimony.

[48] The trial judge also acknowledged that there was nothing in the substance of the appellant's evidence or in the manner in which he gave his evidence which would cause the trial judge to disbelieve that evidence. Once again, this aspect of his reasoning is readily apparent.

[49] In addition to his assessment of the respective credibility of the two main witnesses, the trial judge also considered the diary. As he put it in his reasons: "There is more to this case, however, than what each of the parties have said in the trial, and that is what can be derived from A.D.'s diary."

[50] The trial judge proceeded in his reasons to consider the circumstances in which the diary was discovered, the contents of the three entries that were placed in evidence, the timing of the making of the entry dated February 6, and the contents of that entry.

[51] The trial judge concluded that the diary was A.D.'s "recording of a running series of events." I take this to mean that the trial judge was satisfied that the February 6 entry that described the sexual assault was made between the dates of the other two entries, the first being December 5, 2002, and the third being February 8, 2003. The trial judge proceeded to find that a diary entry made between those dates rebutted trial counsel for the appellant's suggestion that A.D. had fabricated her allegations after she started to visit her mother so that she could go and live with her mother. Although the trial judge did not expressly so state, it is clear to me that the trial judge was referring to fabrication at or about the time A.D. reported the alleged assault to her mother in the spring of 2004.

[52] It was open to the trial judge to conclude that the diary was written at or about February 6, 2003. It was unchallenged that A.D. wrote the diary entry and that neither she nor her mother had anything to do with the police obtaining possession of the diary.

[53] The trial judge's analysis of the evidence demonstrates the route he took to his verdict and permits effective appellate review. The trial judge rejected totally the appellant's denial because stacked beside A.D.'s evidence and the evidence concerning the diary, the appellant's evidence, despite the absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt. An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection

of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

[54] On the trial judge's reasons, the appellant knew why he was convicted. His daughter's evidence, combined with the credibility enhancing effect of the diary, satisfied the trial judge of the appellant's guilt beyond a reasonable doubt despite the appellant's denial of the charges under oath.

[55] The trial judge's reasons allowed for effective appellate review. His reasons permitted this court to assure itself that the trial judge had properly apprehended the relevant evidence, applied the proper legal principles to that evidence, particularly the burden of proof, made findings of credibility that were available to him on the evidence, and ultimately returned a verdict based on the evidence and the application of the relevant legal principles to that evidence.

[56] I would dismiss the appeal.

RELEASED: "DD" "NOV 30 2006"

"Doherty J.A."
"I agree J.C. MacPherson J.A."
"I agree Paul Rouleau J.A."

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[1] In his factum, counsel argued that the verdict was unreasonable. He, wisely in my view, abandoned that argument in his oral submissions.