SUPREME COURT OF YUKON

Citation: *R.* v. *Winfield*, 2008 YKSC 69

Date: 20080919
S.C. No. 07-AP016
Registry: Whitehorse

Between:

REGINA

Respondent

And

PATRICIA WINFIELD

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

Stephanie Schorr — Counsel for the Respondent
Zeb Brown — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal from a Territorial Court decision (2008 YKTC 30) where the appellant, Ms. Winfield, was found guilty of the offence of careless driving contrary to s. 186 of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153. The appellant contends that the verdict was unreasonable, or alternatively that it cannot be supported by the evidence.

[2] The circumstances of the offence were that the appellant was northbound in her motor vehicle on the North Klondike Highway on September 22, 2007. She proceeded to overtake the complainant, Mr. Ambrose, when another vehicle was headed towards her

in a southbound direction. The trial judge accepted the complainant's evidence that this was done in a manner without due care and attention and without reasonable consideration for persons using the highway. The appellant maintains that she successfully completed the passing manoeuvre without violating s. 186 of the *Motor Vehicles Act*.

ISSUE

[3] Pursuant to s. 822(1) of the *Criminal Code*, this summary conviction appeal is governed by ss. 683 – 689, which relate to appeals of indictable offences, with the exception of sub-sections 683(3) and 686(5). Section 686(1) states:

> "On the hearing of an appeal against a conviction… 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. …"

[4] The test is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered: *R.* v. *Biniaris,* 2000 SCC 15.

[5] The appellant's counsel clarified at the hearing of this appeal that he is not arguing that the reasons of the trial judge are deficient, in the sense of being insufficient or inadequate, as discussed in *R.* v. *Sheppard,* 2002 SCC 26. Rather, the appellant's counsel says that the reasons are defective, in the sense of displaying an illogical or irrational form of reasoning or a misapprehension of the evidence. Further, the appellant's counsel clarified that he was not suggesting the trial judge ignored or

misapplied the principles expressed in *R.* v. *W. (D.)*, [1991] 1 S.C.R. 742, respecting reasonable doubt when credibility is at issue and the accused has testified.

[6] Rather, the appellant's counsel submits that the principal issue on this appeal is the manner in which the trial judge assessed, and ultimately rejected, the appellant's credibility. In particular, counsel argues that there were no valid reasons for the trial judge to find that the appellant's version of the incident was incredible and, further, that the appellant's version was not necessarily irreconcilable with that of the complainant.

ANALYSIS

Standard of Review

[7] The case law is replete with admonitions that appellate courts should be highly deferential of factual determinations made by trial judges, particularly where credibility is at issue. Further, appellant tribunals are cautioned against reassessing the evidence at trial for the purpose of determining guilt or innocence: *R.* v. *Hay* (1990), 25 M.V.R. (2d) 121 (B.C.C.A.). Further, absent an error of law or a miscarriage of justice, the test to be applied by a summary conviction appeal court is whether the evidence at trial is reasonably capable of supporting the trial judge's conclusions. If it is, the appeal court is not entitled to substitute its view of the evidence for that of the trial judge: *R.* v. *Nickerson* (1999), 178 N.S.R. (2d) 189 (C.A.); *R.* v. *Corbett,* [1975] 2 S.C.R. 275. Further, a misapprehension of the evidence does not necessarily render a verdict unreasonable: *R.* v. *Morrissey* (1995), 22 O.R. (3d) 514 (C.A.). In *Fletcher* v. *Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, Wilson J. stated, at para. 26, that appellate courts should only interfere where the trial judge has made a "palpable and overriding error which affected

his assessment of the facts". Further, there should be deference to the trier of fact because substantial resources are allocated to the fact finding process in the first instance, and it is the trial judge who is in the best position to assess the credibility of testimony. Finally, Wilson J. warned that appellate courts should not depart from trial judges' conclusions on the evidence "merely on the result of their own comparisons and criticisms of the witnesses."

[8] In *Housen* v. *Nikolaisen*, 2002 SCC 33, Iacobucci and Major JJ., for the majority of the Supreme Court of Canada, at paras. 22 and 24, spoke of the "high standard of deference" to be applied to factual determinations made by trial judges and that:

> "… where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged."

Earlier, at para. 4, Iacobucci and Major JJ. spoke about the importance of "finality" as an aim of litigation. With respect to the role of appellate courts they said this:

> "There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge." (my emphasis)

[9] In *R.* v. *Beaudry*, 2007 SCC 5, Fish J., speaking for the four judges in the minority with respect to the result of the appeal, described the kind of manifest error required in order to justify appellate intervention as "reasons that are illogical on their face, or contrary to the evidence" (para. 97). However, at para. 98, he hastened to add that:

> "…appellate courts, in determining whether a trial judge's verdict is unreasonable, cannot substitute their own view of the facts for that of the judge or intervene on the ground that the judge's reasons ought to be more fully or more clearly

> expressed. That is beyond the purview of an appellate court…"

[10] After reviewing these and other related authorities, Romilly J., in *R.* v. *Orban*, 2007 BCSC 760, concluded, at para. 47, that a determination of the reasonableness of a verdict, in the context of reasons for judgment, might be carried out as follows:

> "A determination is made as to whether the trial judge made any serious errors in his assessment of the evidence. If the trial judge did so, and his verdict would not necessarily have been the same absent these errors, the verdict will be unreasonable… and a new trial required…" (my emphasis)

At para. 48, Romilly J. also accepted that the standard of review of a trial judge's findings of fact is "palpable and overriding error", pursuant to the Supreme Court of Canada's decision in *Housen* v. *Nikolaisen,* cited above.

[11] In *R.* v. *Gagnon*, 2006 SCC 17, Bastarache and Abella JJ., speaking for the majority, confirmed this test at para. 10:

> "There is general agreement on the test applicable to a review of a finding of credibility by trial judge: the appeal court must defer to the conclusions of the trial judge unless a palpable or overriding error can be shown. It is not enough that there is a difference of opinion with the trial judge…" (my emphasis)

At para. 19, Bastarache and Abella JJ. noted that the Supreme Court of Canada has consistently admonished trial judges to explain their reasons on credibility and reasonable doubt in a way that permits adequate appellate review. However, having encouraged such expanded reasons, the justices noted that it would be counter-productive to dissect them in a way that would undermine the trial judge's responsibility for weighing the evidence:

> "…A trial judge's language must be reviewed not only with care, but also in context. Most language is amenable to multiple interpretations and characterizations. But appellate

> review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error…"

And further, at para. 20:

> "Assessing credibility is not a science. It is difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses on attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.*, [2005 SCC 25], that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected."

This last passage was repeated by Charron J., speaking for the Supreme Court, in *R.* v. *Dinardo*, 2008 SCC 24, at para. 26.

Trial Judge's Assessment of the Evidence

[12] The trial judge summarized Mr. Ambrose's testimony as follows. He was a farmer, living in Carmacks, who was returning from Alberta on September 22, 2007, hauling a 26-foot stock trailer loaded with several horses. He knew that he was travelling at 90 kilometres an hour as his vehicle was set on cruise control. Approximately 12 miles north of Braeburn, he noticed a red pickup truck some distance behind him and kept a check on it in his rear view mirror. He then became aware of being overtaken by the red truck at a high rate of speed, which he estimated between 135 and 150 kilometres per hour. (Actually, the evidence was between *130* and 150 kilometres per hour, though the appellant's counsel concedes that nothing turns on this error.) As the red truck was starting to overtake him on a straight stretch of road, Mr. Ambrose observed another vehicle coming from the other direction travelling south. He said that the passing occurred on a straight stretch of road where the dotted centre line indicated that passing was legal. The day was sunny and the visibility was clear. The red truck passed by Mr.

Ambrose's vehicle as the southbound vehicle passed, so that all three vehicles were abreast momentarily. In order to avoid a collision, Mr. Ambrose applied the brakes and pulled over to the side of the paved portion of the highway as far as he could. Had the stock trailer wheels moved onto the soft shoulder, there was a risk that it would have tipped and rolled, perhaps taking Mr. Ambrose's truck with it. He said that the southbound vehicle also slowed down and pulled over to the opposite side of the highway to allow the red truck to squeeze in between. He estimated that only centimetres separated his vehicle from the red truck when it passed him.

[13] Mr. Ambrose described the red truck as a late 90's Sonoma pickup, which he recognized because he also owns one. He said the incident occurred at "1840 hours" and when the red truck passed by him he noted the license plate number, which he recorded a few minutes later as Yukon plate EHP 82.

[14] After unloading his horses at his farm, Mr. Ambrose returned to Carmacks and proceeded to drive around town looking for the red Sonoma pickup, which he located in his own neighbourhood. He reported the incident to the police and provided a written statement on September 24, 2007.

[15] The trial judge also referred to the evidence of the appellant, Ms. Winfield, and commented that her version of the incident differed markedly from that recounted by Mr. Ambrose. The appellant's evidence was that she was the registered owner of the red Sonoma pickup with Yukon plate EHP 82. She was an instructor at Yukon College who had moved to Carmacks earlier in September 2007. She said that on September 22, 2007, she had been shopping in Whitehorse and was on her way back to Carmacks. She said she was not in a hurry to get home. She stated that she came upon a truck

hauling a stock trailer somewhere around Braeburn, which was travelling at a speed of 80 kilometres per hour. Initially, Ms. Winfield thought that the trailer was being hauled by a friend of hers from Dawson City and she was upset that her friend did not have extended mirrors on her truck and did not appear to have operational running lights on the trailer. She followed the truck and trailer for approximately 20 minutes. When she realized that the truck hauling the trailer was not her friend's vehicle, she decided to pass. She provided a photograph of the highway where the passing occurred, being a location 37 kilometres north of Braeburn. When she was three quarters of the way past the truck and stock trailer, a car came around a curve in the road towards her. She observed the car slowing and pulling over to the side, so she decided to complete the pass and then re-entered her own lane. She said that her normal speed was the speed limit, which was at 90 kilometres an hour, and that she passed the stock trailer at 100 kilometres per hour, but that she was travelling faster when she completed the pass. She said that she had completed the pass and returned to the northbound lane before the southbound vehicle passed by her and that at no time were the three vehicles abreast.

[16] The trial judge assessed the credibility of Mr. Ambrose very favourably, describing him as "an exceptional witness" who was "very careful and precise in his answers". He said he had "no hesitation" in accepting Mr. Ambrose's version of events. He noted that Mr. Ambrose did not previously know Ms. Winfield, so that there was no suggestion of bias or improper motive. He also noted that Mr. Ambrose provided significant detail about what occurred before and after the incident, describing the time of the incident as "1840 hours" and his speed at 90 kilometres, as set by his cruise control. He was impressed that Mr. Ambrose was able to accurately record the license plate number. He

stated that Mr. Ambrose was not shaken in cross-examination and, in fact, on several occasions his credibility was enhanced. He stated that Mr. Ambrose's actions in attempting to locate the offending vehicle and reporting to the police were consistent with the occurrence of the serious incident he described, and that it would not have merited that follow up action if the event had occurred as described by the appellant.

[17] In his written argument, the appellant's counsel argued that the trial judge disregarded certain frailties in the evidence of Mr. Ambrose. However, at the appeal hearing he seemed to concede that, for the most part, the trial judge's assessment of Mr. Ambrose's evidence was properly within his role as the trier of fact, with one possible exception. The trial judge noted that the appellant was not known to Mr. Ambrose, so there was "no suggestion of bias or improper motive" and that Mr. Ambrose "had no reason to make up the story as he had never met Ms. Winfield before." The appellant's counsel submitted that the same could be said of Ms. Winfield, since she had not previously met Mr. Ambrose. Consequently, that the trial judge did not identify this as a factor which weighed equally in favour of the appellant is tantamount to an error of law, because it implies that the appellant had a reason to make up her story in order to secure an acquittal.

[18] The appellant's counsel referred to *R.* v. *B. (L.)*, [1993] O.J. No. 1245 (C.A.) in support of this proposition. Arbour J.A., as she then was, delivered the judgment of the court in that case. The appellant had been convicted of sexually assaulting his stepdaughter, who at the time was between eight and twelve years old. The evidence adduced by the Crown at trial was from the complainant and an expert witness. The appellant testified in his defence and denied any wrongdoing. He was convicted by a

judge sitting without a jury, who found that, in considering the credibility of the various witnesses, he was entitled to take motive into consideration. When he came to consider the evidence of the appellant, the trial judge said:

> "The accused, of course, has a motive for not telling the truth: he does not wish to be convicted."

Arbour J.A. held, at paras. 4 and 5, that this statement entirely displaced the presumption of innocence and presupposed the guilt of the appellant:

> "… The statement made by the trial judge went beyond the common sense consideration that witnesses may have, to different degrees, an interest in the outcome of the proceedings, and that this is a factor, among others, which the trier of fact may take into account in assessing credibility.
>
> There are many ways in which a witness may have an interest in the case which may be viewed as affecting the weight that the trier of fact may want to place on the witness's evidence… In a criminal case, the accused has an obvious direct interest in the outcome of his or her trial…" (my emphasis)

But later, at para. 7, she continued:

> "The impugned passage in the trial judge's reasons in this case, in my opinion, goes beyond the permissible consideration of the accused's interest in being acquitted, as one factor to be taken into account when weighing his testimony. It falls into the impermissible assumption that the accused will lie to secure his acquittal, simply because, as an accused, his interest in the outcome dictates that course of action. This flies in the face of the presumption of innocence and creates an almost insurmountable disadvantage for the accused. The accused is obviously interested in being acquitted. In order to achieve that result he may have to testify to answer the case put forward by the prosecution. However, it cannot be assumed that the accused must lie in order to be acquitted, unless his guilt is no longer an open question. If the trial judge comes to the conclusion that the accused did not tell the truth in his evidence, the accused's interest in securing his acquittal may be the most plausible explanation for the lie. The explanation for a lie, however,

> cannot be turned into an assumption that one will occur." (my emphasis)

[19] In my view, *B. (L.)* is distinguishable from the case under appeal. There, the trial judge clearly crossed the line in terms of making an assumption that the accused would lie in order to secure his acquittal. The trial judge in this case made no such assumption. Further, it is not impermissible for a trial judge to take into account that a witness may have an interest in the outcome of the proceedings, or not, and that is all that the trial judge in the present appeal was doing when he commented on the absence of bias or improper motive on the part Mr. Ambrose. Finally, when the trial judge expressed his opinion that Mr. Ambrose "had no reason to make up the story as he had never met Ms. Winfield before", this was in the context of a longer passage at para. 18:

> "Ms. Winfield would have me believe that Mr. Ambrose either made up his version of events or was mistaken in his observations. He had no reason to make up this story as he had never met Ms. Winfield before. The differences between his version and that of Ms. Winfield are so substantial that they cannot be explained by mistaken observations."

Here the trial judge was referring to the submissions of Ms. Winfield's counsel at the close of the trial, and he was merely providing his response to that position, as opposed to implicitly suggesting that Ms. Winfield had a reason to make up her story.

[20] In any event, the appellant's counsel conceded that this issue does not constitute a stand-alone ground of appeal.

[21] I now come to the crux of this appeal, which centers on the trial judge's assessment of the appellant's credibility. Here the trial judge stated as follows, at para. 15:

> "Ms. Winfield's evidence that Mr. Ambrose was travelling at 80 kilometres an hour and that she followed his vehicle for 20

> minutes at that speed is not believable in the circumstances. Her explanation that she thought that the stock trailer belonged to a friend in Dawson, that she was upset because her friend did not have extended mirrors or running lights, did not make any sense to me. Why did she continue to follow it for 20 minutes? What was she going to do about her concerns if her friend was driving that vehicle? She said that she realized after 20 minutes of following the stock trailer that it did not belong to her friend and then decided to pass it. Twenty minutes is a long time to be travelling at 80 kilometres on the North Klondike highway on a clear day with excellent road conditions. I note that her view of the back of the stock trailer would be the same throughout that time period, yet somehow she determined that the trailer did not belong to her friend. She did not explain what changed her mind." (my emphasis)

[22] This last statement by the trial judge was an error. In fact, the appellant did explain what changed her mind, by testifying as follows:

> "… Somewhere near Braeburn I came upon a trailer being hauled by a vehicle, obviously, but initially I couldn't see the vehicle, and it was only when we went around a curve that I saw that it was red truck [as written]… And when I first saw the vehicle go around the corner, I actually saw it was a friend of mine from Dawson who has a couple of horses, and I was really ticked about it and I thought that I would follow the vehicle. And the reason that it bothered me is I knew how much she - - I knew how much she was always nervous about driving her horses, like hauling them back and forth, and I couldn't believe she was doing it without extended mirrors. And it also appeared that she didn't have running brake lights. I don't recollect seeing any brake lights at all on this trailer, and I thought it was, you know, sort of a dangerous thing to be doing.
>
> I'm not a car expert. I'm not a truck expert. Her vehicle is red and it's a Dodge. But what I realized after we had travelled - - I'd probably been behind Mr. Ambrose for about 20 minutes or so, 15, 20 minutes, and we had gone around a curve and I realized at that point that it wasn't her vehicle because it was much bigger. She drives a much smaller Dodge. Was much bigger. I didn't know what it was but it wasn't hers.

> So I decided that I wanted to pass for two reasons. One is when I was directly behind the trailer, I couldn't actually see the road directly in front of the vehicle; I couldn't see the vehicle at all, because the trailer was wider than the vehicle, and I couldn't see the driver's mirrors and I couldn't see the driver in the mirrors. So I kept my distance and at no point did I see like brake lights so I wasn't sure that the brakes were working and I didn't - - so I kept my distance a little further back. And I decided at that point that the next - - when the next opportunity came I would pass. …" (Transcript of Trial Proceedings, p. 17)

Later, the appellant testified that she was concerned that if the vehicle in front of her ran into an elk or something then she might have a rear end collision with it.

[23] To be clear, the trial judge was fully aware of the appellant's evidence that the reason she changed her mind and decided to pass the vehicle in front of her was because she realized that it was not being driven by her friend. He referred to this evidence twice in his reasons for judgment (paras. 7 and 15). His only mistake was in stating that the appellant did not explain how it was that she determined that the trailer did not belong to her friend. The question for me is whether this mistake constitutes a "palpable and overriding error", sufficient for me to conclude that his guilty verdict was unreasonable. In my view, the trial judge's error on this point does not take the appellant's case over the high threshold of deference which appellate courts must apply to factual determinations made by trial judges, particularly those involving assessments of credibility: *Housen* v. *Nikolaisen*, cited above, at para. 24.

[24] As Charron J., indicated in *R.* v. *Beaudry*, cited above, at para. 58:

> "… The test to be applied is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered". In every case, it is the *conclusion* that is reviewed, not the process followed to reach it. I agree that … a faulty thought process in a judge's reasons can sometimes explain an unreasonable conclusion reached by the judge. But

> a verdict is not necessarily unreasonable because the judge has made errors in his or her analysis. The review must go further than that. In every case, the court must determine whether the *verdict* is unreasonable and, to do so, it must consider all the evidence. …" (emphasis already added)

Later, at para. 59, Charron J. quoted the comment of Doherty J.A. of the Ontario Court of Appeal in *R.* v. *Morrissey* (1995), 97 C.C.C. (3d) 193, that "A misapprehension of the evidence does not render a verdict unreasonable." Charron J. said that there must be a connection between an error made in interpreting evidence and an unreasonable verdict, and that the two issues must not be confused. At para. 60, she continued that it is not enough to determine that the trial judge made errors, but that the analysis must be taken further. She then referred to Laskin J.A. in the Ontario Court of Appeal, who summarized the analysis as follows in *R.* v. *G. (G.)* (1995), 97 C.C.C. (3d) 362, at para. 59, as follows:

> "When an appellate court finds error, it has a duty to consider the nature of the error, its effect on the verdict, and when the verdict is rendered by a judge alone, on the reasoning process by which the verdict was reached. Obviously not every error in the apprehension or appreciation of evidence or in the drawing of a conclusion from the evidence warrants quashing a conviction…"

[25] In my view, the focus of the trial judge in assessing the appellant's credibility was not so much on her failure to explain how she determined the trailer ahead of her did not belong to her friend, but rather on her testimony that when she initially thought the trailer was being hauled by her friend in what she described as "dangerous fashion" that she continued to follow the trailer for 15 or 20 minutes or so, and only decided to pass when she realized that it was *not* being driven by her friend. It is important to remember that there was no explanation from the appellant during her testimony at the trial as to *why* she conducted herself in that fashion. Perhaps, as her counsel suggested at the appeal

hearing, she was simply hoping that her friend might eventually pull over at some point, which would allow the appellant to confront her about the dangerous manner in which she was towing the trailer. However, no questions of that nature were put to her and there is simply no evidence on the point. Nor were there any submissions made by her counsel at the close of the trial touching on the issue. While I may not have had the same curiosity over the issue as the trial judge did, or may not have given it the same degree of importance in my reasoning or my assessment of the appellant's credibility at the trial, it is clearly not for me, as an appellate court judge, to substitute my view of the evidence for that of the trial judge. Rather, I must respect the trial judge's "privileged position in assessing the facts": *Beaudry*, at para. 62.

[26] The appellant's counsel further argued that the trial judge erred in deciding the case by choosing between the two versions of events testified to by Mr. Ambrose and the appellant and that he gave no sound reason for disregarding the appellant's evidence. I have already answered the last part of this objection by concluding that the trial judge did provide a reason for finding against the appellant's credibility and that it is not for me, as an appellate court, to take issue with his analysis in that regard, unless it is fundamentally illogical or irrational, which I determine is not the case.

[27] The appellant's counsel submitted that the trial judge's comment that "twenty minutes is a long time to be travelling at 80 kilometres on the North Klondike Highway on a clear day with excellent road conditions" was simply an "idiosyncratic observation" and that many people drive at a moderate speed, at or below the posted speed limit. He argued that since it was not, on its face, unusual for someone to travel for that length of time at that speed and location, it was irrational or illogical for the trial judge to have used

that fact as a reason for adversely assessing the appellant's credibility. I reject that argument because it attempts to unfairly parse out or dissect what the trial judge was actually saying. Clearly, the comment was made in the context of what the trial judge found to be unusual behaviour by the appellant in following the truck and trailer for that length of time in circumstances where she was clearly concerned about the apparent dangerousness of the situation.

[28] The appellant's counsel also submitted that the trial judge fell into the trap of treating this as a "credibility contest" between Mr. Ambrose and the appellant. This issue was addressed in *R.* v. *J.H.S.*, 2008 SCC 30, where Binnie J., speaking for the Supreme Court of Canada, was deciding an appeal arising from a sexual assault conviction. The accused, who denied all allegations of impropriety, was tried before a judge and jury. The complainant and the accused were the principal witnesses. The trial judge charged the jury on the credibility of the witnesses and specifically instructed the jury that the trial was not a choice between two competing versions of events. The jury convicted. A majority of the Court of Appeal set aside the conviction and ordered a new trial on the basis that the trial judge insufficiently explained the principles of reasonable doubt as they apply to credibility. The Supreme Court allowed the appeal and restored the conviction. The issue on appeal clearly involved the so called "*W. (D.)* instruction" on reasonable doubt in circumstances where the accused has testified. At para. 14, Binnie J. noted that the Court of Appeal held that:

> "The charge failed to direct that if the jury did not believe the testimony of the accused but were left in a reasonable doubt by that evidence, they must acquit."

However, Binnie J. responded as follows:

> “In my view, with respect, the reasoning of the majority brushes uncomfortably close to the "magic incantation" error. At the end of the day, reading the charge as a whole, I believe the instruction to this jury satisfied the ultimate test formulated by Cory J. in *W. (D.)* as being whether "the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply."

In conclusion, Binnie J. was satisfied that the trial judge reminded the jury that they must consider *all of the evidence* when determining reasonable doubt and that they should not decide whether something happened “simply by comparing one version of events with another, or choosing one of them” (para. 15).

[29] At the hearing of this appeal, I specifically asked the appellant’s counsel whether he was raising any *W. (D.)* issues, as the respondent’s counsel had spent some time on that question in her written submissions. In response, the appellant’s counsel candidly conceded that there was no real issue arising from the trial judge’s assessment of the credibility of the complainant. More particularly, he conceded that there *was* evidence to support the trial judge’s conclusions that the complainant was credible and that he observed what he said he observed. However, the appellant’s counsel suggested that the trial judge erred by moving too directly from his assessment of the complainant’s credibility to being satisfied that the offence charged had been proven beyond a reasonable doubt and that this was “to some degree” a *W. (D.)* problem.

[30] I can find no fault with the trial judge’s approach in this area. First of all, it is noteworthy that the trial judge felt the need to adjourn to consider his reasons following the close of the evidence on the final submissions of counsel. It is also clear from his comments in that regard that he intended to give thorough consideration to all of the

evidence in determining whether he was left with a reasonable doubt. At the close of the proceedings on February 27, 2008, he said this:

> "I'm likely to have to write a short decision or at least work through the facts. As both of you know, I've got facts here that are quite different and I'm going to have to sort through them and make some decisions and, in an end result, determine whether or not, based on all the evidence, I'm left with a doubt, a reasonable doubt, as to whether or not the charge has been made out. I'm not going to be able to do that today, based on the limited time I'm going to have…" (my emphasis)

Ultimately, the trial judge rendered his oral reasons for judgment on March 5, 2008, so he had about a week to consider his decision.

[31] Secondly, it is apparent from the reasons for judgment that the trial judge carefully reviewed the evidence, and then reviewed the law of careless driving, before making his findings of fact. In making those findings he initially assessed Mr. Ambrose's evidence and then assessed the appellant's evidence. He also referred to some other evidence provided by both counsel on the probable width of the roadway at the location of the incident. He further went on to apply his findings of fact to the law before concluding that the appellant was guilty as charged.

[32] Finally, while there is now a requirement, arising from the *Sheppard* case, cited above, that trial judges provide reasons which are sufficiently intelligible to permit appellate review of the correctness of their decisions, the comments of the Supreme Court of Canada in *R.* v. *Burns*, [1994] 1 S.C.R. 656, at para. 17, are still applicable: "…the judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence…"

[33] Taking all of these circumstances into account, I disagree with the suggestion of the appellant's counsel that the trial judge jumped from a finding of credibility in favour of Mr. Ambrose to a finding of guilt against Ms. Winfield.

[34] The final argument raised by the appellant's counsel was that, in assessing the evidence, the trial judge had a "responsibility" to try to reconcile the stories of the complainant and the appellant. In particular, the appellant's counsel disagreed with the characterization by the trial judge that the appellant's version of the incident "differed markedly from that recounted by Mr. Ambrose" and that the two accounts differed "in all significant details" and could not be explained by mistaken observations.

[35] I reject this argument, as it once again invites me to interfere with the fact finding and analysis of the trial judge, where credibility was a central issue. At the risk of repetition, I am bound to follow the direction of the Supreme Court of Canada to take account of the trial judge's privileged position in assessing the evidence: *R.* v. *Beaudry*, cited above, at para. 62. My role is not to write a better judgment, but to review the reasons in light of the arguments made and the relevant evidence and to uphold the decision unless a palpable and overriding error leading to a wrong result has been made. This objective was well summarized by Charron J. in *Beaudry*, at para. 63:

> "In my view, the need to adhere to this fundamental principle is even more acute when, as in the instant case, what is in issue is the trial judge's assessment of the credibility of the witnesses. That is why in *R. v. Burke*, [1996] 1 S.C.R. 474, Sopinka J. stated that the appellate courts' power of review must be exercised sparingly when the verdict rests on a question of credibility (para. 5-6). He added that instances where a trial court's assessment of credibility cannot be supported on any reasonable view of the evidence were "rare" (para. 7)…"

[36] In further response to this final argument by the appellant, I do not think it can be said that the trial judge totally ignored Ms. Winfield's evidence in coming to the conclusions he did. While he accepted that the vehicles were on a straight stretch of road and that the appellant should have seen the vehicle coming towards her in the southbound lane, either before she started to pass or very shortly thereafter, he also said as follows, at para. 19:

> "… I am prepared to make the assumptions most favourable to her, namely, that the southbound car was travelling fast and that she misjudged its speed and the time required to pass Mr. Ambrose's truck and stock trailer safely. During the pass, it should have become apparent to her that she was not going to make it past the Ambrose vehicle. Nevertheless, as both Mr. Ambrose and the southbound vehicle had pulled over slightly, to the side of the pavement, she decided to continue her pass between the two vehicles. …"

CONCLUSION

[37] The trial judge concluded that there was a real danger that both the trailer and Mr. Ambrose's truck might have rolled, had the tires on the passenger side moved onto the soft shoulder of the road. He also determined that the space between Ms. Winfield's vehicle and Mr. Ambrose's vehicle was only a "matter of centimetres" and that had she made contact, she could have forced it onto the soft shoulder with disastrous consequences. In conclusion he stated, at para. 21:

> "In my opinion, an ordinarily prudent person would not have attempted to pass the Ambrose vehicle in the circumstances described. In all likelihood, the high speed that she was travelling at contributed to her misjudging the speed of the ongoing vehicle. During the passing manoeuvre, it would have become evident to a reasonably prudent person that the pass could not be completed safely. A prudent person would have applied the brakes terminating the pass and returned to the northbound land behind the Ambrose stock trailer."

He went on to find the appellant guilty of the offence of careless driving.

[38] In my view, that is a verdict that a properly instructed jury, acting judicially, could reasonably have rendered. Therefore, I dismiss the appeal.

Gower J.