# COURT OF APPEAL OF YUKON

Citation: *R. v. J.R.*,
2022 YKCA 9

Date: 20221027
Docket: 21-YU878

Between:

**Rex**

Respondent

And

**J.R.**

Appellant

Restriction on publication: A publication ban has been automatically imposed under s. 111(1) of the *Youth Criminal Justice Act*, restricting the publication of information that would identify a child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person. An order imposing this ban was made by the Territorial Court of Yukon in a related criminal matter.

Before: The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of Yukon, dated April 23, 2021 (conviction) (*R. v. J.R.*, 2021 YKSC 27, Whitehorse Docket 19-01503).

## Oral Reasons for Judgment

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| Counsel for the Appellant: | V. Larochelle |
| Counsel for the Respondent: | M. McKay |
| Place and Date of Hearing: | Vancouver, British Columbia<br>October 24, 2022 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>October 27, 2022 |

***Summary:***

*Appeal from conviction on one count of assault simpliciter and one count of assault with a weapon, to wit: an extension cord. Held: Appeal allowed. With respect to the common assault count, the appellant and complainant gave conflicting versions of events. Both testified they were attacked by the other. The trial judge considered there to be a "clear risk" in relying on the complainant's testimony in the absence of confirmatory evidence. The trial judge relied on the testimony of the complainant's sister as confirmation of the complainant's account and convicted the appellant. The evidence of the sister did not, however, confirm the complainant's testimony as to the commission of an assault, nor did it undermine the appellant's claim that he merely restrained the complainant to ward off an assault. On the approach the judge considered to be necessary, the conviction on this count is unreasonable. The appeal is allowed, the assault conviction set aside, and an acquittal entered. With respect to the assault with a weapon count, the conviction rested entirely on the evidence of the complainant's sister. The complainant had no recollection of being hit by the appellant with an extension cord. The trial judge failed to consider whether the exculpatory aspects of the complainant's evidence on this count raised a reasonable doubt about the appellant's guilt; this failure amounts to error in law. The curative proviso cannot be applied. It cannot be said that no properly instructed trier of fact, acting reasonably, could convict based on the sister's evidence. Accordingly, the appeal is allowed, the conviction on this count is set aside, and a new trial is ordered.*

**FITCH J.A.**:

## I. Introduction

[1] This is an appeal from conviction on one count of assault *simpliciter* (Count 1) and one count of assault with a weapon (Count 3). The convictions were entered following a judge-alone trial in the Supreme Court of Yukon. Reasons for judgment are indexed as 2021 YKSC 27.

[2] The appellant is the complainant's maternal grandfather. He was charged with five historical assault-related offences alleged to have been committed against the complainant between 2004 and 2012. He was acquitted on Counts 2, 4 and 5. A directed verdict of acquittal was entered on Count 5, as the Crown called no evidence on that count.

[3] The assault with a weapon occurred in 2004 when the complainant was about seven years old. The trial judge found that the appellant struck the complainant on

his backside with an electrical cord when the complainant refused to stop playing with it.

[4] The common assault was committed in 2008 when the complainant was eleven years old. The trial judge found that the appellant grabbed the complainant and pinned him to his bed after the complainant did something to upset the appellant's wife.

[5] The appellant testified at trial.

[6] With respect to Count 3, he denied ever striking the complainant with an electrical cord. With respect to Count 1, he admitted pinning the complainant to his bed, but testified that he did so in response to the complainant's assaultive behaviour towards him and, even then, only as a means of restraining him.

[7] The appellant advanced eight detailed grounds of appeal. In my view, it is unnecessary to consider all of them to properly dispose of this appeal.

[8] For the reasons that follow, I conclude that the conviction on Count 1 is unreasonable within the meaning of s. 686(1)(a)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*]. I would allow the appeal on Count 1, set aside the conviction and enter an acquittal. I conclude that the conviction on Count 3 reflects error in law in the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93. This is not an appropriate case for the application of the curative proviso. Accordingly, I would allow the appeal on Count 3, set aside the conviction and order a new trial.

## II. Background

[9] By all accounts, the complainant was behaviourally challenged as a child and youth. The complainant agreed that his parents had a difficult time managing him.

[10] The complainant testified that the appellant was very abusive towards him, both verbally and physically.

[11] The appellant testified that, even though the complainant was a boisterous and challenging child, his relationship with the complainant was good for much of his childhood and into his young teen years.

[12] The assaults underlying both counts were found by the judge to have occurred when the appellant intervened in response to what he considered to be disobedient behaviour displayed by the complainant.

[13] The complainant's acts of defiance toward authority figures as a young boy—perhaps not unusual in themselves—escalated in his teen years to occasional threats and acts of violence towards his mother and father.

[14] In 2015, the complainant was found guilty of sexually assaulting and threatening two of his younger sisters between 2010 and 2014. The complainant testified at his preliminary inquiry and at trial. He denied sexually assaulting his sisters. He maintained his innocence after his conviction, telling the author of a pre-sentence report that he did not sexually assault his sisters. In fact, he suggested to her that the appellant might be responsible for these assaults.

[15] At trial in the case at bar, the complainant admitted that he had sexually assaulted his younger sisters and lied about this on two occasions under oath. He agreed that by falsely attempting to blame the appellant for these serious offences, he knew he was putting his grandfather in jeopardy. He agreed that he did not care whether his grandfather ended up in trouble because of his false insinuations.

[16] The complainant's allegations of abuse against his grandfather emerged after his conviction for sexual assault, in the midst of his parents' divorce and ensuing custody battle.

[17] Against this background, the trial judge accepted that there was a "clear risk" in relying on the complainant's testimony in the absence of confirmatory evidence. I understand this self-direction to be an acknowledgment by the trial judge that it would be unsafe to convict the appellant on the unconfirmed evidence of the

complainant. She applied this self-direction in her reasons for judgment and acquitted where there was no evidence confirming the complainant's account.

**Count 1: Common Assault**

[18] The appellant was charged with assault with a weapon in relation to this incident, but convicted of the lesser included offence of assault.

[19] The complainant and appellant gave divergent accounts of this incident. I will address only so much of those accounts as is necessary to dispose of this appeal from conviction on this count.

[20] The complainant testified that the incident started when he refused to permit his grandmother to pray for him and pushed her hand off his shoulder. In response, the appellant came into his bedroom, slammed him against a wall, slapped him around, and pinned him on his bed. The complainant testified that he was screaming and crying during this incident.

[21] The appellant testified that he went into the complainant's bedroom after being informed that the complainant had punched his grandmother—the appellant's wife. He said he wanted to find out what had happened. When he admonished the complainant saying, "You must never hit your grandmother", the complainant started swinging and kicking at him. He testified that he wrapped his arms around the complainant to restrain him and pinned him to the bed. The complainant protested saying, "Get off me" and "Leave me alone". In examination-in-chief, the appellant was asked whether the complainant was shouting during the incident. He replied, "Not really. It was no shouting or screaming or anything like that. It was spoken." In cross-examination, the appellant testified that the complainant "…wasn't really yelling. I have no memory of him yelling." The appellant testified that he said to the complainant, "I am not going to punish you. Your father will do that when he comes home." The appellant released the complainant when he stopped struggling.

[22] The complainant's sister, referred to by the judge as O.N., testified that she recalled an occasion in which the appellant was summoned to help discipline the

complainant. As the complainant was being disciplined, she walked by the complainant's open bedroom door and looked inside. She saw the appellant pinning the complainant to the bed and holding him down. The complainant was hollering. She continued to walk by the door as the children were not supposed to see their siblings being disciplined. This is the only portion of the incident she observed.

[23] The trial judge had concerns about the credibility of the appellant. On this count, she found his version of events to be "seriously undermined" by two things. First, he did not make efforts to determine what had happened between the complainant and his grandmother, even though this was his stated reason for confronting the complainant. In addition, there was no evidence that the appellant followed up with the complainant's father about this incident, even though he expected the complainant's father to follow through with punishment when he got home. The complainant's father was not called to give evidence at trial. The judge said, "one would expect some evidence that either J.R. … or someone else followed up with [the complainant's father] afterwards. However, there is no evidence to that effect before me". In addition, the judge rejected the appellant's evidence that the complainant was not yelling during the incident, finding this version of events to be improbable given the nature of the incident and the complainant's general behaviour and attitude when he was young.

[24] The trial judge found that the description of the incident provided by the complainant's sister did not correspond with the appellant's claim that he was simply maintaining control over the complainant, waiting for him to calm down. The nature of the perceived inconsistency between the accounts given by the appellant and the complainant's sister was not explained by the trial judge.

[25] The judge rejected the appellant's evidence that he simply restrained the complainant to avoid being kicked and hit by him. Having rejected the appellant's evidence on this central issue, the judge turned to consider whether there was evidence confirming the complainant's account upon which a guilty verdict could safely be based.

[26] With respect to certain details of the complainant's account—that the appellant pushed him against the wall and slapped him—the judge found no confirmatory evidence and concluded that, "it would be unsafe to conclude beyond a reasonable doubt that the assault encompasses J.R. pushing [the complainant] twice on the wall and slapping him".

[27] The judge found, however, that the complainant's evidence the appellant pinned him to the bed was "corroborated" by evidence given by the complainant's sister, O.N.:

> [341] [The complainant's] evidence that his grandfather pushed him and pinned him on the bed is corroborated by [his sister's] evidence that she recalled an incident, when she was between the ages of seven and 10 years old, when [the complainant] had gotten into trouble, and sent to his room. As she wanted to know what was happening, she walked by [the complainant's] bedroom and saw, in passing, that her grandfather had [him] pinned to his bed. According to [the sister's] evidence her grandfather was leaning his weight on [the complainant], and holding him down. She stated that her grandfather was using more of his side to hold [the complainant] down. She added that she could hear [the complainant] struggling and screaming while this incident was happening.

[28] The appellant's conviction for assault in relation to this count therefore rested on the judge's finding that the appellant took hold of the complainant and pinned him to his bed.

[29] Importantly, the complainant's sister did not see the beginning of the altercation and could not comment on how the incident unfolded or who was the aggressor. Both the complainant and the appellant testified that the incident ended with the appellant pinning the complainant to the bed. That is what the complainant's sister saw. And that is all she saw. Respectfully, her evidence did not confirm the complainant's account that the appellant entered the bedroom and aggressively assaulted him, nor did it undermine the appellant's testimony that he committed defensive acts of restraint in response to the complainant's assaultive behaviour.

[30] As the sister's evidence did not "corroborate" the complainant's version of events in a way that incriminated the appellant, the judge could not, following her self-direction, have reasonably concluded that the evidence established the

appellant's guilt on this count beyond a reasonable doubt. Respectfully, this flaw in the judge's analysis explains the unreasonable verdict she reached on this count, and justifies the order I am proposing: see *R. v. Biniaris*, 2000 SCC 15 at para. 37.

[31] Regardless whether the reasonableness of the verdict in this case is viewed through the lens of the test set out in *R. v. Yebes*, [1987] 2 S.C.R. 168, 1987 CanLII 17—whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered—or the test set out in *R. v. Beaudry*, 2007 SCC 5—whether the verdict rests on a factual finding plainly contradicted by the evidence—the result is the same. The verdict is unreasonable, the conviction must be set aside, and, in the circumstances of this case, an acquittal entered.

**Count 3: Assault with a Weapon**

[32] On Count 3, the Crown alleged that the appellant did, in committing an assault on the complainant, use a weapon, to wit: an extension cord. It was incumbent on the Crown to prove the offence as particularized: *R. v. Krymowski*, 2005 SCC 7 at para. 18.

[33] The appellant's conviction on this count rested on the evidence of the complainant's sister. The judge found her to be a credible and reliable witness. She testified that when her brother ignored the appellant's direction to stop jumping on chairs and causing a ruckus, the appellant grabbed an extension cord, folded it, and struck the complainant with it once "across the butt". She testified that the appellant was angry when he did this, and appeared to hit the complainant hard with the cord.

[34] The complainant's version of events—apparently in relation to the same incident, although the judge made no definitive finding on this point—was inconsistent with the one offered by his sister in one important way: the complainant testified that he was playing with an extension cord contrary to the expressed wishes of the appellant. When he persisted doing so, the appellant "slammed [him] over his leg" and slapped him really hard with his hand four or five times. He said that while the spanking did not leave any marks, he was sore for a day or two afterwards.

[35] The complainant was clear in in his evidence that he has no recollection of being struck by the appellant with an electrical cord.

[36] If believed, the complainant's version of events could conceivably ground a conviction for common assault. Section 43 of the *Code* justifies the use of reasonable corrective force by a teacher, parent, or person standing in the place of a parent toward a pupil or child. The exemption for "a person standing in the place of a parent" is limited to individuals who have assumed all the obligations of parenthood: *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 173 at 190, 1984 CanLII 77; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 at para. 21. There was no evidence that the appellant had assumed all the obligations of parenthood. Indeed, his evidence was decidedly to the contrary.

[37] The complainant's evidence could not, however, support a conviction for assault with a weapon. Indeed, the complainant provided what amounts to an exculpatory—or partially exculpatory—version of events in relation to this count.

[38] As with all exculpatory evidence, regardless of its source, it was incumbent on the trial judge to consider whether the complainant's evidence raised a reasonable doubt about his guilt. The *W.(D.)* framework applies to evidence favourable to the defence even when that evidence is tendered by the Crown: *R. v. B.D.*, 2011 ONCA 51 at para. 114; *R. v. Sanhueza*, 2020 BCCA 279 at paras. 29–33.

[39] While it was open to the judge to convict the appellant on this count, the only path to this verdict was for her to disbelieve the exculpatory evidence of the appellant and the complainant, find that their versions of events did not raise a reasonable doubt, and conclude on the basis of the complainant's sister's evidence that the Crown had established the guilt of the appellant beyond a reasonable doubt.

[40] In addition, the judge could not approach the complainant's evidence on this count on the footing that it was unsafe to place reliance on it in the absence of confirmatory evidence. While it was appropriate for the judge to instruct herself in this way where the complainant's evidence incriminated the appellant in the

commission of an offence (as it did in relation to Count 1), it would be error in law for the judge to conclude that she could not act on the complainant's exculpatory evidence in relation to Count 3 unless it was independently confirmed: *R. v. Ryan*, 2014 ABCA 85 at paras. 24–25, 77–87; *R. v. Chenier* (2006), 205 C.C.C. (3d) 333 at 352, 2006 CanLII 3560 (Ont. C.A.); *R. v. Pilotte* (2002), 163 C.C.C. (3d) 225 at para. 92, 2002 CanLII 34599 (Ont. C.A.), leave to appeal to SCC ref'd, 29360 (13 February 2003); *R. v. Tzimopoulos* (1986), 29 C.C.C. (3d) 304 at 340, 1986 CanLII 152 (Ont. C.A.), leave to appeal to SCC ref'd, 20093 (29 January 1987); *R. v. Hoilett* (1991), 3 O.R. (3d) 449 (C.A.) at 451, 1991 CanLII 7285 (Ont. C.A.).

[41] While these cases generally address a situation where the exculpatory evidence comes from the mouth of a defence witness, the principle applies with the same force where the exculpatory evidence comes from the mouth of a Crown witness, including the complainant.

[42] The judge concluded that the complainant's evidence was corroborated by his sister to the limited extent that the appellant hit the complainant on his bottom because he was doing something wrong. She acknowledged that their evidence was different on the critical point of whether the appellant spanked the complainant with his hand or struck him with an extension cord.

[43] The judge accepted evidence given by the complainant's sister that the appellant struck the complainant once on his bottom with an extension cord. She continued:

> [389] In light of the evidence I accept, I do not believe J.R.'s flat denial of ever hitting [the complainant] with an extension cord or hitting him because [the complainant] was playing with an extension cord.
>
> [390] Also, I am not left in a reasonable doubt by that denial.
>
> [391] Based on the evidence I accept, I am convinced beyond a reasonable doubt that J.R. committed an assault with a weapon on [the complainant], to wit an extension cord, and I find him guilty of that charge.
>
> [Emphasis added.]

[44] What is missing from the judge's analysis is any consideration of whether the complainant's evidence gave rise to a reasonable doubt about the appellant's guilt. I consider this error in principle to be manifest in the reasons for judgment. The judge proceeded on the basis that the only exculpatory evidence before her was sourced in the evidence given by the appellant. Her failure to consider whether exculpatory evidence from the complainant's own mouth raised a reasonable doubt amounts to error in principle.

[45] I appreciate that reasons must be read as a whole. I acknowledge, in this regard, that the judge reproduced the relevant portions of *W.(D.)* in her reasons for judgment. The second prong of the *W.(D.)* inquiry begs consideration of whether evidence favourable to the accused, even if not accepted, gives rise to a reasonable doubt. But even if it could be said that the judge understood her task at the second stage of the inquiry to encompass evidence favourable to the defence given by the complainant, the reasons for judgment do not reflect an appreciation that, in the context of Count 3, she could not limit herself to acting only on those portions of the complainant's evidence that were independently confirmed.

[46] I appreciate, as well, that appellate review takes account of the whole of the record, including the submissions of counsel. While the closing submissions of counsel were not transcribed for the purposes of this appeal, we were advised by the Crown that, to the best of her knowledge, the issues discussed in paras. 39–41 were not identified by trial counsel or brought to the trial judge's attention.

[47] For the foregoing reasons, I am of the view that the judge's reasons on this count reflect error in principle. Given the centrality of the error, the curative proviso has no application.

[48] While I would allow the appeal, I cannot say that no properly instructed trier of fact, acting judicially, could reasonably convict the appellant on this count given the evidence of the complainant's sister. Accordingly, I would allow the appeal on this count, set aside the conviction and direct a new trial.

[49] In all the circumstances, including the fact that the sentence has now been served, I expect that the Crown will carefully consider whether it is in the interests of justice to retry the appellant on this count.

[50] **ABRIOUX J.A.**: I agree.

[51] **HORSMAN J.A.**: I agree.

[52] **FITCH J.A.**: The appeal on Count 1 is allowed, the conviction is set aside and an acquittal is entered. The appeal on Count 3 is allowed, the conviction is set aside and a new trial is ordered.

"The Honourable Mr. Justice Fitch"