

COURT OF APPEAL OF YUKON

Citation: *R. v. Deuling*,
2024 YKCA 7

Date: 20240531
Docket: 23-YU901

Between:

Rex

Respondent

And

Paul Thomas Deuling

Appellant

Before: The Honourable Madam Justice Shaner
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Territorial Court of Yukon,
dated December 9, 2022 (conviction) (*R. v. Deuling*, 2022 YKTC 49,
Whitehorse Registry Docket 19-00137C).

Counsel for the Appellant: R.S. Fowler, K.C.

Counsel for the Respondent: M. Williams

Place and Date of Hearing: Whitehorse, Yukon
November 24, 2023

Place and Date of Judgment: Whitehorse, Yukon
May 31, 2024

Written Reasons by:

The Honourable Madam Justice Shaner

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Abrioux

Summary:

The Appellant was tried on one count of indecent assault and four counts of sexual assault. Each was alleged to have taken place at discrete times and involved the same Complainant. The Appellant was convicted on one count of sexual assault (Count 4) and acquitted on the remaining ones. The trial judge made numerous negative credibility and reliability findings respecting the Complainant's evidence on four of the five counts, leading him to find the appellant not guilty, but he did not consider or apply these findings in assessing the Complainant's evidence on Count 4. The Appellant seeks to overturn the conviction, arguing the trial judge erred in law by not considering the evidence as a whole, specifically, in failing to consider to apply the negative credibility and reliability findings when assessing the Complainant's evidence on Count 4. Held: Appeal allowed. The conviction is set aside and an acquittal is directed. In assessing credibility and reliability on Count 4, the trial judge erred in not considering the evidence as a whole. With respect to remedy, an acquittal is the appropriate remedy, rather than a new trial. Given the evidentiary record, an acquittal is the only reasonable verdict with respect to Count 4. Further, a new trial solely on Count 4 would create the same evidentiary problem which forms the basis of the appeal: it would deprive the trier of fact of the opportunity to consider and apply the credibility and reliability findings arising out of the Complainant's evidence on the other four counts.

Reasons for Judgment of the Honourable Madam Justice Shaner:

INTRODUCTION

[1] Paul Deuling (“Deuling”) was tried on one count of indecent assault and four counts of sexual assault against DM. The indecent assault was alleged to have occurred between 1980 and 1983 and the sexual assaults between 1983 and 1988. In reasons indexed at *R. v. Deuling*, 2022 YKTC 49, the trial judge acquitted Deuling on the indecent assault charge and all but one of the sexual assault charges (Count 4). He appeals from that conviction.

[2] I would grant the appeal for the reasons below.

GROUND OF APPEAL

[3] The trial judge made extensive adverse credibility and reliability findings with respect to DM's evidence on Counts 1, 2, 3, and 5 of the Information. The basis of the appeal is that he erred in law by neither considering nor applying those adverse findings when he assessed and ultimately accepted DM's evidence on Count 4.

BACKGROUND

[4] The five counts on the Information span a period of eight years, from 1980 to 1988. During that time, Deuling was a teacher and coach at various schools in Whitehorse. The indecent assault (Count 1) was alleged to have occurred between 1980 and 1983 at an elementary school where Deuling taught and coached at the same time DM was a student there. The first sexual assault (Count 2) was alleged to have occurred while Deuling was a teacher at a junior high school where DM was a student, during the 1983–1984 school year. The second and third sexual assaults (Counts 3 and 4) were alleged to have occurred between June and September of 1986 and during the month of October 1986 respectively, while DM was in high school. The final charge (Count 5) alleged sexual assaults which took place after DM had left school and her family home, between November of 1986 and December of 1988.

THE TRIAL JUDGE’S ASSESSMENT OF EVIDENCE AND REASONS

[5] DM was the Crown’s primary witness. The Crown called an additional eight witnesses: DM’s two former stepmothers, her sister and brother, the former principal of one of the schools she attended, the former vice-principal of another school she attended, one of her former teachers, and one of Deuling’s former colleagues from whom he rented accommodations. The trial judge expressed concern in varying degrees with respect to the reliability of some of these latter witnesses, as well as their ability to recollect the events, but he found all of them credible. By contrast, he made extensive and serious adverse findings about DM’s credibility and reliability.

[6] The trial judge began his reasons by instructing himself on a number of legal principles, including considerations in assessing evidence given by an adult about events occurring in childhood, and in assessing credibility. With respect to the former, he cited *R. v. (W.)R.*, 1992 CanLII 56 (SCC), [1992] 2 SCR 122, reiterating the comments made by McLachlin, J. (as she was then) at 134:

... Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be

assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[7] With respect to credibility assessment, the trial judge referred to *R. v. Huson*, 2021 BCSC 1549 at para. 95, which cited the following passage from *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 298, leave to appeal ref'd [2012] SCCA No. 392:

186 Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.Noah 202 (Ont. H.C.); *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para.128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[8] The trial judge noted DM's testimony was the only direct evidence in support of the charges and accordingly, "any issues arising from the credibility and reliability of DM must be carefully considered": *Reasons*, at para. 170. He also acknowledged there could be challenges in recalling details of events alleged to have occurred more than 40 years earlier, particularly given DM was a child or teenager throughout the time span.

[9] DM gave extensive testimony about abuse she suffered in the family home throughout her childhood. This was central to the narrative on each count, underpinning the explanations DM gave for many of her interactions with Deuling.

[10] DM had two stepmothers when she was growing up, VK and BK. She testified that she and her siblings endured frequent and significant mental and physical abuse

while living with VK. She described beatings, being denied food, and VK cutting her and her sister's hair severely short and close to the scalp. She said VK had held a hammer to her head and threatened to kill her. There were often police interventions at the home. As a result of her home life, DM missed a lot of school.

[11] VK admitted during her testimony that the home she shared with DM and her siblings was sometimes chaotic; however, she denied there was any physical and emotional abuse directed at the children. She specifically denied the allegations that she withheld food from DM and her siblings or threatened to kill her with a hammer. The trial judge found VK "testified credibly in a full and frank manner, without equivocation" and he accepted her evidence as "credible, reliable, and trustworthy": *Reasons*, at paras. 167–168. As will be discussed, he later reiterated these findings in stronger terms.

[12] DM also testified she and her sister were assaulted from time to time by the second stepmother, BK. She said this likely happened monthly. The trial judge noted BK's testimony that while the home life was fairly good, DM's father was physically abusive and at times, police intervention was required. BK also admitted to pulling DM's hair on one occasion. The trial judge found BK was a credible witness, but aspects of her testimony were "vague and less than reliable": *Reasons*, at para. 109.

[13] The trial judge found both DM's sister, TM, and her brother JM, were credible witnesses, but he noted each had difficulty recalling events related to the charges against Deuling including, in TM's case, an inability to recollect major events in DM's life consistently and accurately, which called their reliability into question. Importantly, he noted neither sibling provided any evidence to corroborate DM's evidence about abuse in the family home.

[14] In submissions at trial, defence counsel raised a number of issues arising out of DM's testimony which he argued bore directly on her credibility. The most significant of these was the truthfulness of DM's testimony in respect to abuse VK directed at her. In addressing this, the trial judge acknowledged he found VK to be a credible and reliable witness who denied all of DM's allegations of abuse. As noted, he also

acknowledged neither of DM's siblings gave evidence supporting the abuse and police interventions DM described in her testimony. Similarly, he acknowledged BK, whom he found credible, denied abusing DM, save for pulling her hair on one occasion: *Reasons*, at paras. 178–181. Despite the conflicting evidence, and his finding that both VK and BK were credible witnesses, the trial judge declined to find DM had deliberately lied and was therefore not a credible witness:

[182] There are, therefore, clear conflicts in some of the evidence of D.M. and other witnesses on the question of violence, abuse and police interventions in the M family home while D.M. was in high school.

[183] I am, however, not satisfied that the disagreement between witnesses on the issues in the M family home inevitably led to the conclusion that D.M. deliberately lied, and is therefore not a credible witness.

[184] In reaching that conclusion, I have taken into consideration D.M.'s age at the time these events allegedly arose; the general acknowledgement of a somewhat chaotic home environment by all material witnesses; and the passage of time since events took place.

[15] The trial judge went on to set out the methodology he proposed to use in assessing DM's credibility and reliability, and how he would apply his findings. The methodology called for a compartmentalized approach to each of the counts on the Information, but ostensibly left room to consider the totality of the evidence in assessing credibility and reliability, if required:

[217] I have considered whether or not my findings with respect to D.M.'s credibility and reliability on the allegations set out in any of the individual Counts before the Court should have general application to her evidence as a whole. I am not satisfied that such is automatically the case.

[218] D.M.'s recollections and evidence on each of the time frames set out in the information before the Court span almost 10 years. The earliest events are alleged to have taken place almost 40 years ago. Clearly D.M.'s ability to have observed, recalled, and reported events from her childhood will vary with the passage of time and events.

[219] Given the range of time covered by these charges, I am satisfied that an assessment of D.M.'s credibility and reliability is best determined by specific consideration of her evidence on each count, unless a general issue of credibility or reliability arises from such analysis.

[16] As noted, in assessing her evidence on each of Counts 1, 2, 3, and 5, the trial judge made numerous adverse credibility and reliability findings against DM; however, he made no negative findings with respect to her evidence on Count 4, nor did he

apply the negative findings arising out of the evidence on the other counts to Count 4. The allegations in each count and the trial judge's findings are summarized below.

Count 1: Indecent Assault (Between 1980 and 1983)

[17] It was alleged that while DM was in grades 8 and 9, Deuling was her teacher and coach and he used her to demonstrate various basketball and volleyball moves during gym classes and practices. DM said in doing so, Deuling would hold her upper chest while touching her back and buttocks with his penis.

[18] The trial judge was not satisfied "... any reliable evidence had been adduced" to prove this charge and accordingly, directed an acquittal. He made the following adverse credibility findings:

- a) DM "exaggerated" the period when Deuling was her teacher, admitting on cross-examination she had a female gym teacher at the relevant time, with Deuling only occasionally present as a coach: *Reasons*, at para. 230.
- b) When asked in direct examination about the frequency of the indecent assaults, she said they were in "every class, every basketball and volleyball practice", but on cross-examination she changed her answer to "often": *Reasons*, at para. 231.
- c) She was "vague and inconsistent" in reporting who was present when the assaults were alleged to have taken place, including whether female teachers were present: *Reasons*, at paras. 232–233.
- d) Her assertion that Deuling repeatedly sexually assaulted her in the presence of other students and teachers did not have a ring of truth: *Reasons*, at para. 234.
- e) There were material inconsistencies between the description of the assaults she gave in her police statement and her testimony at trial, for which there was no satisfactory explanation. Importantly, she did not tell

the police she felt Deuling's penis rubbing against her: *Reasons*, at paras. 235–242.

Count 2: Sexual Assault (Between September 1, 1983 and June 30, 1984)

[19] Count 2 alleged Deuling kissed DM on the lips in his office, which was located in the school gym. DM was in grade 9 at the time and had missed a considerable amount of school. She had gone to see Deuling in his office to discuss the abuse she was suffering at home and the consequent school absences. She said she chose a time when she knew there was some kind of activity going on in the school gym because she knew Deuling would be there. She also said there was a glass window in the office, which was tinted to prevent anyone outside the office from seeing in.

[20] In dismissing this charge, the trial judge noted the following problems with DM's evidence:

- a) DM's description of the glass window in the office was inconsistent with what she told the police and moreover, changed on cross-examination. During direct examination, she described the window as being made of "darker" glass; however, DM did not mention the dark glass to the police in her statement. While under cross-examination, she was insistent the window was made of "privacy glass" which, as noted, would allow someone in the office to see into the gym while preventing someone in the gym from seeing into the office: *Reasons*, at paras. 256–260.
- b) DM's evidence about the window also differed from that of Frederick Smith, who had been the school principal at the time. He said he was certain the window in Deuling's office was completely transparent, the purpose of which was to allow people in the gym to see into the office and to protect the teacher. The trial judge accepted Smith's evidence, calling it credible and reliable: *Reasons*, at para. 261.
- c) The trial judge found DM's descriptions of the physical surroundings "...at best, uncertain. DM's descriptions of those circumstances would appear

to have been unreliable and perhaps, misleading”: *Reasons*, at para. 263.

- d) DM’s evidence about the amount of detail she shared with Deuling regarding her home life when she went to his office changed on cross-examination, giving rise to concerns about the reliability of her recollections: *Reasons*, at paras. 264–267. The judge also returned to the evidence DM gave about the abuse and police interventions at her home, noting it conflicted directly with that of her siblings and her former stepmother, VK. The trial judge considered this important because DM identified the abuse and police interventions as the key reasons she went to see Deuling: *Reasons*, at paras. 269–272.

Count 3: Sexual Assault (Between June 1 and September 30, 1986)

[21] The sexual assault in Count 3 was alleged to have happened between June and September of 1986. DM was 17 years old, between grades 11 and 12. She had a chance meeting with Deuling, who invited her to participate on his relay team in a road race. This was not a school activity.

[22] DM accepted Deuling’s invitation and the two started training for the race together. On the day in question, they met for a run. DM told police that as they were running on a trail, with her in the lead, Deuling grabbed her arm and pulled her, causing her to fall to the ground. DM said Deuling got on top of her and put his arm over her throat so she could not speak or breathe, and then had vaginal intercourse with her without her consent.

[23] The trial judge expressed numerous concerns with what emerged in DM’s evidence under cross-examination, specifically:

- a) When she reported this sexual assault to the police in 2017, DM did not disclose Deuling had put his arm over her throat. The trial judge found this was a material inconsistency because it represented a significantly increased level of violence and raised a real question as to what actually

occurred when Deuling pulled her to the ground: *Reasons*, at paras. 292–294.

- b) DM testified she was wearing clothing given to her by Deuling at the end of her grade 9 school year when she met him for the run. She described the clothing in detail. During cross-examination she said she had been honoured to receive the clothing from Deuling because it “... represented a time where I was doing pretty good in life as a kid”: *Reasons*, at para. 295; *Transcript*, Volume 1, p 158, ll 2–4. The trial judge considered this problematic because a major theme of DM’s evidence with respect to Count 2 (i.e., the alleged sexual assault in Deuling’s office in the gym) were the significant difficulties she had been experiencing at home and at school the same year Deuling gave her the clothes.
- c) The trial judge also found it troubling that DM had not told the police what she was wearing when she went running with Deuling that day. Given her evidence about the importance of that clothing to her, the fact that she did not disclose it to the police in the initial interview put her ability to recall the events of that day in issue: *Reasons*, at paras. 295–297.
- d) In both her statement to police and during direct examination, DM said the first time Deuling touched her while the two were running was when he grabbed her arm from behind, causing her to fall. It was not revealed until cross-examination that before the sexual assault, Deuling had held her hand while the two admired a view. The trial judge found this was a significant inconsistency, raising further issues as to the accuracy and reliability of DM’s recollection of her interactions with Deuling that day: *Reasons*, at paras. 298–300.
- e) The trial judge found DM’s evidence about the immediate aftermath of the alleged sexual assault was inconsistent. On direct examination, she first said she “ran out of there” immediately afterwards. Later, she said she walked back to Deuling’s truck. The trial judge concluded that this,

too, raised concerns about DM's ability to recall the events of that day: *Reasons*, at paras. 301–303.

[24] Overall, the trial judge found DM's testimony on Count 3 was "incomplete and materially inconsistent", and that she was not "... a reliable witness demonstrating the ability to accurately observe, recall and testify to the material details of the circumstances alleged to have taken place ...": *Reasons*, at paras. 304 and 307. Accordingly, he directed an acquittal.

Count 4: Sexual Assault (Between October 1 and 31, 1986)

[25] As noted, Deuling was convicted on this count. It alleged he sexually assaulted DM while the two were on a camping trip together, in late October of 1986.

[26] Although the trial judge was never able to resolve the true purpose of the trip, DM said Deuling invited her to go to a sport skills camp out of town. She said she packed her sleeping bag, some sports clothing and she wore a light jacket, pants and runners. Her father dropped her off at a school parking lot early on the morning the camp was to begin. Deuling was waiting in his truck. There were no other students around. The two left and drove out of town.

[27] They drove down a highway. Eventually, Deuling turned off into a clearing. There was no one else there. DM helped to set up a tent with Deuling's instructions. Deuling had also brought a gun and a camera.

[28] DM testified she became very cold. It was late fall and she said she had not dressed for the temperatures, nor had she packed any appropriate clothing. After setting up the tent, the two went inside. DM said at Deuling's direction, they zipped their sleeping bags together for warmth. She said she felt sick to her stomach because she did not want to be assaulted "again" (presumably referring to the sexual assault alleged in Count 3). They got into the combined sleeping bag. DM said Deuling told her they should remove their clothing to stay warm. During direct examination, she was asked what she believed her options to be at that point and she responded:

A: To do what I was told because that's what I learned. Do what you're told and the beatings are less.

And my sister was a pretty yappy person. She was always mouthing off. She got the shit kicked out of her – sorry, Your Honour. So, I did what I was told...

Transcript, p. 74, ll 18–23

[29] DM said Deuling then had vaginal intercourse with her without her consent.

[30] Sometime later, they ate. DM said she then went off alone to relieve herself. She heard a gunshot and then Deuling came running over to her and said he had shot a bear.

[31] They went to search for the bear. After locating it, DM held a flashlight while Deuling skinned it. She said this took hours and she was very cold because of her light clothing. A number of times while describing the incident, she said the dead bear made her think Deuling could kill her and leave her there.

[32] Eventually, DM returned to the tent. Deuling joined her later. She said they had vaginal intercourse for a second time and that again, this happened without her consent. On cross-examination, it was put to DM that she had not told the police about the second sexual assault when she gave her statement.

[33] Later, they broke camp and began driving back to Whitehorse. They stopped on the highway when they encountered a man Deuling knew. DM said Deuling told her to hide on the floor of the truck while he talked to the man. After Deuling and the other man finished talking, Deuling and DM continued the drive back to Whitehorse. Deuling dropped DM off at her home.

[34] The trial judge addressed a number of points in DM's testimony on Count 4. Among these was her evidence about the purpose of the trip. DM said it was her understanding that the purpose was to attend a sports camp, but she had no recollection of the location or other details. She was unconcerned that there were no other students waiting at the school when her father dropped her off. The trial judge was unable to conclude whether the trip was a ruse for DM's parents so she and Deuling could go camping together, or whether the fact that there was no sports camp

was truly a surprise to her. Ultimately, he determined concerns about DM's evidence as to the purpose of the trip could be explained by DM's age at the time. In particular, he said the details were "... not a priority for a young teenager, excited about a weekend outing ...": *Reasons*, at para. 343. In any event, he found this did not affect her evidence, stating "... the objective detail provided by D.M. on all other facts related to this Count far outweighs the significance of any issues arising from the evidence concerning the genesis of the trip's purpose.": *Reasons*, at para. 360.

[35] The trial judge acknowledged the apparent inconsistency between what DM told the police and what she said at trial with respect to how many sexual assaults took place during the camping trip. As noted, she testified there were two sexual assaults, one before the bear was shot and the other afterward; however, on cross-examination, it was put to her she told police only about the first sexual assault. She agreed, explaining:

When he said "that time", I replied yes, just the once that time. It's very confusing when you're – when you've never spoken in front of a police officer now after 30-something years. It's not going to come out perfect, and your memory's not going to come out perfect.

But he asked "Just the once" and then I answered "Just the once" so no, I didn't mention the thing in the morning ...

Transcript, p. 182, ll 2–8

[36] The trial judge found it was unclear whether this was an actual inconsistency. It was his view that the second sexual assault was not addressed directly by the police when DM was interviewed, thus explaining the inconsistency. The trial judge concluded that in any event, it did not affect her reliability or credibility with respect to Count 4 and he accepted her evidence, stating (my emphasis):

361 In summary, D.M.'s evidence *with respect to this count* was very detailed and specific, in terms of the circumstances leading up to the sexual assaults alleged against Mr. Deuling, the assaults themselves and D.M.'s unequivocal lack of consent to the sexual assaults.

362 Where D.M. could not recall detail, she was frank in acknowledging the same. Although uncertain on a limited number of issues on cross-examination, D.M. was unshaken on the key details surrounding the sexual assaults, the details of the assaults themselves and her lack of consent.

363 With respect to the facts *relevant to this count*, I find that D.M. demonstrated a clear ability to observe, recall and to report the details of her interactions with Mr. Deuling and specifically, the sexual assaults, that took place at the wilderness campsite in October 1986. D.M.'s evidence was not unreasonable nor implausible given the circumstances of the assaults.

364 I find that D.M.'s *evidence on this count* was both credible and reliable given the extensive detail provided in both direct and cross-examination, and fundamentally unshaken on cross-examination with respect to these specific allegations.

Count 5: Sexual Assault (Between November 1, 1986 and December 31, 1988)

[37] In December of 1986, DM was pregnant. Deuling was not the father. Deuling was living in a colleague's basement suite, where DM visited him frequently. The allegations underpinning Count 5 are that Deuling engaged in sexual activity with DM without her consent on multiple occasions during the time period set out in the Information, both before and after her baby was born.

[38] The trial judge made several adverse findings respecting DM's credibility, described below:

- a) In December of 1986, DM lived at home with her father and stepmother, BK; however, she testified that upon confirming her pregnancy, she found it too uncomfortable to remain there and so she accepted an offer from her former stepmother, VK, to live with her. DM said she had no other choice but to move in with VK, who she called "my abuser" in her testimony. She said she was homeless and had no means of supporting herself. The trial judge found this at odds with evidence from her stepmother, BK and her sister, TM, who both confirmed DM had moved from the main family home into an upstairs apartment in the house, where she lived for a time before leaving to move in with VK. The trial judge concluded this raised a credibility concern: *Reasons*, at para. 391(a)–(d).
- b) Still with respect to DM's testimony that she was forced to live with "my abuser", the trial judge said (at para. 391(f)):

I am not satisfied that the evidence supports the assertion made by D.M. that V.K. was ever her abuser. There is a clear conflict on the evidence between D.M. and V.K. on the issue of abuse, and also as to the supports in place for D.M. throughout the time frame of Count #5. I have resolved the conflict in this evidence by rejecting D.M.'s characterization of V.K. as her abuser. V.K. was a credible and reliable witness and I accept her evidence on these matters in preference to that of D.M. which was exaggerated and unreliable. (My emphasis.)

- c) The trial judge also rejected DM's claims that she was unable to support herself, noting this conflicted with her own evidence that she was in fact working, at least until she delivered her baby. It also conflicted with BK's evidence that the family would support children while they were in the family home, including providing food: *Reasons*, at paras. 391(h)–(j).
- d) DM testified that at on one occasion, Deuling forced her to have sex on the floor while she was menstruating to avoid getting blood on his bedsheets. She did not tell the police about this in her initial statement, leading the trial judge to conclude her evidence was unreliable with respect to sexual assaults alleged in Count 5: *Reasons*, at para. 391(k).

[39] The trial judge was unequivocal in finding DM's evidence in respect to Count 5 was not credible, stating:

393 Furthermore, on the issue of D.M.'s homelessness, lack of support and implicitly forced decision to take up residence with her alleged abuser V.K., I do not find D.M.'s evidence on those issues as they relate to Count #5 to be credible or trustworthy.

DISCUSSION

[40] The central issue in this appeal is whether the trial judge erred in concluding DM was a reliable and credible witness with respect to Count 4, given his adverse credibility and reliability findings on the other counts. Deuling submits the verdict should be set aside on the basis of legal error, pursuant to s. 686(1)(a)(ii) of the *Criminal Code*, R.S. c. C-34 and further, that it is unreasonable or not supported by the evidence, pursuant to s. 686(1)(a)(i).

[41] A number of legal principles are engaged. First, an appellate court will not interfere with a trial judge's credibility findings absent overriding and palpable error. *R. v. Gagnon*, 2006 SCC 17 at para. 20. Second, although their credibility findings must be treated with deference, trial judges must sufficiently explain how credibility concerns are resolved. Failure to do so may constitute reversible error: *R. v. Dinardo*, 2008 SCC 24 at para. 26. Third, trial judges must consider all of the evidence in determining guilt. This was set out succinctly in *R. v. C.M.M.*, 2020 BCCA 56:

[120] A failure to consider all of the evidence in determining guilt or innocence constitutes an error of law: *R. v. J.M.H.*, 2011 SCC 45 at para. 31, citing *R. v. Morin*, 1992 CanLII 40 (SCC), [1992] 3 S.C.R. 286 at 295–96; *R. v. B. (G.)*, 1990 CanLII 115 (SCC), [1990] 2 S.C.R. 57.

[121] Ordinarily, a trial judge's assessment of credibility will attract substantial deference; however, a "credibility assessment that is tainted by an error of law may displace the deference ... and warrant appellate intervention": *R. v. Lacombe*, 2019 ONCA 938 at para. 32 (internal references omitted).

[122] It is well-established that a "jury's determination of which witnesses to find credible is a holistic exercise that involves assessing the plausibility and coherence of a given witness's testimony throughout the course of the trial": *R. v. Goldfinch*, 2019 SCC 38 at para. 123, Moldaver and Rowe JJ., concurring (emphasis added). A legally incorrect approach to that assessment runs the risk that the final step in the trial process, the weighing of the evidence, will be flawed: *R. v. B. (G.)* at 77.

[42] DM was the Crown's primary witness, and hers was the only evidence on Count 4. Thus, everything turned on her credibility. The trial judge articulated the reasons he accepted DM's evidence about what happened specifically during the camping trip, and he resolved conflicts and inconsistencies within that particular evidence to find DM "credible and reliable". He did not, however, refer to or consider the adverse credibility findings he made in respect to the other counts, nor did he make any attempt to reconcile them. Given the importance of credibility to the analysis of Count 4, the omission is stark.

[43] The findings on DM's credibility and reliability on the other counts were not confined to minor, collateral, or irrelevant details. Rather, they went to the heart of the allegations and the trustworthiness of her evidence. It will be recalled that the trial judge described DM's testimony that Deuling had repeatedly indecently assaulted her

in gym class and at practices (Count 1) “exaggerated”, “vague and inconsistent”, “materially inconsistent” and, importantly, lacking “a ring of truth”. He also found material inconsistencies in DM’s evidence on Count 3, including her failure to disclose to police that Deuling had essentially choked her while sexually assaulting her during the run and her testimony that she received clothing from Deuling at the end of grade nine, when she was “doing pretty good in life as a kid”. The latter obviously stood at odds her testimony about the abuse she suffered at home.

[44] The abuse DM said she suffered in her family home at the hands of VK and later, BK, was central to the narrative surrounding each Count. It was DM’s stated rationale for going to see Deuling in his office at the school gym (Count 2) and “escaping her abuser” was the reason she gave for accepting invitations to see Deuling in the period covered by Count 5. Importantly, on Count 4, DM cited the abuse she suffered at home as one of the reasons she acceded to Deuling’s request to remove her clothing while the two were in the tent. As discussed, the trial judge unequivocally rejected DM’s evidence that VK had ever abused her, characterizing it as “exaggerated and unreliable”. In contrast, he referred to VK as a credible and reliable witness, and he accepted her evidence.

[45] The trial judge expressly instructed himself to take a compartmentalized approach to assessing DM’s evidence. His stated reasons for this approach were the age of the charges and the amount of time they spanned, being close to 10 years. DM’s ability to have observed and to recall the events surrounding each charge “...would vary with the passage of time and events”: *Reasons*, at para. 218. Respectfully, that rationale is not supported in the circumstances here. The sexual assaults described in each of Counts 3, 4, and 5 are temporally close, each allegedly either starting or happening in the latter half of 1986.

[46] The trial judge’s self-instruction appeared to leave room to consider the totality of the evidence, including credibility and reliability findings on the other counts, when addressing each count individually. He also stated at certain points that his conclusions on Count 4 were based on a consideration of *all* the evidence. It is clear

from the context of the Reasons, however, that the trial judge limited himself to DM's testimony on that count and did not factor concerns about her evidence on the other counts into his analysis. Given the pervasiveness of the adverse findings throughout his reasons, the trial judge's failure to take them into account and rationalize them when he assessed DM's credibility and reliability on Count 4 led to an overriding and palpable error. Without doubt, this tainted both the weight he assigned DM's evidence and his conclusion that Deuling was guilty.

CONCLUSION

[47] The guilty verdict on Count 4 turned entirely on the trial judge's favourable assessment of DM's credibility; however, that assessment was made without regard to the totality of the evidence, particularly, the extensive adverse credibility findings made with respect to the other counts. This led him to make an overriding and palpable error in his assessment of DM's credibility on Count 4. Moreover, it was an error of law.

[48] The final question is disposition. Under s. 686(2) of the *Criminal Code*, where an appeal is allowed under s. 686(1)(a), the Court shall quash the judgment and direct an acquittal be entered or a new trial ordered. In my view, this is an appropriate case to direct an acquittal be entered.

[49] As explained recently in *R. v. Bouvette*, 2023 BCCA 152 at paras. 114–117, an appeal court will generally order a new trial where it is satisfied, based on the evidentiary record, that a reasonable jury, properly instructed on the law, could convict. The test for a directed acquittal is strict: *Bouvette* at para. 114, citing *R. v. Dhillon*, 2014 BCCA 480 at para. 50. Acquittal must be the only reasonable verdict: *Truscott (Re)*, 2007 ONCA 575 at para. 752. Nevertheless, an appeal court may exercise its discretion to direct an acquittal be entered in exceptional circumstances, even where an acquittal would not be the only reasonable verdict: *Bouvette* at para. 115; *R. v. D.R.S.*, 2013 ABCA 13; *Truscott* at para. 259.

[50] It is my view that the whole of the evidentiary record does not reasonably permit a finding of guilt on Count 4. Count 4 turns entirely on DM's credibility. The negative

credibility and reliability findings on the other counts irreparably undermine her evidence. In such circumstances, the standard of proof beyond a reasonable doubt cannot be discharged. An acquittal is the only reasonable verdict.

[51] Further, the way trial unfolded, and the trial judge’s findings, are such that this case falls outside the norm. Deuling was tried on five counts. The trial judge acquitted Deuling on four of the five counts based on his finding of extensive and significant deficiencies in DM’s credibility and reliability. These findings should have been applied in his analysis on Count 4. A new trial solely on Count 4 would pose the same problem; the new trier of fact would be deprived of the opportunity to apply the negative credibility and reliability findings in assessing DM’s evidence. This would be manifestly unfair.

DISPOSITION

[52] I would allow the appeal, set aside the guilty verdict on Count 4, and direct an acquittal be entered.

“The Honourable Madam Justice Shaner”

I AGREE:

“The Honourable Mr. Justice Willcock”

I AGREE:

“The Honourable Mr. Justice Abrioux”