

COURT OF APPEAL OF YUKON

Citation: *R. v. Sweeney*,
2025 YKCA 6

Date: 20250516
Docket: 24-YU916

Between:

Rex

Respondent

And

Kevin Victor Sweeney

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting, or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Alibhai

On appeal from: An order of the Supreme Court of Yukon, dated November 9, 2023 (conviction) (*R. v. Sweeney*, 2023 YKSC 66, Whitehorse Docket 21-01508).

Oral Reasons for Judgment

Counsel for the Appellant: C. Drolet

Counsel for the Respondent: M. Williams
D. King
(appeared on May 16, 2025 only)

Place and Date of Hearing: Whitehorse, Yukon
May 14, 2025

Place and Date of Judgment: Whitehorse, Yukon
May 16, 2025

Summary:

The appellant appeals his convictions on the basis the trial judge failed to apply the test set out in R. v. W.(D.), [1991] 1 S.C.R. 742, 1991 CanLII 93, and applied uneven scrutiny in her credibility analysis. Held: Appeal dismissed. The judge's reasons, when read as a whole, make clear she understood and applied W.(D.). The appellant failed to identify a reversible error in the trial judge's methodological approach or reasoning process that affected the credibility assessment. Rather, he complains about the trial judge's findings of fact that were supported by the evidence and well within her purview.

ALIBHAI J.A.:

Introduction

[1] On November 9, 2023, the appellant, Kevin Sweeney, was convicted of 10 *Criminal Code* offences relating to sexual abuse and assaults on the complainant who, at the time of the offences, was approximately 17 years old. Mr. Sweeney was found not guilty on two counts relating to the same series of events.

[2] Mr. Sweeney appeals his convictions on the basis that the trial judge failed to apply the test set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93, and applied uneven scrutiny in her credibility analysis.

[3] I see no merit to either ground of appeal.

R. v. W.(D). analysis

[4] Mr. Sweeney's sole contention with respect to the trial judge's *W.(D.)* analysis is the assertion that, "[t]he trial judge immediately qualified the testimony of the Appellant as not credible and not reliable, without considering the whole of the evidence and failing to adequately consider the Appellant's traumatic brain injury. The trial judge goes further in her analysis by also affirming that the Appellant was lying ... '*at least at times*'".

[5] The trial judge's reasons show that she considered the appellant's brain injury, and took it into account in her general assessment of credibility:

[13] It is not difficult to find that Mr. Sweeney is unreliable. It is more complicated however, to determine whether Mr. Sweeney is also not credible.

While X.Y. was living with Mr. Sweeney, he was physically attacked by several people. Since then, he has suffered from a number of medical issues, including a faulty memory from head trauma. At trial he testified that his memory is intact up to the attack, stating: "I remember everything fine up until the point where I got attacked. That was straightforward A to Z". After that, however, he still has his memories but he says they are mixed up, and, it appears, sometimes difficult to retrieve.

[6] Notwithstanding the brain injury, the trial judge found at para. 16 of her decision that "at times" Mr. Sweeney's evidence was not credible. There was sufficient evidence before her to make that finding of fact. For example, as the trial judge noted, the appellant's evidence was uniformly favourable to himself, and consistently inconsistent, regardless of whether he was testifying about events before his brain injury, where according to Mr. Sweeney there were no issues with his recollection, or events after the brain injury, where memory issues were supposed to have been a factor.

[7] After assessing credibility issues generally, the trial judge noted, as set out in *W.(D.)*, that credibility is not an all or nothing proposition, and that there is always a requirement to consider whether the evidence she accepts establishes guilt beyond a reasonable doubt:

[22] Credibility, however, is not an all or nothing proposition. The court may believe, all, some, or none of a witness' testimony. I will therefore still assess Mr. Sweeney's and X.Y.'s credibility, in addition to that of the other witnesses, issue by issue.

[23] In addition, although credibility in this case is key to the determination of charges against Mr. Sweeney, this is not a credibility contest between X.Y. and Mr. Sweeney. Rather, I must determine whether I believe the evidence that supports Mr. Sweeney; if so, I must acquit. If I do not believe the evidence, but it leaves me with a reasonable doubt about Mr. Sweeney's guilt, then I must acquit. Then, even if I am not left in reasonable doubt by the evidence that supports Mr. Sweeney, I must also consider the evidence I do accept to determine if I am convinced beyond a reasonable doubt of Mr. Sweeney's guilt.

[8] The trial judge proceeded to do just that. For example, when she considered count 2, which involved allegations relating to sexual interference on the part of Mr. Sweeney, and a third party, Mr. Anshoor, the trial judge noted:

[94] However, even if I do not believe Mr. Sweeney and Mr. Anshoor, I must still review the evidence I do accept and determine whether it convinces me beyond a reasonable doubt that the offences occurred.

[9] There is no need for a trial judge to consistently re-state the *W.(D.)* test throughout their decision as long as it is clear from the context of the decision, read as a whole, that the trial judge is alive to the issue and applies the test properly. She did so in this case. I would not accede to this ground of appeal.

Uneven scrutiny of the credibility analysis

[10] Mr. Sweeney's main ground of appeal is that the trial judge applied a different level of scrutiny to the evidence of the complainant as compared to the defence witnesses. It is an open question as to whether uneven scrutiny of the evidence is a free-standing ground of appeal or a separate and distinct error of law (*R. v. Mehari*, 2020 SCC 40 at para. 1; *R. v. G.F.*, 2021 SCC 20 at paras. 100–101), but even if it is, it is "a notoriously difficult" ground of appeal (*R. v. Greif*, 2021 BCCA 187 at para. 75). In order to succeed, the appellant must establish that the findings of credibility of the trial judge were tainted by palpable and overriding error: *Greif* at para. 76. An appellate court can also intervene if there are errors in principle in the assessment of the evidence. The focus is on finding and identifying a reversible error: *R. v. Campbell*, 2023 BCCA 19 at paras. 48–49.

[11] An appellant cannot succeed by inviting an appellate court's reassessment of the trial judge's findings of credibility, complaining about the judge's interpretation of the evidence or the mere fact the judge did not find the appellant to be credible. An appellant must show an error in the trial judge's methodological approach or the reasoning process that affected the credibility assessment: *Greif* at para. 77.

[12] This, Mr. Sweeney has failed to do. What he has done is complain about the trial judge's findings of fact that were supported by the evidence and well within her purview.

[13] For the purposes of this appeal, two examples will suffice.

[14] Example number one. Mr. Sweeney complains the trial judge accepted the complainant's evidence as credible, despite the "inconsistencies in her testimony", including the fact that she did not remember time and places, that she had an addiction problem, and that she was unable to remember many details about the charges. These are not inconsistencies. An inconsistency is where a witness' evidence is contradicted by other evidence adduced by the same witness or by other evidence presented at trial. The issues Mr. Sweeney points to are matters that may go to the reliability of a witness but it is open to a trial judge to accept the evidence of a witness, despite concerns about reliability, especially as happened in this case, where none of the concerns raised relate to a material fact.

[15] Example number two. Mr. Sweeney contrasts the trial judge's finding with respect to the credibility of the complainant as set out above, with her rejection of his evidence. For example, Mr. Sweeney points to both his own evidence and the evidence of a third party, Mr. Anshoor, that the complainant had never been to Mr. Anshoor's homes. This was directly contradicted by the evidence of the complainant who described the interior of one of Mr. Anshoor's homes and the general location of another. Mr. Sweeney accepts the trial judge could have used this evidence to find the complainant had been in Mr. Anshoor's home but complains the trial judge never explained how she went from that conclusion to finding Mr. Anshoor was his drug dealer and the sexual activity described by the complainant had occurred. Contrary to Mr. Sweeney's assertion, the trial judge did provide reasons for her conclusions:

[41] [The complainant's] evidence that she attended both homes with Mr. Sweeney, and went on multiple occasions, is inconsistent with Mr. Sweeney's and Mr. Anshoor's evidence in a few ways. It is inconsistent with their evidence about how often, and where, they met up; it is inconsistent with their evidence about how often [the complainant] and Mr. Anshoor saw each other; and it is inconsistent with their evidence that [the complainant] did not go to Mr. Anshoor's house. These inconsistencies are significant and affect my assessment of Mr. Anshoor's credibility. I conclude that Mr. Anshoor is not credible on this issue; that Mr. Anshoor did give crack cocaine to Mr. Sweeney as [the complainant] described; and that Mr. Sweeney used crack cocaine as [the complainant] described.

...

[103] Given the strength of [the complainant's] testimony and the photographic evidence of her injuries, I find that the events occurred largely as described by [the complainant].

[104] Specifically, I find Mr. Sweeney and [the complainant] went to Mr. Anshoor's house; [the complainant] performed oral sex on Mr. Anshoor at Mr. Sweeney's suggestion; Mr. Anshoor gave them crack cocaine; Mr. Sweeney had sexual contact with [the complainant], including hitting her with a belt; and [the complainant] wanted to leave, but Mr. Sweeney would not.

[16] All of these findings of fact were available to the trial judge on the evidence. Mr. Sweeney has not identified any reversible error on appeal.

[17] Mr. Sweeney's other complaints are of a similar nature. They are essentially attempts to re-litigate findings of fact made by the trial judge. That is not the purpose of an appellate review. As the British Columbia Court of Appeal noted in *Campbell*:

[37] Appellate courts engage in a functional and contextual analysis of reasons for judgment. In doing so, they accord significant deference to credibility findings and factual assessments made by trial judges, bearing in mind the distinct advantages trial judges enjoy in those realms. Where there is a reasonable basis for a trial judge's factual findings and inferences, an appellate court will not substitute its own view of the evidence. On the contrary, a trial judge's evaluation of the evidence will only be disturbed on appeal where a palpable and overriding error has been shown: *R. v. G.F.*, 2021 SCC 20 at para. 5; *R. v. M.D.*, 2021 BCCA 339 at para. 54; *R. v. Clark*, 2005 SCC 2 at para. 9.

[18] Assessments of credibility and reliability are amongst the most difficult exercises undertaken by a trial judge. This is especially true in a sexual assault case, where the event often occurs in private with only the accused and the complainant present. The trial judge is in the best position to make findings of credibility and reliability, as she "lives through the trial", personally observing the witnesses as they testify, comparing the coherency and consistency of their evidence, and being able to compare the evidence of one witness with the totality of the evidence presented at trial. It is particularly difficult in such a context to provide a verbatim account of the entire thought process relating to issues of credibility, and the inferences drawn from them, and a trial judge is not obligated to do so: *R. v. Kruk*, 2024 SCC 7 at paras. 81–84; *R. v. Gagnon*, 2006 SCC 17 at paras. 19–20.

[19] An appellate court's role is to review the decision as a whole to determine if it is sufficient to explain the conclusions reached by the trial judge, based on the evidence presented at trial, with the applicable legal principles being followed, and that there is no palpable and overriding error.

[20] Once that is done in this case, no basis is shown to interfere with the factual findings of the trial judge. I would not accede to this ground of appeal.

Disposition

[21] For all of these reasons, I would dismiss the appeal.

[22] **MARCHAND C.J.Y.C.A.:** I agree.

[23] **FISHER J.A.:** I agree.

[24] **MARCHAND C.J.Y.C.A.:** The appeal is dismissed.

“The Honourable Mr. Justice Alibhai”