SUPREME COURT OF YUKON

Citation: *H.M.Q.* v. *Gill*, 2010 YKSC 05

Date: 20100126
S.C. No. 09-AP001
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

GURPREET SINGH GILL

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

David McWhinnie — Counsel for the Respondent
André Roothman — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal by Mr. Gurpreet Gill from a finding by a Territorial Court Judge that he was guilty of committing a common assault upon his wife, Harjinder Dhillon, also known as Vicky Toor. Counsel for the appellant raised three grounds of appeal: first, that the verdict was unreasonable or cannot be supported by the evidence; second, that the trial judge failed to provide adequate reasons; and third, that the trial judge failed to apply, or misapplied, the principles from *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.), in assessing the credibility of the appellant and the burden of proof.

[2] Section 822(1) of the *Criminal Code* provides that on a summary conviction appeal from a conviction, s. 686(1) of the *Criminal Code* applies. Pursuant to s. 686(1)(a), an appeal may be allowed on any of the following grounds:

> (i) the verdict is unreasonable or cannot be supported by the evidence;
>
> (ii) an error on a question of law; or
>
> (iii) a miscarriage of justice.

[3] Appeals based on the inadequacy or insufficiency of a trial judge's reasons may involve any of these grounds of appeal, depending on the circumstances of the case: *R*. v. *Sheppard*, 2002 SCC 26, at para. 55.

[4] The evidentiary portion of the trial lasted one day and was comprised of the evidence of five witnesses, including the appellant. The only issue was credibility. The appellant was facing two charges: one of common assault against Ms. Dhillon under s. 266 of the *Criminal Code* and one of uttering a threat to Ms. Dhillon to cause her bodily harm, contrary to s. 264.1(1)(a) of the *Code.* The Crown argued that the common assault was founded on one or both of two distinct factual allegations. The first was that the appellant struck Ms. Dhillon in the forearms with a coat hanger. The other was that the appellant struck Ms. Dhillon in the mouth with a closed fist. With respect to the uttering threat charge, it was alleged that the appellant threatened to kill Ms. Dhillon if she did not call the R.C.M.P. and instruct them to withdraw the assault charge. The trial judge stated that he was left with a reasonable doubt on the allegations involving the hanger and the threat, but he was satisfied beyond a reasonable doubt that the appellant struck Ms. Dhillon on the mouth with his hand or fist, resulting in a cut to Ms. Dhillon's lower lip.

FACTUAL BACKGROUND

[5] Apart from a conflict in the testimony of the appellant and Ms. Dhillon over the allegations of the blow to the mouth, the striking with a hanger, and the uttering of a threat, there was little disagreement about the background facts in this case.

[6] As noted by the trial judge in his reasons, Ms. Dhillon and the appellant agreed to an arranged marriage, which took place in India in 1998. The appellant is 11 years younger than Ms. Dhillon. At the time of the marriage, Ms. Dhillon had lived in Canada for approximately 12 years. She had been previously married and had a son from that relationship. The appellant lived in India and was sponsored by Ms. Dhillon in his immigration to Canada, which did not occur until 2001.

[7] The events which gave rise to the charges took place on or about January 21, 2008. The couple have been separated since then.

[8] Between the appellant's arrival in Canada and the date of the assault, there were problems in the marriage, the most significant of which led to the appellant leaving the family home on two occasions. In 2003, he left to stay with his aunt in Yellowknife, where he remained for three weeks until he was notified by Ms. Dhillon that she was pregnant. In due course a second son was born to the couple. Later, in 2006, the appellant again left the family home for Vancouver, where he remained for approximately six months.

[9] In January 2008, Ms. Dhillon was self-employed, operating the Quiznos sandwich shop in Whitehorse together with her brother, who was also her business partner. Ms. Dhillon's immediate family was comprised of herself, the appellant, and the two children, who have remained with Ms. Dhillon since the separation.

[10] Ms. Dhillon gave evidence that, on January 21, 2008, she came home from work at 6:10 p.m. and went into the bedroom to watch television with her younger son. She said that the appellant came into the bedroom and laid down on the bed where she and the child were seated. According to her, the appellant asked her to leave the bedroom, and she indicated she wanted a few more minutes to finish watching a program on the television. She said the appellant then got angry, and kicked or pushed her with his foot in the back, knocking her from the bed. She said the appellant then struck her in the forearms with a hanger and that she folded her arms over her chest to protect herself, with the inside of her arms against her body. Ms. Dhillon then said that the appellant punched her in the mouth with his fist, causing her lip to bleed. Her evidence continued that the appellant then left the bedroom for the kitchen, where he broke the land-line telephone and some dishes, spread ketchup on the walls, and removed the curtains from the living room to clean up some of the mess on the kitchen floor. She said the appellant then left the home.

[11] Ms. Dhillon said that when she saw the phone was broken, she also left the home and went to the Quiznos restaurant. After speaking with her brother and a friend there, she called the R.C.M.P. Constable Drover attended at the restaurant at about 10:30 p.m. Ms. Dhillon and her brother explained that they wanted some information about police procedures in domestic violence situations. They were adamant that they did not want charges laid. They said they only wanted a file opened in this instance, so that the police could respond more quickly in the event there were further problems in the future. Ms. Dhillon explained that she was concerned about her marriage, as, in her East Indian culture, she feared that she would be blamed for a second divorce. Constable Drover

explained that the R.C.M.P. policy in such cases of domestic violence was to proceed with charges, regardless of the views of the complainant. This upset Ms. Dhillon and her brother.

[12] Constable Drover witnessed a cut on Ms. Dhillon's bottom lip and when she asked Ms. Dhillon if there were any more injuries, Ms. Dhillon rolled up her sleeve and showed her two lash bruises on the inside of her left forearm. When Constable Drover asked Ms. Dhillon what happened, Ms. Dhillon told her that the injury on her left forearm was caused by a stick. Ms. Dhillon later explained that she used the word stick because she could not think of the word for hanger at the time she was speaking with Constable Drover. Constable Drover took no photographs of the injuries because Ms. Dhillon did not want to pursue charges.

[13] After speaking with Constable Drover, Ms. Dhillon returned to the family home with her younger son and her mother, as she did not expect the appellant to return that evening. However, she said that the appellant returned at 2 a.m., came into the bedroom and grabbed her by the shirt asking her whether she had been to the R.C.M.P. When she replied affirmatively, she said that the appellant threatened to kill her and the two children if she did not drop the charges. As a result, she agreed to call the R.C.M.P. first thing in the morning, which she says she did at the appellant's insistence. When she told the R.C.M.P. she did not want any charges laid, she was asked to come down to the detachment to discuss the situation. She said she did so and was followed shortly thereafter by the appellant, who also attended at the detachment and presented his driver's license for identification, apparently in an unsuccessful attempt to join the

meeting between Ms. Dhillon and the attending R.C.M.P. officer. Following that meeting, the police did not pursue charges.

[14] The appellant's testimony of the confrontation in the bedroom on January 21, 2008, and the early hours of the following morning, differed from that of Ms. Dhillon. He said she came home around 7:15 p.m. and he was already there with the younger child, who was watching cartoons on television. He said that he was expected to cook supper that evening, but was feeling ill and layed down in the bedroom. He said that Ms. Dhillon asked him why supper was not ready and that she came into the bedroom swearing and tore the blanket off of him. He said that she called him "lazy" and said she owned the house and that he should get the hell out of there and get his own place. He said that he agreed to leave and started packing his clothes. He then testified that Ms. Dhillon stopped him and apologized saying "Sorry, that came out wrong". He replied, "Vicky, I don't want to argue in front of my kid". He then took his car keys and left the house without taking any of his belongings. He denied assaulting Ms. Dhillon in any way or touching her with anger or saying anything in anger. He denied making a mess in the kitchen and using the curtains to wipe the floor. He said he never saw any injury to Ms. Dhillon's lip.

[15] The appellant gave further evidence that he returned to the home about 1 o'clock in the morning and saw his mother-in-law, his two children, and Ms. Dhillon sleeping in the living room. He said he went into the bedroom and layed down on the bed. He said that Ms. Dhillon walked into the bedroom and told him she had contacted the R.C.M.P. He asked, "For what?", and she replied, "I showed my bruises to them", and that she told that police he had beaten her up. The appellant said he replied, "Whatever, Vicky". He

said he did not really believe her because she was always saying stuff like that to hurt him.

[16] The appellant further testified that when he got up in the morning around 7 a.m. he heard Ms. Dhillon on the telephone saying “I don’t want any charges on him” and that whomever she was talking to wanted to talk to Ms. Dhillon in person. He said that she then left the house and he could not believe that “she lied”, presumably about the allegation of assault. Consequently, he followed her to the police station because he wanted to speak to the same R.C.M.P. officer “to tell him this is not true”. When he arrived, Ms. Dhillon was already in an inner office. A receptionist took his driver’s license and then returned, telling him “Sorry, it’s going to make it worse. We can’t do that”. He said he then returned home, packed his stuff and ended the relationship. He denied threatening Ms. Dhillon, as alleged.

[17] After the separation, the appellant said that Ms. Dhillon repeatedly phoned him, apologizing and imploring him to return home. When he did not show any interest in returning, she started threatening to lay charges and to get him fired from his employment. She also threatened to deny him access to the younger child. He said that it was only when he hired a family lawyer around the middle of June 2008 to commence a divorce, that the complainant returned to the R.C.M.P. to press charges of assault and uttering threats.

[18] The appellant’s aunt, Surjit Cheema, who lives in Yellowknife, was instrumental in arranging the couple’s marriage. During the domestic difficulties in 2003, she paid the appellant’s way to Yellowknife when he left the family home for three weeks. She testified that during that time there were calls everyday from Ms. Dhillon asking the appellant to

return, which he did after learning that Ms. Dhillon was pregnant with their child. Ms. Cheema further testified that after becoming aware that the appellant had left the home in early 2008, Ms. Dhillon was calling her repeatedly asking for her assistance in persuading the appellant to return to the family home. She said that Ms. Dhillon did not mention the allegation of assault until three months later. She said that she had not personally met with the appellant between May 2003 and 2009.

[19] Todd Greek, a co-worker of the appellant, also testified. He said that he had been employed with the appellant for three or four years and was aware of the separation in January 2008. He subsequently overheard telephone calls between Ms. Dhillon and the appellant in which Ms. Dhillon was pleading with the appellant to return to the family home. He said that she would be shouting on the telephone. He overheard remarks by Ms. Dhillon to the effect that if the appellant did not come home, she would make his life hell, and that on one occasion she threatened to have the appellant deported to India.

ANALYSIS

1. Was the verdict unreasonable or unsupported by the evidence?

[20] Counsel are agreed that the test on this ground of appeal under s. 686(1)(a)(i) of the *Criminal Code* is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered: *R.* v. *Yebes*, [1987] 2 S.C.R. 168, at para. 20. An appellate court may not interfere with findings of fact made and inferences drawn by a trial judge unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The standard is whether there has been a “palpable and overriding error”: *R.* v. *Clark*, [2005] 1 S.C.R. 6. It is not enough for a reviewing court to simply take a different view of the evidence than the trier of fact: *R.* v. *Biniaris,* [2000] 1 S.C.R. 381.

Where a case turns on issues of credibility, the sufficiency of the reasons in relation to this ground of appeal should be considered in light of the deference afforded to trial judges on credibility findings. Deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, will rarely merit appellate intervention: *R.* v. *Dinardo*, [2008] 1. S.C.R. 788.

[21] It is important to restate here that the trial judge was not satisfied beyond a reasonable doubt regarding Ms. Dhillon's evidence about being struck with a hanger or about the alleged threats. With respect to the former allegation, the trial judge noted that Ms. Dhillon was inconsistent in describing the object with which she was struck, initially saying it was a "stick", because she could not think of the English word for hanger. Curiously, the trial judge then referred to Ms. Dhillon's evidence about "the injuries to her arms in an area *not* shown to Constable Drover". With respect, I suspect what the trial judge meant to say here was that the injury to the inside of Ms. Dhillon's left forearm which *was* shown to Constable Drover was inconsistent with her description of being struck on the outside of her forearms crossed against her chest. In any event, the trial judge concluded that Ms. Dhillon's evidence "might well have satisfied me on a lower standard of proof but does not meet the standard in a criminal trial".

[22] With respect to the alleged threats, the trial judge concluded that "while they probably occurred, there is a reasonable doubt, as no mention was made to the police officer of such threats until five months later", when Ms. Dhillon returned to the R.C.M.P. to press charges in June 2008. The trial judge recognized that, about that time, the appellant had filed for a divorce and Ms. Dhillon was concerned that her reputation in her East Indian community would be damaged by a second divorce. The trial judge also

acknowledged (and implicitly made findings) that Ms. Dhillon's pleas to have the appellant return home were ultimately unsuccessful and she had threatened that she would not allow the appellant to see her son again. He also said that she had threatened to have him deported.

[23] The appellant's counsel expressly did not argue that the guilty verdict for punching Ms. Dhillon in the mouth was "inconsistent" with the trial judge's determinations that he had reasonable doubts about her being hit with a hanger or about the appellant threatening Ms. Dhillon. In any event, I would have declined to accept such an argument, since the findings of reasonable doubt are not so irreconcilable with the guilty verdict, that no reasonable jury, properly instructed could possibly have found the appellant guilty of the assault by the punch to the mouth: *R.* v. *Pittiman*, [2006] 1 S.C.R. 381.

[24] The essence of the argument by the appellant's counsel on this ground of appeal is that, on the whole of the evidence, Ms. Dhillon's version of the punch assault lacked any air of reality, for reasons which included those set out below (in each case I have indicated my response):

1. *Ms. Dhillon did not call the police until around 10:30 p.m., which was about three or four hours after the confrontation in the bedroom.* Standing alone, this fact is not particularly probative of Ms. Dhillon's credibility. If she did not return home until about 7:15 p.m., as the appellant testified, by the time the confrontation ended and Ms. Dhillon arrived at the Quiznos restaurant, it could have easily been after 8 p.m. and Ms. Dhillon likely spent a good deal of time discussing the matter with her brother and her friend in deciding whether or not to involve the police.

2. *Ms. Dhillon made no mention to Constable Drover of the appellant breaking plates and spreading ketchup on the walls of the kitchen, as alleged.* That is not particularly surprising, given Ms. Dhillon's expressed reticence to have any charges laid against the appellant.
3. *Ms. Dhillon did not telephone the police or anyone else about the assault from the family home, because she said the appellant broke the land-line telephone. However, when she returned to the home she remembered that there was another telephone available, plus one supplied to her by a friend, which she used the next morning to call the R.C.M.P.* There is nothing illogical or inconsistent with Ms. Dhillon's testimony in this regard. She said she left the home for Quiznos when she saw the land-line telephone was broken. It is also apparent that she wished to discuss the matter in person with her brother, who was presumably working at the restaurant, as well as her friend. This helps to explain why she would want to meet with them there. The additional phone which she retrieved upon returning home was presumably in storage, because she said she had to "charge that one that night", and the other phones were given to her by her friend for safety.[1]
4. *The appellant's counsel noted Ms. Dhillon's delay of several months in proceeding with the charges. He also stressed a number of factors relating to her apparent motive for wanting to proceed with the charges. For example, she only pressed the charges when it became evident that the appellant did not plan to return to her and had commenced legal*

[1] Transcript, p. 27, lines 23-28.

> *proceedings for a divorce and for access to his son. Counsel noted that, from Ms. Dhillon's point of view, a second divorce would damage her reputation within her East Indian community. Counsel also noted that, from Ms. Dhillon's perspective, she believed the appellant's family wanted to get rid of her. Finally, the appellant's counsel referred to Ms. Dhillon's threats to have the appellant fired from his job, and to have him deported if he did not return to her. Indeed, she eventually attempted to have him deported prior to the trial.* I agree that all of this evidence was capable of having an adverse impact on Ms. Dhillon's credibility. However, the evidence was not ignored by the trial judge. Rather, he expressly referred to much of this evidence in his determination that he had a reasonable doubt about the charge of uttering threats. I will collectively refer to these points later in these reasons as the evidence of "*animus*" of Ms. Dhillon towards the appellant.

[25] At the appeal hearing, the appellant's counsel also referred to the trial judge's determination that he was satisfied beyond a reasonable doubt that the injury to Ms. Dhillon's lip was caused by the appellant striking her, "as that is the only reasonable conclusion to be drawn from the evidence". The appellant's counsel submitted that this was an error because of "a gap" in the Crown's evidence. His primary reasons for this submission were that:

1. Ms. Dhillon made no mention to Constable Drover that the appellant had punched her;

2. Constable Drover made no observation of any blood on Ms. Dhillon's clothing, even though Ms. Dhillon said that her lip was cut on the inside, was "bleeding badly", and that some blood dripped on her clothes; and
3. Constable Drover only observed a cut on Ms. Dhillon's lower lip and made no mention of seeing any swelling to the lip, despite the fact that Ms. Dhillon testified in cross-examination that her lip was swollen "quite a bit" from the punch.

[26] Although the trial judge did not expressly deal with these points in his reasons, he did make a finding of fact that the appellant struck Ms. Dhillon in the mouth with his hand or fist, resulting in a cut to her lip, which was later observed by Constable Drover. Unfortunately, this finding of fact was made by the trial judge almost immediately after his relatively comprehensive review of the evidence of all the witnesses, including the background of marital conflict between the appellant and Ms. Dhillon. Therefore, it has the initial appearance of being a conclusory determination. However, it was not made without any regard to the appellant's evidence on the point, which I will return to later in my discussion regarding the third ground of appeal. As for the trial judge's later statement, at para. 22 of his reasons, that the appellant caused the injury to Ms. Dhillon's lip because that was "the only reasonable conclusion" to be drawn from the evidence, it seems to me that this is analogous to how a trier of fact might deal with a piece of circumstantial evidence. If the guilt of the accused is the "only reasonable inference" to be drawn from the proven circumstantial facts, then the verdict cannot be said to be unreasonable: see *R.* v. *Cooper*, [1978] 1 S.C.R. 860 at para. 881. Finally, it is also apparent that the trial judge took into account the evidence of *animus* in relation to this

particular assault. At para. 29 of his reasons, following a review of that evidence, he said, “This type of behaviour, both preceding and more particularly following the assault, does not detract from her evidence regarding the assault itself”.

[27] It is clear from the unanimous decision of the Supreme Court of Canada in *R.* v. *R.E.M.*, 2008 SCC 51, that in assessing the adequacy or sufficiency of a trial judge’s reasons in a criminal case, a court of appeal is directed to read the reasons as a whole, in the context of the entire record of the trial, including all of the evidence and the arguments of counsel, and with an appreciation of the purpose for which the reasons are delivered (para. 16).

[28] Looking more closely at the three reasons expressed by the appellant’s counsel as establishing a “gap” in the Crown’s evidence, in the context of the entire trial record, certain considerations arise which tend to undermine the appellant’s argument.

[29] First, although Ms. Dhillon testified in cross-examination that there was “a lot of blood” resulting from the cut to her lip, that there were “some drips on my clothes”, and that she was wearing the same clothes when she met with Constable Drover at the Quiznos restaurant, she also testified in re-examination that she was wearing a coat while in the restaurant. This would explain why Constable Drover made no particular observation of seeing any blood on Ms. Dhillon’s clothing.

[30] Second, the fact that Ms. Dhillon made no mention to Constable Drover of being punched in the mouth by the appellant is not inconsistent with her evidence that she did not want charges laid against her husband at that point. Both Constable Drover and Ms. Dhillon gave consistent evidence that the purpose of the meeting in the restaurant was

for Ms. Dhillon to obtain further information about the R.C.M.P. policies in relation to domestic violence, the laying of charges and the court process.

[31] Third, it is apparent from Constable Drover's testimony that she may well have presumed the injury to Ms. Dhillon's lip was the result of spousal violence and therefore did not feel the need to press Ms. Dhillon on the point. In direct examination, Constable Drover said the following:

> "During that meeting I discussed the police procedures in domestic violence and the charging and the court system. And she didn't want any part of laying charges as there was a cultural stigma attached to charging somebody for abuse, especially a husband. I explained that due to our domestic policy we have the onus to charge and we could take that away from the victim and, therefore, charges would be laid, as I had witnessed injury on her bottom lip and the inside of her left forearm there was two lash bruises. I had asked if there was any injuries and she – I witnessed the injury on her lip first, and then I asked if there were any more, and she rolled up her sleeve and I saw the ones on the inside of her forearm. So, I had asked what had happened, and from that I learned that the injury on her left forearm was caused by maybe a stick, I do believe…" (emphasis added) [2]

Based on this evidence, although Ms. Dhillon did not provide any further specific details, Constable Drover apparently felt she had reasonable and probable grounds to charge the appellant with assault, as she later said she passed the file on to a day shift officer to locate the appellant and arrest him for that offence.[3]

[32] Fourth, the evidence of Ms. Dhillon about the swelling of her lower lip was arguably subjective. We know that the cut to her lip was visible to Constable Drover, and therefore had to be, at least partially, on the outside of the lip. In addition, Ms. Dhillon said that the inside of her lip was cut and that it was swollen "quite a bit". [4] However, there was no cross-examination of Constable Drover by the appellant's counsel

[2] Transcript, p. 2, lines 29-30.
[3] Transcript, p. 3, lines 42-43.
[4] Transcript, p. 26, line 24; page 27, line 6.

specifically about whether she observed swelling in the area of the cut. Further, regardless of the absence of such evidence, it is not necessarily inconsistent for Constable Drover not to have made particular note of that fact. It may well have felt to Ms. Dhillon as though her lip was swollen in the area of the injury, as part of the injury was to the inside of the lip, which was not visible to Constable Drover. Finally, between three and four hours had apparently passed since Ms. Dhillon said she was struck, so any immediate swelling may have subsided by the time of the meeting in the restaurant.

[33] Taking all of these considerations into account, I am not persuaded that the somewhat conclusory determination by the trial judge that the injury to Ms. Dhillon's lip had to have been caused by the appellant is capable of constituting a "palpable and overriding error". While I may not necessarily have come to the same conclusion, I am unable to say that a properly instructed jury, acting judicially, could not have done so. Therefore, I am not persuaded that the verdict was unreasonable or unsupported by the evidence and I dismiss this ground of appeal.

2. Failure to provide adequate reasons

[34] Even if the trial judge's verdict was not "unreasonable", if he failed to provide adequate reasons, this could still constitute a reversible error of law under s.686(1)(a)(ii) of the *Criminal Code*: see *R.* v. *Sheppard*, cited above, at paras. 39, 55 and 68.

[35] The recent case of *R.* v. *R.E.M.*, cited above, is particularly instructive as to the current view of the Supreme Court of Canada on the issue of adequate reasons. At paras. 11 and 12, McLachlin C.J. summarized the authorities which establish that

reasons for judgment in a criminal trial serve three principle functions:

1. they tell the parties affected why the decision was made, in the sense of providing a logical connection between “what” the judge has decided, namely the verdict, and “why” he or she made that decision, i.e. the basis for the verdict;
2. they provide public accountability, in the sense that justice must not only be done, but it must be seen to be done; and
3. they permit effective appellate review, by enabling appeal courts to discern the inferences drawn by the trial judge, as well as his or her understanding of the legal principles governing the outcome of the case.

In addition, McLachlin C.J. noted that reasons help ensure fair and accurate decision making, in the sense that they direct the judge’s attention to the salient issues and lessen the possibility of overlooking or under-emphasizing important points of fact or law. Finally, reasons are a fundamental means of developing the law uniformly in accordance with the principle of *stare decisis*. In all these ways, McLachlin C.J. concluded that “reasons instantiate the rule of law and support the legitimacy of the judicial system” (para. 12).

[36] In the case at bar the issue is not that the trial judge failed to supply reasons, but rather whether his reasons were sufficient. As I noted above, *R.E.M.* clearly and repeatedly indicates that courts of appeal are to consider this issue by reading the reasons as a whole, in the context of the entire trial record, including the evidence, the arguments of counsel and the purposes or functions for which the reasons are delivered. At para. 17, McLachlin C.J. continued, “The object is not to show *how* the judge arrived at

his or her conclusion, in a “watch me think” fashion. It is rather to show *why* the judge made that decision” (emphasis already added).

[37] In quoting Doherty J.A., in *R.* v. *Morrissey* (1995), 22 O.R. 3d 514 C.A., at p. 525, McLachlin C.J. agreed, at para. 18, that a trial judge’s reasons are not intended to be, and should not be read, as a “verbalization of the entire process engaged in by the trial judge in reaching a verdict”. Similarly, McLachlin said, at para. 20, that:

> “the trial judge need not expound on evidence which is uncontroversial, or detail his or her finding on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can be logically discerned.”

She explained, at para. 21, that this is what is meant by the phrase in *Sheppard*, cited above, “the path taken by the trial judge through confused or conflicting evidence”.

[38] Further in *R.E.M.*, at para. 28, McLachlin C.J. quoted with approval from the Supreme Court’s earlier decision in *R.* v. *Gagnon*, [2006] 1 S.C.R. 621, where Bastarache and Abella J.J.

stated, at para. 20:

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

[39] As for the degree of detail required, McLachlin C.J. concluded, at para. 43 of *R.E.M.*, that the reasons, read in the context of the record and the submissions on the live issues in the case must “show that the judge has seized the substance of the matter. Provided that this is done, detailed recitations of evidence or the law are not required”.

[40] With respect to the role of appellate courts in assessing the sufficiency of reasons, McLachlin C.J. continued, at para. 54, that the starting position is one of deference toward the trial judge's perception of the facts, absent a palpable and overriding error. At paras. 55 and 56, she went on to say that, if it appears the trial judge has recognized and dealt with evidence which is contradictory or confusing, then the reasons are not deficient, notwithstanding that they lack detail or are less than ideal:

> "… The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law. Reasonable inferences need not be spelled out…"

On the other hand, where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and, more particularly, a complete disregard of such evidence, then appellate intercession is justified.

[41] On this ground of appeal, the appellant's counsel again challenged the statement by the trial judge that the appellant's guilt was "the only reasonable conclusion" for the cut on Ms. Dhillon's lip. Similarly, counsel repeated his argument that the trial judge failed to deal with the "inconsistencies" between the evidence of Constable Drover and that of Ms. Dhillon in respect of the latter's failure to complain to the former about the punch, as well as the absence of any observation of blood on Ms. Dhillon's clothing or any swelling to her lip. I have already addressed and dismissed these points, so I will not do so again here. I would simply add that, for my reasons above, I do not necessarily agree that they are points of *inconsistency*. While it may have been desirable for the trial judge to deal with the points in greater detail, I remain satisfied that his reasons show that he "seized the substance of the matter" (see *R.E.M.*, para. 43).

[42] The appellant's counsel further submitted on this ground of appeal that the trial judge failed to explain how he reconciled what I have collectively referred to as the evidence of *animus* with the allegations of assault. I would respond by simply indicating that, with respect to the allegation that the appellant struck Ms. Dhillon with a hanger, the trial judge conceded that he *had* a reasonable doubt. So that finding is not an issue on this appeal. With respect to the allegation that the appellant punched Ms. Dhillon in the mouth, the trial judge, in my view, clearly had the *animus* evidence in mind in deciding that he was satisfied beyond a reasonable doubt that an assault had occurred. At para. 18 of his reasons, the trial judge referred to the undisputed evidence of the background of the parties, including the appellants' absences from the home in 2003 and 2006. Further, at paras. 26-29, the trial judge referred to various aspects of the evidence capable of indicating Ms. Dhillon's animosity towards the appellant, including:

1. her delay in reporting the alleged threats;
2. her own threats to deny the appellant access to his son and to have him deported;
3. her argumentative demeanour during her testimony; and
4. her motive to preserve her reputation by avoiding a second divorce from the appellant.

Notwithstanding such evidence, both preceding and following the assault, the trial judge was satisfied that it did "not distract from [Ms. Dhillon's] evidence regarding the assault itself". That was a finding that was open to him as the trier of fact.

[43] While one might have preferred the trial judge to explain matters more fully, one ought not be too critical of him for failing to reconcile every frailty in the evidence. In

short, the trial judge's reasons do not disclose a lack of appreciation of relevant evidence nor a complete disregard of such evidence.

[44] For these reasons, and those which follow, I would also dismiss this ground of appeal.

3. Failure to apply the burden of proof and W.(D.)

[45] In *R.* v. *W.(D.)*, cited above, the Supreme Court summarized the principles to be applied on the issue of credibility when the accused has testified, by directing the trier of fact as follows:

1. if you believe the accused, you must acquit;
2. even if you do not believe the accused, if his or her evidence leaves you with a reasonable doubt, you must acquit; and
3. even if you do not believe the accused and are not left with a reasonable doubt by his or her evidence, you must nevertheless ask yourself whether you are left with a reasonable doubt based on the other evidence which you do accept. Another way of expressing this third point is that if you do not know who to believe, you must acquit.

[46] In the case at bar, the appellant's counsel submitted that the trial judge did not refer to the test in *W.(D.)* and did not explain why he rejected Ms. Dhillon's evidence in respect of the alleged assault with the hanger and the uttering of threats, but not in respect of the cut on the lip. Counsel submitted that there were at least as many points of conflicting evidence and questions about the cut on the lip as with the other issues. My first response to this submission is that it is clear from the record that the trial judge was alive to and correctly appreciated the *W.(D.)* issues, as this was raised during the

submissions of counsel.[5] Secondly, it is trite to say that a trial judge may accept some, none or all of what any witness says: see *R.E.M.*, para. 65. I have already referred above to why the trial judge was not satisfied beyond a reasonable doubt with respect to the allegations about the hanger and the uttering of threats. There is nothing inherently illogical or inconsistent about the trial judge having made those determinations, while at the same time finding the appellant guilty of the punch. I have already indicated that counsel expressly refrained from arguing that there were inconsistent verdicts in this case. Thirdly, the trial judge specifically indicated that, with respect to both the allegations involving the hanger and the uttering of threats, he might well have been satisfied that they were proven if the standard was a balance of probabilities. This, in my view, implicitly indicates that he generally *accepted* the evidence of Ms. Dhillon with respect to both of those allegations, and did not *reject* her evidence, as the appellant's counsel submitted. Therefore, there is not necessarily any inconsistency between the trial judge's findings on all three matters.

[47] The appellant's counsel further submitted that the "only reasonable conclusion" approach of the trial judge to the punch in the mouth did not constitute compliance with the principles of *W.(D.)*, presumably because on the face of it, this approach ignored the appellant's evidence. I stated above that I initially shared this concern, because of the conclusory nature of the trial judge's determination on the injury to Ms. Dhillon's lip.

[48] However, I am directed by *R.E.M.* to look at the trial judge's reasons in the context of the record as a whole and, having done so, I am satisfied he did not ignore the appellant's evidence. On the contrary, at paras. 13 and 14, he gave a fair summary of the

[5] Submissions, pp. 9-10.

appellant's contradictory evidence. Then, at paras. 24 and 25, the trial judge returned to his assessment of the appellant's denial of punching Ms. Dhillon, stating as follows:

> "Regarding the cut lip, I do not believe the denial of the defendant, as it is inconsistent with his immediate leaving of the home after the assault and his demand the following morning that she drop charges. Nor do I believe his evidence that he only went to the police station to give his side of the story as, having been denied that opportunity at the time of his arrival, there is no evidence that he made any further attempt that day or later on to return to the police station or to speak to the police.
>
> On all of the evidence there is no doubt in my mind that punch to the face occurred."

[49] I concede that I was somewhat troubled by these brief reasons for rejecting the appellant's evidence. It was unfortunate that the trial judge disbelieved the appellant's denial as being inconsistent with his immediate leaving of the home "after the assault and his demand the following morning that she drop charges". This reasoning immediately appears to be circular, as if to say he disbelieved the appellant because he believed the complainant. That would constitute an impermissible "jump" from belief in the complainant to the guilt of the accused. Nevertheless, what I think the trial judge had in mind here was that the undisputed fact that the appellant immediately left the family home after the confrontation in the bedroom was inconsistent with his own evidence as to exactly what happened during the confrontation. As I noted above, the appellant initially said that Ms. Dhillon was angry at him for not having supper ready, swore at him, called him lazy and told him to get his own place. However, the appellant then testified as follows:

> "… And then that really hurt, so I got up and went to the kitchen. 'Okay, Vicky, that's what you really want, that's what I going to do.' So I came in my bedroom and then I started packing stuff. And she came in the bedroom and then stopped – stopped me and said, 'Sorry, that came out wrong.' And then I said, 'Vicky, I don't want to argue in front of my kid.'

> And then I just took my car keys, and then I didn't grab anything, I just left there. And then – then I left the house."[6]

On this evidence, there was no apparent need for the appellant to leave the family home, as Ms. Dhillon had acknowledged she spoke inappropriately and apologized to him for the argument that had just occurred.

[50] With respect to the trial judge disbelieving the appellant when he said that he only went to the police station to give his side of the story, the evidence is capable of supporting the trial judge's logic. As I noted above, the appellant testified that when he came back home about 1 o'clock in the morning Ms. Dhillon informed him that she had contacted the R.C.M.P., showed them her bruises and told them that he had beaten her up. The appellant said that he did not believe Ms. Dhillon in that regard, because she always said stuff like that to hurt him. However, the appellant's testimony continued that he heard Ms. Dhillon on the telephone around 7 a.m. the following morning saying "I don't want any charges on him" and that he assumed she was talking to the R.C.M.P., because they wanted to talk to her in person. After she left the house, the appellant testified "And then like I couldn't believe that she lied. And then I – I drove right behind her, because I want to speak to the same R.C.M.P. officer to tell him this is not true…" [7]

[51] As I also indicated above, the appellant next said that the receptionist told him that he could not meet with Ms. Dhillon and the R.C.M.P. officer, as it would "make it worse". The appellant then testified that he simply returned home, packed his stuff and ended the relationship. I believe it is that evidence which the trial judge had difficulty with. On the face of it, the appellant had no reason to believe that Ms. Dhillon was successful in having the charges dropped. He was obviously concerned enough about what he said

[6] Transcript, p. 58, lines 14-20.
[7] Transcript, p. 58, lines 29-35.

were false allegations that he wanted to speak to the same police officer Ms. Dhillon was speaking with. Therefore, based upon his own evidence, it was inconsistent for the appellant to simply have left the detachment and ended the relationship without making more of an effort to either clarify that the charges were dropped or to put his version of the truth to the R.C.M.P.

[52] It is also important to remember that most of the evidence of *animus* by Ms. Dhillon towards the appellant surfaced *after* the separation, when Ms. Dhillon began her rather aggressive campaign to have the appellant return home. Therefore, on the day he attended at the detachment, there was little to justify his leaving the relationship.

[53] In conclusion, the trial judge said that "on all of the evidence", which included that of the appellant, he had no doubt in his mind that the punch to the face occurred.

[54] *R.* v. *Dinardo*, cited above, was also a case which turned on credibility. McLachlin C.J. referred to this case in *R.E.M.*, at para. 31, and stated that:

> "The trial judge's reasons failed to articulate the alternatives to be considered in determining reasonable doubt as set out in *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742. Charron J. stated that only the substance, not the form, of *W.(D.)* need be captured by the trial judge, then went on to say:
>
> > In a case which turns on credibility such as this one, the trial judge must direct his or her mind to <u>the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises reasonable doubt</u> as to his guilt. [para. 23]" (my emphasis)

[55] At para. 32 of *R.E.M.*, McLachlin C.J. continued to quote Charron J. in *Dinardo*, who stated that where credibility is a determinative issue, deference is in order and intervention will be rare:

> "… While the reasons must explain why the evidence raised no reasonable doubt, 'there is no general requirement that reasons be so detailed that they allow an appeal court to retry the entire case on appeal.

> There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel (para. 30)."

[56] In *R.E.M.*, the Court of Appeal had found the trial judge's reasons to be deficient for grounds which included:

1. a failure to make general comments about the accused's evidence;
2. a failure to reconcile generally positive findings about the complainant with the rejection of some of her evidence; and
3. a failure to explain why he rejected the accused's plausible denial of the charges.

However, at para. 61, McLachlin C.J. concluded that, in summary, the trial judge's reasons showed that on most points, he accepted the evidence of the complainant and rejected that of the accused. The same could be said of the case at bar.

[57] Further, at para. 66 of *R.E.M.*, McLachlin C.J. continued:

> "Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial…"

Accordingly, said the Chief Justice, while it may have been desirable for the trial judge to explain certain matters more fully, when the record is considered as a whole, the basis for the verdict is evident (para. 67). Once again, those comments are applicable to the case at bar.

[58] The trial judge did not ignore the appellant's evidence. While his initial reason for disbelieving the appellant's denial appeared to be circular, there is a basis in the evidence to support the trial judge's finding that the denial was inconsistent with the

appellant immediately leaving the family home after the confrontation in the bedroom. Similarly, there is a basis for the trial judge disbelieving the appellant's evidence on why he followed Ms. Dhillon to the police station.

[59] It is also implicit that the trial judge generally believed Ms. Dhillon's evidence about the three alleged unlawful acts. However, on two of those three acts, namely the allegations involving the hanger and the uttering of threats, the trial judge quite properly took into account all of the evidence, including inconsistencies and the evidence of *animus*, in deciding that he was left with a reasonable doubt. He similarly took the *animus* evidence into account in assessing whether the allegation of the punch was proven to the criminal standard.

[60] The trial judge did not expressly comment on the so called inconsistencies raised by the appellant's counsel regarding the absence of a complaint of a punch by Ms. Dhillon to Constable Drover or the absence of any observation by the latter of swelling or blood. As I have opined above, I do not agree that these are necessarily inconsistencies, and while it might have been preferable for the trial judge to have addressed the points, his failure to do so does not justify a finding that he failed to seize the substance of the critical issues at the trial. On the contrary, he appears to have given particular weight to the evidence that Ms. Dhillon had a cut on her lower lip shortly after the confrontation in the bedroom, which cut was objectively confirmed by Constable Drover. He seems to have expressed the importance of this evidence by stating that it led to "the only reasonable conclusion" that the appellant caused the injury. Viewed in the context of circumstantial evidence, that was not an unreasonable inference for him to draw.

[61] In some respects, the case at bar is similar to the decision of the Ontario Court of Appeal in *H.M.T.Q.* v. *J.J.R.D.*, [2006] O.J. No. 4749. In that case, the appellant had similarly submitted that the reasons of the trial judge were inadequate in that they did not offer any explanation for the total rejection of his exculpatory evidence. The appellant was appealing from his conviction on a charge of sexually assaulting his young daughter. He contended that, in the circumstances of that case, where the Crown's evidence was not overwhelming and the appellant's evidence was not obviously unreliable, the trial judge's failure to give any reason for rejecting the appellant's evidence constituted an error in law or a miscarriage of justice and necessitated a new trial. Doherty J.A. reviewed the authorities and applied a functional and contextual assessment of the adequacy of the trial judge's reasons. He noted, at para. 46, that the trial judge assessed the evidence of the complainant and was alive to the potential frailties in her evidence. However, Doherty J.A. concluded that the basis upon which the trial judge found her to be credible was readily apparent on the entirety of the record. Further, at para. 47, notwithstanding that finding, Doherty J.A. said the trial judge did not proceed directly to a finding that the allegations were proved beyond a reasonable doubt. In fact, the trial judge acknowledged that there was nothing in the substance of the appellant's evidence, or the manner in which he gave his evidence, which would have caused him to disbelieve that evidence (para. 48). However, Doherty J.A. noted, at para. 49, that in addition to the trial judge's assessment of the respective credibility of the two main witnesses, namely the complainant and the accused, the trial judge also considered the complainant's diary, the circumstances in which it was discovered, as well as the contents and timing of

certain entries, which he found corroborated the complainant's evidence. At para. 54, Doherty J.A. concluded:

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

[62] In the case at bar, a similar conclusion could be reached, based upon the trial judge's implicit acceptance of Ms. Dhillon's testimony with respect to all three of the unlawful acts. Even though the trial judge was not convinced beyond a reasonable doubt with respect to two of those acts, he might well have convicted if the standard of proof was on a balance of probabilities. With respect to the third alleged unlawful act, namely the punch to the mouth by the appellant, the trial judge had not only Ms. Dhillon's evidence, but also the "credibility enhancing effect" of the injury to her mouth, to support his conclusion of guilt beyond a reasonable doubt, despite the appellant's denial.

[63] Thus, it becomes obvious "why" the trial judge found the appellant guilty, in the sense that the path taken by him through the conflicting evidence is discernable.

[64] Lastly, this was a relatively short and simple trial with the evidentiary portion taking only one day. The final submissions were made by counsel five days later and the oral reasons were issued only three days after that. Therefore, the evidence and the arguments of counsel would have been relatively fresh in the appellant's mind when the reasons were given. I have little doubt that he knows why he was found guilty. As Doherty J.A. said in *J.J.R.D.*, at para. 33:

> "Nor should appellate courts overestimate the complexity of most criminal litigation or underestimate the ability of those involved in the trial process to understand the reasons for the outcome. Most criminal trials, even the difficult ones, are not particularly complicated. Most accused, even those

> who vehemently disagree with the result, understand only too well why there were convicted…" (my emphasis)

[65] In summary, the trial judge's reasons allow for effective appellate review and permit this Court to assure itself that he properly apprehended the relevant evidence, applied the proper legal principles to that evidence, including the burden of proof, and made findings of credibility that were available on the evidence.

[66] Accordingly, I also dismiss this ground of appeal.

CONCLUSION

[67] After reviewing the evidence of all of the witnesses, the trial judge made certain findings of fact with respect to the specific subject matter of the charges. In particular, he found that the appellant struck Ms. Dhillon in the mouth with his hand or fist, resulting in a cut to her lip. He said that this was "the only reasonable conclusion to be drawn from the evidence". While that determination initially appeared conclusory, it is readily apparent from the reasons for judgment that the trial judge took the appellant's evidence into account and made certain assessments about it before concluding that he did not believe the appellant's denials. While one aspect of the trial judge's reasoning in his assessment of the appellant's evidence could be said to be circular, I am not persuaded that it constitutes an impermissible "jump" from a belief in Ms. Dhillon to the guilt of the appellant.

[68] My role as an appellate court judge is to seek basic fairness, and not perfection nor "an esoteric dissection of the words" used: *R.* v. *Sheppard*, cited above, at para. 60. Rather, looking at the reasons in the context of the evidentiary record as a whole, as well as the submissions of counsel and the purpose for the reasons, I am satisfied that the trial judge appears to have seized the substance of the matter, which was one of

credibility. While I may not have made the same decision, that is not the test. The conclusion of the trial judge was not unreasonable or unsupported by the evidence. A properly instructed jury, acting judicially, could reasonably have come to the same result.

[69] With respect to the appellant's second argument, that the reasons were insufficient to the point of constituting an error of law, I again remain unpersuaded. I am not to examine the sufficiency of the reasons by expecting them to be a verbalization of the entire process engaged in by the trial judge in reaching his verdict. Nor am I to intervene simply because I may think the trial judge did a poor job of expressing himself in some respects. Rather, I am to look for the path taken by the trial judge through the conflicting evidence to see "why" he found the appellant guilty. For the reasons given above, I am satisfied that this path is apparent, and that I understand the basis for the guilty verdict. Thus, the record, including the reasons for judgement, allows for effective appellate review, and does not indicate that the trial judge failed to appreciate any determinative relative evidence or exhibited a complete disregard of such evidence.

[70] As for the appellant's final argument that the trial judge failed to correctly apply the burden of proof and the principles from *W.(D.)*, I conclude that he directed his mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raised a reasonable doubt as to his guilt. Notwithstanding my concern about one of the reasons for the trial judge's disbelief of the appellant's denial, I remain satisfied that, at the end of the day, the factors detracting from the credibility of the appellant are sufficiently clear from the record as a whole. The reasons are not deficient simply because the trial judge failed to recite all of these factors. I also recognize that assessing the credibility of a witness is not a purely intellectual exercise

and may involve factors that are difficult to verbalize.

[71] Thus, the appeal is dismissed.

Gower J.