

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Sanichar, 2013 SCC 4, [2013] 1 S.C.R. 54 | **Date:** 20130124**Docket:** 34720 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**Harry Persaud Sanichar**

Respondent

**Coram:** McLachlin C.J. and Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**(paras. 1 to 4)**Dissenting Reasons:**(paras. 5 to 22) | Karakatsanis J. (McLachlin C.J. and Abella, Rothstein, Moldaver and Wagner JJ. concurring)Fish J. |

R. *v.* Sanichar, 2013 SCC 4, [2013] 1 S.C.R. 54

Her Majesty The Queen Appellant

v.

Harry Persaud Sanichar Respondent

**Indexed as: R. *v.* Sanichar**

2013 SCC 4

File No.:  34720.

2012:  December 6; 2013:  January 24.

Present:  McLachlin C.J. and Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for ontario

 *Criminal law — Appeals — Trial judge convicting accused of several charges involving physical and sexual abuse — Court of Appeal setting aside convictions and ordering new trial — Whether appeal raises question of law — Whether Court of Appeal erred in setting aside convictions and ordering new trial.*

 *Held* (Fish J. dissenting): The motion to quash the appeal should be dismissed. The appeal should be allowed and the convictions should be restored.

 *Per* McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.: The trial judge did not apply wrong legal principles in assessing the reliability of the complainant’s evidence or in his application of the burden of proof. This appeal raises a question of law, namely whether the trial judge was required to self-instruct on the dangers of convicting because the complainant’s evidence related to events from the distant past; suffered from various frailties; and stood alone where confirmatory evidence might reasonably have been expected to exist.

 *Per* Fish J. (dissenting): The reasons of the majority in the Court of Appeal contain no assertion — either express or implied — that the trial judge was required as a matter of law to self-instruct on the dangers mentioned by Justice Karakatsanis. Moreover, the dissent in the Court of Appeal is not based on any disagreement, real or imputed, with the majority’s reasons regarding self-instruction. Rather, it relates to questions of fact or, at best, questions of mixed fact and law. Pursuant to s. 693(1)(*a*) of the *Criminal Code*, the Crown may only appeal to this Court on any question of law on which a judge of the court of appeal dissents, which plainly is not the case here.

**Cases Cited**

By Karakatsanis J.

 **Referred to:** *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197.

By Fish J. (dissenting)

 *R. v. McGrath*, [2000] O.J. No. 5735 (QL).

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 693(1)(*a*).

 APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Cronk and Blair JJ.A.), 2012 ONCA 117, 288 O.A.C. 164, 280 C.C.C. (3d) 500, 92 C.R. (6th) 303, [2012] O.J. No. 748 (QL), 2012 CarswellOnt 1914, setting aside the accused’s convictions entered by Newbould J., [2008] O.J. No. 4993 (QL), and ordering a new trial. Appeal allowed, Fish J. dissenting.

 *Christine Bartlett-Hughes* and *Holly Loubert*, for the appellant.

 *Mark C. Halfyard* and *Michael Dineen*, for the respondent.

 The judgment of McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

1. Karakatsanis J. — We are satisfied, for the reasons of Laskin J.A., that the trial judge did not err, and more particularly, did not apply wrong legal principles in assessing the reliability of the complainant’s evidence or in his application of the burden of proof.
2. The majority of the Ontario Court of Appeal found that the approach taken by the trial judge in assessing the complainant’s evidence was based on wrong legal principles (2012 ONCA 117, 288 O.A.C. 164). In particular, the majority held that in the circumstances of this case, the trial judge was required to self-instruct on the dangers of convicting because the complainant’s evidence related to events from the distant past; suffered from various frailties; and stood alone where confirmatory evidence might reasonably have been expected to exist, and his failure to do so constituted a legal error.
3. Laskin J.A. disagreed. In his view, the issue of whether to self-instruct in this manner was discretionary on the part of the trial judge and there was no requirement that he do so as a matter of law. We agree with his assessment of the matter. Viewed in that light, his dissenting reasons raise a question of law: see *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 29-30.
4. The respondent’s motion to quash the appeal is dismissed. The appeal is allowed and the convictions are restored, for the reasons of Laskin J.A.

 The following are the reasons delivered by

1. Fish J. (dissenting) — Unlike Justice Karakatsanis, and with the greatest of respect, I would grant the respondent’s motion to quash this appeal.
2. My colleague writes:

. . . the majority [in the Court of Appeal] held that in the circumstances of this case, *the trial judge* *was required* to self-instruct on the dangers of convicting because the complainant’s evidence related to events from the distant past; suffered from various frailties; and stood alone where confirmatory evidence might reasonably have been expected to exist, *and his failure to do so constituted a legal error*. [Emphasis added; para. 2.]

1. I have three observations in this regard.
2. First, I am unable to find in the reasons of the majority any assertion ― express or implied ― that the trial judge was required as a matter of law to self-instruct on the dangers mentioned by my colleague.
3. Rather, Blair J.A., speaking for the majority, merely described as “sensible” the “idea that trial judges *should consider* the ‘needto self-instruct on the frailties of evidence concerning events from the distant past’ . . . for all of the reasons summarized in *McGrath*” (2012 ONCA 117, 288 O.A.C. 164, at para. 41; citing *R. v. McGrath*, [2000] O.J. No. 5735 (QL) (S.C.J.), at paras. 11-15 (emphasis added)).
4. Moreover, there is no dispute that the factors set out by my colleague are all present in this case. And I agree that it is sensible, as Justice Blair held, for trial judges to “consider the need to self-instruct” on the frailties of the evidence in cases where these factors are likewise present.
5. My second observation is that nothing in the reasons of Laskin J.A., the dissenting justice in the Court of Appeal, suggests that he was of a different view in this regard. On the contrary, Justice Laskin agreed that it may be sensible for trial judges to consider the need to self-instruct in such cases, but added that they are not legally required to do so expressly(paras. 70-71).
6. Justice Blair did not say that they were. Rather, as we have seen, he simply found it logical or prudent ― “sensible”, as he put it ― for trial judges to *consider* *the need* for a self-instruction of this sort. He then took care to add that “[e]ach case will depend upon its own circumstances”, and made plain that he did “not mean to suggest that some type of formal instruction need necessarily be given” (para. 41).
7. Justice Blair’s ensuing statement confirms, in my view, that an express self-instruction was *not* legally required by the majority in the court below, even where the factors mentioned by Justice Karakatsanis are present, as in this case.
8. What *is* required, the majority held, is that “the trial judge’s reasons should demonstrate that he or she is alert to the frailties of, and the risks associated with, such evidence, and to the need to address it with that careful scrutiny” ― and, even then, only “[w]here . . . there are *objective reasons* to scrutinize carefully the reliability of a witness whose testimony is central to the proof of guilt” (para. 41 (emphasis added)).
9. This was so in the present case, according to Justice Blair, and applied as well “in this type of case generally” (para. 41).
10. On a fair reading of these passages, and with respect, I am unable to agree with Justice Karakatsanis that the majority in the Court of Appeal held that the trial judge was *legally required* “to self-instruct on the dangers of convicting because the complainant’s evidence related to events from the distant past; suffered from various frailties; and stood alone where confirmatory evidence might reasonably have been expected to exist”.
11. My third observation ― in itself dispositive of the present appeal ― is this: Justice Laskin’s dissent was *not* based on his disagreement, real or imputed, with the majority’s reasons regarding self-instruction by the trial judge in this case, or self-instruction by trial judges generally in cases of this sort. That is apparent both from the Order of the Court of Appeal and, perhaps more significantly, from Justice Laskin’s own reasons.
12. According to the Order:

 **THIS COURT ORDERS** that the appeal is allowed and a new trial ordered.

 **THE HONOURABLE JUSTICE LASKIN DISSENTING HELD** that the learned trial judge did not err in his approach to the assessment of the reliability of the [complainant]’s evidence. Further, he held that the trial judge did not err in holding that the absence of police and school records corroborating the [complainant]’s evidence that she had reported that sexual abuse had taken place did not create a reasonable doubt when weighed against the other evidence of the complainant. Accordingly he would have dismissed the appeal. [A.R., vol. I, at p. 106]

1. The Order of the Court of Appeal is in full conformity with Justice Laskin’s expressly stated reasons for disagreeing with the majority. He sets out the grounds of his dissent in these terms:

I have read the reasons of my colleague, Blair J.A. He would allow the appeal, set aside the convictions and order a new trial. He would do so for two reasons. First, he concludes that the trial judge did not properly assess the reliability of the complainant’s evidence. Second, he concludes that the trial judge failed to consider whether the absence of documentary evidence that might have corroborated the complainant’s evidence gave rise to a reasonable doubt.

I respectfully disagree with both of these conclusions. Throughout his lengthy reasons, the trial judge considered not just the credibility, but the reliability of the complainant’s evidence. Indeed, at several points he did so expressly. He addressed various concerns about the complainant’s testimony that bore on the accuracy of her evidence. And, perhaps most important, he held that it would be unsafe to act on two of the alleged incidents of sexual abuse and disregarded the complainant’s evidence of those incidents. He did so not because he found her evidence lacking in credibility, but because he found that her evidence on those two incidents was not sufficiently reliable.

The trial judge also considered the effect of the absence of police and school records, but remained convinced beyond a reasonable doubt of the appellant’s guilt on the basis of the complainant’s evidence. That was his call to make. I would dismiss the appeal. [paras. 64-66]

1. Neither the Order of the Court of Appeal nor the reasons of Justice Laskin are capable of supporting the Crown’s submission that this appeal raises a question of law. The grounds of Justice Laskin’s dissent raise questions of fact or, at best, questions of mixed fact and law.
2. Pursuant to s. 693(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, the Crown may only appeal to this Court “on any question of law on which a judge of the court of appeal dissents”, which plainly is not the case here.
3. With respect for those who are of a different view, I would therefore quash this appeal for want of jurisdiction.

 *Appeal allowed,* Fish J. *dissenting.*

 Solicitor for the appellant: Attorney General of Ontario, Toronto.

 Solicitors for the respondent: Rusonik, O’Connor, Robbins, Ross, Gorham & Angelini, Toronto.