



SUPREME COURT OF CANADA

CITATION: R. v. S.S., 2023 SCC 1

APPEAL HEARD: January 10, 2023
JUDGMENT RENDERED: January 10, 2023
DOCKET: 40147

BETWEEN:

His Majesty The King
Appellant

and

S.S.
Respondent

- and -

Criminal Lawyers' Association (Ontario) and Criminal Trial Lawyers' Association
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and O'Bonsawin JJ.

JUDGMENT READ

BY: Wagner C.J.
(para. 1)

MAJORITY: Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer and O'Bonsawin JJ.

DISSENT: Rowe J.

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His Majesty The King

Appellant

v.

S.S.

Respondent

and

**Criminal Lawyers' Association (Ontario) and
Criminal Trial Lawyers' Association**

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2023: January 10.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and O’Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Admissibility — Hearsay — Threshold reliability — Accused charged with sexual offences against young niece — Child psychologist concluding that niece could not testify at trial because it would be too traumatizing — Trial judge admitting niece’s unsworn videotaped police statement into evidence at trial by application of principled exception to hearsay rule — Accused convicted and appealing on basis that trial judge erred in threshold reliability analysis and in admitting statement — Majority of Court of Appeal setting aside conviction and entering acquittal — Majority holding that trial judge erred in failing to tailor threshold reliability analysis to specific hearsay dangers at play and to determine whether there were procedural or substantive substitutes for contemporaneous cross-examination that could overcome dangers — Majority also holding that trial judge erred in making positive finding that niece had no motive to fabricate and using finding to support reliability of statement — Dissenting judge concluding that trial judge was alive to role of cross-examination in threshold reliability analysis and that his reasons convincingly address procedural and substantive reliability — Dissenting judge also concluding that trial judge was entitled to conclude that niece’s police statement was not deliberate untruth — Conviction restored.

APPEAL from a judgment of the Ontario Court of Appeal (Feldman, MacPherson and Thorburn JJ.A.), 2022 ONCA 305, 161 O.R. (3d) 641, 414 C.C.C. (3d) 56, [2022] O.J. No. 1841 (QL), 2022 CarswellOnt 5175 (WL), setting aside the conviction entered by Gray J., 2017 ONSC 5459, [2017] O.J. No. 4840 (QL), 2017 CarswellOnt 14644 (WL), and entering an acquittal. Appeal allowed, Rowe J. dissenting.

Michael S. Dunn, for the appellant.

Jeff Marshman and *Ingrid Grant*, for the respondent.

Maija Martin and *Nicola Langille*, for the intervener the Criminal Lawyers' Association (Ontario).

William J. van Engen and *Deborah R. Hatch*, for the intervener the Criminal Trial Lawyers' Association.

The judgment of the Court was delivered orally by

[1] THE CHIEF JUSTICE — A majority of this Court would allow the appeal, substantially for the reasons of the dissenting judge, MacPherson J.A. Justice Rowe would dismiss the appeal, substantially for the reasons of the majority of the Court of Appeal. Therefore, the appeal is allowed and the conviction is restored.

Judgment accordingly.

*Solicitor for the appellant: Ministry of the Attorney General — Crown Law Office,
Criminal, Toronto.*

Solicitors for the respondent: Grant and Marshman, Toronto.

*Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Martin
Barristers, Toronto; Yellowknife Legal Aid Clinic, Yellowknife.*

*Solicitors for the intervener the Criminal Trial Lawyers' Association: Bottos Law
Group, Edmonton; Deborah R. Hatch Criminal Law, Edmonton.*