English translation of the judgment of the Court by SOQUIJ

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| Yan c. R. | | | | | 2024 QCCA 399 |
| COURT OF APPEAL | | | | | |
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| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | QUEBEC | | |
| No.: | 200-10-004021-221 | | | | |
| (150-01-062871-208) | | | | | |
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| DATE: | April 4, 2024 | | | | |
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| CORAM: | | THE HONOURABLE | | JULIE DUTIL, J.A.  GENEVIÈVE COTNAM, J.A.  LORI RENÉE WEITZMAN, J.A. | |
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| JUN JIE YAN | | | | | |
| APPELLANT – Accused | | | | | |
| v. | | | | | |
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| HIS MAJESTY THE KING | | | | | |
| RESPONDENT – Prosecutor | | | | | |
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| JUDGMENT | | | | | |
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1. The appellant is appealing against a judgment rendered on September 15, 2022, by the Court of Québec, Criminal and Penal Division, District of Chicoutimi (the Honourable Sonia Rouleau), convicting him of possession of child pornography (s. 163.1 *Cr. C*.).
2. For the reasons of Dutil, J.A., with which Cotnam and Weitzman, JJ.A. concur, **THE COURT**:
3. **DISMISSES** the appeal.

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|  | | LORI RENÉE WEITZMAN, J.A. |
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| Mtre Nicolas Gagnon | | |
| PERRON, THÉORET | | |
| For the Appellant | | |
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| Mtre Sébastien Vallée | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | |
| For the Respondent | | |
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| Hearing date: | January 18, 2024 | |

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| REASONS OF DUTIL J.A. |
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1. On June 20, 2022, the appellant was convicted of possession of child pornography. He was in possession of a silicone doll, having the features of a female child, including three orifices of various depths in the areas where the mouth, vagina and anus would be.
2. The appellant argues that the judge erred in dismissing the application to exclude evidence. He also claims that the verdict was unreasonable as it was incompatible with the whole of the evidence.

# The facts

1. The appellant is a Chinese national who arrived in October 2019. He has a limited command of French and was assisted by a French-Mandarin interpreter at the trial in the District of Chicoutimi.
2. In the summer of 2020, the appellant was living in a multi-unit building in Saguenay. Ms.Marie-Danielle Lanfranc was his neighbour at the time. From August 7 to 22, 2020, he was away from his home, in Montreal. According to Ms. Lanfranc’s testimony,[[1]](#footnote-2) the appellant initially told her that he would leave a note on the door and allow the letter carrier to enter to leave the mail and deliveries in the apartment. Instead, Ms. Lanfranc offered to take care of it and to sign a contract to that effect. She was to retrieve his mail and parcels and leave them in his apartment as well as give the keys to friends of the appellant who would be coming to stay there on the weekend of August 8 and 9, 2020.
3. Having failed to retrieve the keys on the Monday following the visitors’ stay, on August 10, 2020, Ms. Lanfranc entered the apartment through the unlocked back door to inspect and ensure everything was in order. She went into the bedroom where she saw a doll that had the features of a female child. It was covered by a fleece blanket with the feet, shoulders and head exposed. The scene made Ms. Lanfranc uncomfortable. She returned to her apartment and called the police to give them a brief description of the doll.
4. The following day, August 11, 2020, Ms. Lanfranc returned to the appellant’s apartment accompanied by a friend Mr. Martial Tremblay.[[2]](#footnote-3) She noticed that the doll had a different hairstyle. It was still under the blanket but was wearing a camisole. Ms. Lanfranc then took a photo that was later given to the police. She also provided them with a statement, which was used to obtain a search warrant. Police officers went to the appellant’s apartment on August 12, 2020 and seized the doll, as well as clothes, wigs, artificial nails, hair elastics and a pump. The doll is approximately 123 cm tall.
5. Upon his return from Montreal on August 22, 2020, the appellant noticed the doll’s disappearance and asked Ms. Lanfranc what had happened. She explained that this type of doll is illegal in Canada. According to Ms. Lanfranc, the appellant did not appear to understand what was going on and he then showed her three dresses that are historically significant in Chinese culture.
6. The police made an appointment with the appellant to arrest him on August 24, 2020, at his apartment. When they arrived, the appellant was waiting outside the building, carrying a backpack. He cooperated very well, but communication was difficult until the interpreter joined them online at the police station. Following the interrogation, police searched the backpack in the cell block and found a Chinese-style child’s dress. At that point there was no interpreter.
7. The genetic analysis carried out on the doll did not reveal the presence of sperm. Only traces of the appellant’s DNA were found on the crotch area.
8. The trial began on March 22, 2022, with the filing of an application to exclude evidence based on insufficient grounds to obtain a search warrant. The judge dismissed the application on June 22, 2022, and the trial was held on September 13, 14 and 15, 2022.
9. The appellant acknowledged possession of the doll sent to him from China by a childhood friend Qiu Kangfei. He explained that he planned to use it as a mannequin to create a blog highlighting the historical clothing of the Chinese Han dynasty. However, he was unable to publish any photos as the doll was seized before the clothes ordered arrived in Canada. According to his testimony, when he was arrested, he put one of the dresses in his backpack to explain his project to the police officers.
10. The appellant further stated that possession of such dolls is common in China. They serve as mannequins for taking non-sexual photos, such as for fashion photos or movies.
11. The appellant was convicted on September 15, 2022, in a judgment rendered from the bench at the end of submissions by counsel, which immediately followed the end of the appellant’s testimony.

# Judgments in first instance

## Judgment on the exclusion of evidence

1. The appellant sought the exclusion of evidence pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms*. He argued that the affidavit in support of the application for a search warrant failed to include exculpatory elements known to the police officers, namely, the photo taken by Ms. Lanfranc and her statement. In addition, he criticized the police for failing to include the size of the doll in the information. As a result, there were insufficient grounds for requesting a search warrant.
2. The judge acknowledged that the evidence was silent on the size of the doll and that the authorizing judge had not seen the photo of the doll and formed his own opinion about its characteristics. However, she was of the view that the missing information was of little importance at the stage of determining reasonable grounds since the offence under s. 163.1 *Cr.C.* refers to any person under the age of 18 years. According to the judge, whether the doll is small or of similar size to a female adult or whether or not it has breasts, is of little importance if the other characteristics allow the authorizing judge to conclude that it is reasonable to believe that the object will prove the commission of the offence.
3. The judge also dismissed the appellant’s argument that the witness, Ms. Lanfranc, broke into his apartment. She dismissed the application to exclude evidence.

## Judgment on guilt

1. The judge first explained that the appellant had made several admissions: (1) he was in possession of the doll; and (2) his DNA was found on the doll’s crotch area, while specifying that no sperm was found on the doll.
2. The judge concluded that a reasonable person, viewing the doll objectively and in its context, would conclude that its dominant characteristic is the representation of the sexual organs and the anal region for sexual purposes. Indeed, the doll represents a prepubescent female child necessarily under the age of eighteen (18) years [translation] “with a disconcerting realism, in terms of both its proportions and its manufacture.” It has three orifices, namely, the mouth, the vagina and the anus. According to the judge, to any reasonable objective person, these characteristics are dominant and explicit. She concluded that these [translation] “orifices are specifically designed for a sexual purpose since their only logical and reasonable use is to insert objects or a part of the human body into them for the purpose of causing sexual stimulation, given the obvious realism.” The other items seized, namely, the accessories, dresses, barrettes, and elastic bands are consistent with a female child’s size.[[3]](#footnote-4) The doll meets the definition of child pornography.
3. The judge rejected the defence of a legitimate purpose related to art. Indeed, the appellant admitted that several items seized were not related to his artistic purpose. Moreover, even though he stated that he had no sexual intentions in possessing the doll, he saw its characteristics and could not have been unaware of the explicit purpose of this object. Despite his culture, ignorance of the law is not a defence.[[4]](#footnote-5)
4. The judge added that, notwithstanding the foregoing, she did not believe the appellant as to the artistic purpose. She first pointed out that when explaining his desire to spread knowledge of his culture, he referred to adult women. The doll, however, bore none of the characteristics of a female adult. The dresses and accessories leave no doubt as to the style’s child-like aspect. Moreover, if the purpose was exclusively artistic, why did the appellant purchase underwear, including two Tanga-style panties, to hide the doll’s private parts?[[5]](#footnote-6) Because the seized dresses covered that part of the body, he did not need to cover the doll’s genitals to take photos devoid of any sexual connotation.[[6]](#footnote-7)
5. She did not accept the appellant’s explanation that he brought a dress in his backpack at the time of his arrest to explain to the police the purpose of the doll. The judge pointed out the police found the dress when they searched the backpack, and the appellant tried twice to get it back. The judge concluded that the appellant’s version was incompatible with his spontaneous reaction at the time of seizure.[[7]](#footnote-8)
6. The judge was of the view that the explanation that he ordered a small doll to reduce shipping costs was not consistent with the fact that the estimated weight of the doll was about fifty (50) pounds. According to her, following the appellant’s rationale of saving money, [translation] “a much lighter, simple mannequin without a frame would have done the job” and would have cost less. She concluded that the appellant’s explanation was outlandish.[[8]](#footnote-9)
7. The judge also found that the appellant’s argument that Ms. Lanfranc’s testimony corroborated his explanation about the dresses and their use for his photography project, was unfounded. She was of the view that this was self-corroboration and, moreover, of little probative value since he was informed of the charges against him. As for the absence of sperm on the doll, this factor is also not likely to raise a reasonable doubt as to the sexual purpose since the doll had been washed at least once, [translation] “while it is equally possible and highly probable that he did not have the time to use it.”[[9]](#footnote-10)
8. The judge therefore concluded:

[translation]

Therefore, therefore, the Court does not believe the accused, his version raises no reasonable doubt as to the explicitly sexual purpose that he, that he had in possessing this doll since its dominant characteristic is the depiction of the sexual organs of a female child under the age of eighteen (18) years his intentions therefore, because of the evidence described, could not have been innocent.[[10]](#footnote-11)

# Issues in dispute

1. The appellant raises two issues:

(1) Did the judge err in dismissing the application to exclude evidence?

(2) Did the judge err in law by rendering an unreasonable verdict?

# Analysis

## Application to exclude evidence

1. The appellant argues that the police’s failure to include in their information a copy of the photo of the doll, taken by Ms. Lanfranc, excluded exculpatory evidence from the authorizing judge’s analysis. The photo shows a doll whose feet protrude well beyond the cardboard box on which it is placed and which the police officers estimated to be about five feet tall. Although size is not a constitutive element of the offence of possession of child pornography, if the authorizing judge had had this photo, he would have determined that it was merely possible and not probable that the doll represented a female child.
2. According to the appellant, the judge could not minimize the seriousness of omitting the doll’s dimensions. She herself noted that the doll resembled a real human being, that she had little or no breasts, and that the shape of a vulva was, in her view, visible under the doll’s underwear.[[11]](#footnote-12) However, these characteristics can apply both to the representation of a female adult and of a female child.
3. In my view, the appellant’s arguments cannot be accepted, and the judgment in first instance is well founded in this regard.
4. In *Araujo*, the Supreme Court, per LeBel J. explained what kind of affidavit must be submitted to the authorizing judge to obtain a search warrant. The statements must be full and frank but remain clear and concise:

[46] Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an ex parte authorization is full and frank disclosure of material facts. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherche du temps perdu*, as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization. Ideally, an affidavit should be not only full and frank but also clear and concise. It need not include every minute detail of the police investigation over a number of months and even of years.[[12]](#footnote-13)

[References omitted, emphasis in original]

1. Concision cannot, however, lead a police officer to omit relevant elements to achieve the desired result. All relevant facts, whether favourable or not, must be submitted to the authorizing judge. The informant police officer cannot present a truncated portrait of reality. In *Morelli*, Fish J. commented as follows:

[58] In failing to provide these details, the informant failed to respect his obligation as a police officer to make full and frank disclosure to the justice. When seeking an *ex parte* authorization such as a search warrant, a police officer — indeed, any informant — must be particularly careful not to “pick and choose” among the relevant facts in order to achieve the desired outcome. The informant’s obligation is to present *all* *material facts, favourable or not*. Concision, a laudable objective, may be achieved by omitting irrelevant or insignificant details, but not by material non-disclosure. This means that an attesting officer must avoid incomplete recitations of known facts, taking care not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed.[[13]](#footnote-14)

1. Pursuant to s. 487 *Cr. C.*, for a search warrant to be issued, the information must convince the authorizing judge that there are reasonable grounds to believe that an offence has been committed and that evidence exists in this regard in the place targeted by the warrant.[[14]](#footnote-15) It takes more than mere suspicion or intuition to reach the threshold necessary to issue the warrant.[[15]](#footnote-16) To establish reasonable grounds, the applicable standard is “reasonable probability” or “reasonable belief.”[[16]](#footnote-17) In *R. v. Sadikov*, Watt J.A. of the Ontario Court of Appeal described it as follows:

[81] The statutory standard – “reasonable grounds to believe” – does not require proof on the balance of probabilities, much less proof beyond a reasonable doubt. The statutory and constitutional standard is one of credibly-based probability: *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145, at p. 167; and *R. v. Law*, 2002 BCCA 594, 171 C.C.C. (3d) 219, at para. 7. The ITO must establish reasonable grounds to believe that an offence has been committed and that there is evidence to be found at the place of the proposed search: *Hunter*, p. 168. If the inferences of criminal conduct and recovery of evidence are reasonable on the facts disclosed in the ITO, the warrant could be issued: *R. v. Jacobson* (2006), 207 C.C.C. (3d) 270 (Ont. C.A.), at para. 22.[[17]](#footnote-18)

1. When an application to exclude evidence is made, reviewing judges must determine whether the search warrant issued meets this standard. They need not ask whether they would have issued the warrant[[18]](#footnote-19) and cannot re-open the exercise, as this is not a *de* *novo*[[19]](#footnote-20) hearing. Therefore, the appellant had the burden of proving that the reviewing judge’s decision was based on: (i) an overriding error of law or of principle; (ii) a failure to consider relevant evidence; or (iii) a palpable and overriding misapprehension of the evidence.[[20]](#footnote-21) This is a high standard of intervention.[[21]](#footnote-22)
2. In this case, I am of the view that the judge did not err in dismissing the application to exclude evidence. She stated the following:

[translation]

It is true that the evidence is silent on the size of the doll and that the authorizing judge did not see the photo of the object in question taken by the witness in order to form his own opinion on the specific nature of the object and to establish whether it corresponded to the definition of child pornography. However, this information appears to be of very little importance at the stage of determining reasonable grounds since the offence in question refers to any person under eighteen (18) years of age. Thus, whether it is small or of similar size to an adult, or whether or not it has small breasts, is of little importance if the other characteristics allow the authorizing judge to conclude that it is reasonable to believe that this object will prove the commission of the offence. He is obviously not at the stage of determining guilt beyond a reasonable doubt. This being the case, the Court believes that, even if the judge had benefited from the witness’s photo and statement, he would have seen that the doll looks like a real human being, that it has no breasts and that a vulva can be seen through its underwear, facts which are included in the affidavit.

...

Thus, the Court is not satisfied that the decision of the authorizing judge was tainted by the absence of the evidence identified by the defence, the photograph and size of the doll, since these facts would not have affected the reasonable grounds for believing that an offence had been committed.[[22]](#footnote-23)

1. I find that the information contained sufficient credible and reliable evidence to allow a search warrant to be issued. The authorizing judge was not misled since the addition of the photo would only have confirmed Ms. Lanfranc’s claims that the photo depicted a female child. This was not an exculpatory element. The appellant did not establish that the reviewing judge committed [translation] “an overriding error of law or principle, failed to consider any relevant evidence or that her decision was tainted by a palpable and overriding misapprehension of the evidence”[[23]](#footnote-24) in dismissing the application to exclude evidence.
2. This ground of appeal is therefore dismissed.

## Unreasonable verdict

1. The appellant also argues that the verdict is unreasonable in two respects. The judge allegedly first erred in finding that [translation] “the dominant characteristic of the doll is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years” (s. 163.1(1)(*a*)(ii) *Cr.C*). In addition, she allegedly erred in dismissing his defence of a legitimate purpose related to art (s. 613.1(6)(*a*) *Cr.C*).
2. The issue of whether the verdict is unreasonable is a question of law. The assessment of the credibility of witnesses, however, remains a question of fact. As the Supreme Court, per Wagner C.J., recently observed:

[8] While the unreasonableness of a verdict is a question of law, the assessment of credibility is a question of fact (*R. v. R.P*., 2012 SCC 22, [2012] 1 S.C.R. 746 at para. 10). A trial judge’s assessment of the credibility of witnesses may be rejected only where it “cannot be supported on any reasonable view of the evidence.” (*R. v. Burke*, 1996 CanLII 229 (SCC), [1996] 1 S.C.R. 474, at para. 7).[[24]](#footnote-25)

1. A court of appeal intervenes only “where the verdict cannot be supported by the evidence” or “where the verdict is vitiated by illogical or irrational reasoning.”[[25]](#footnote-26)

## Dominant characteristic

1. The appellant does not dispute that the apparent age of the doll is that of a person under 18 years of age. He made that admission at the trial. He argues, however, that the judge seems to have confused the evidence of the doll’s apparent minor age and that of its sexual character. In support of her conclusion, the judge stated that the numerous accessories seized with the doll had no other possible purpose than the sexual gratification of its owner. According to the appellant, these items establish only that the doll depicts a female child, which he does not dispute.
2. For the appellant, the mere possibility of having sex with an object does not mean, as the judge seems to suggest, that it serves that purpose. The context must be considered. However, it is up to the respondent to prove beyond a reasonable doubt the dominant characteristic of the doll. To this end, the presence of functional genitals is an element of proof of the doll’s intended purpose, but the analysis cannot end with this simple observation.
3. Child pornography is described as follows in s. 163.1 *Cr.C*:

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| --- | --- |
| **163.1** **(1)** In this section, child pornography means  **(a)** a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,  **(i)** that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or  **(ii)** the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;  **(b)** any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;  **(c)** any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or  **(d)** any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act. | **163.1 (1)** Au présent article, pornographie juvénile s’entend, selon le cas:  **a)** de toute représentation photographique, filmée, vidéo ou autre, réalisée ou non par des moyens mécaniques ou électroniques:  **(i)** soit où figure une personne âgée de moins de dix-huit ans ou présentée comme telle et se livrant ou présentée comme se livrant à une activité sexuelle explicite,  **(ii)** soit dont la caractéristique dominante est la représentation, dans un but sexuel, d’organes sexuels ou de la région anale d’une personne âgée de moins de dix-huit ans;  **b)** de tout écrit, de toute représentation ou de tout enregistrement sonore qui préconise ou conseille une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi;  **c)** de tout écrit dont la caractéristique dominante est la description, dans un but sexuel, d’une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi;  **d)** de tout enregistrement sonore dont la caractéristique dominante est la description, la présentation ou la simulation, dans un but sexuel, d’une activité sexuelle avec une personne âgée de moins de dix-huit ans qui constituerait une infraction à la présente loi. |

1. *R. v. Sharpe*,[[26]](#footnote-27) handed down by the Supreme Court in 2002, is the leading case in the matter of child pornography. McLachlin C.J., for the majority, explains Parliament’s main purpose upon enacting s. 163.1 *Cr. C.*:

[34] Parliament’s main purpose in passing the child pornography law was to prevent harm to children by banning the production, distribution and possession of child pornography, and by sending a message to Canadians “that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners”: *House of Commons Debates*, 3rd Sess., 34th Parl., vol. XVI, June 3, 1993, at p. 20328. However, Parliament did not cast its net over all material that might conceivably pose any risk to children or produce any negative attitudinal changes. Mindful of the importance of freedom of expression in our society and the dangers of vague, overbroad legislation in the criminal sphere, Parliament set its targets principally on clear forms of “child pornography”: depictions of explicit sex with children, depictions of sexual organs and anal areas of children and material advocating sexual crimes with children. Through qualifications and defences Parliament indicated that it did not seek to catch all material that might harm children, but only material that poses a reasoned risk of harm to children and, even then, only where the countervailing right of free expression or the public good does not outweigh that risk of harm.[[27]](#footnote-28)

1. McLachlin C.J. also states that what may be included in pornographic depiction within the meaning of s. 163.1 *Cr.C* could include drawings, paintings, prints, computer graphics, and sculptures:

[35] Section 163.1(1) defines child pornography in terms of two categories: (1) visual representations (s. 163.1(1)(a)); and (2) written and visual advocacy and counselling material (s. 163.1(1)(b)). Visual representations include “a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means”. This is broad enough to include drawings, paintings, prints, computer graphics, and sculpture: in short, any non-textual representation that can be perceived visually.

1. Furthermore, the expression “dominant characteristic”, found in s. 163.1(1)(*a*)(ii) *Cr. C.*, should be analyzed objectively, but in context. McLachlin C.J. states that “[t]he question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its ‘dominant characteristic’ as the depiction of the child’s sexual organ or anal region.” In addition, this depiction must be made “for a sexual purpose.”[[28]](#footnote-29)
2. McLachlin C.J. goes on to state that family photos of naked children are generally not child pornography because the depiction of sexual organs or the anal region is not done for a sexual purpose. However, a reasonable objective observer might consider that the dominant characteristic of this same photo is sexual if it is placed in an album of sexual photos and a sexual caption is added.[[29]](#footnote-30)
3. In *LSJPA – 1811*, the Court explains that the term “sexual organs” must be given a strict interpretation, as stated by the Supreme Court in *Sharpe*, [translation] “to avoid criminalizing the production, possession or distribution of harmless images of nudity such as the photograph of a child taking a bath.”[[30]](#footnote-31) The Court added that Parliament added exceptions when the act has a legitimate purpose to be consistent with the objective of protecting children.[[31]](#footnote-32)
4. This is a unique case and there is not much case law on this issue.[[32]](#footnote-33) The vast majority of child pornography charges under s.163.1 *Cr. C.* relate to graphic representations such as photographs, videos, films or writings. In this instance, it is a silicone doll, and therefore an object, which at first glance does not have as its dominant characteristic the depiction, for sexual purposes, of sexual organs or the anal region of a person under 18 years of age. This inanimate doll looks like a mannequin when it is dressed. It must be undressed to see the anus and vagina. Only the mouth orifice does not have a dominant characteristic of being for sexual purposes.
5. As discussed above, there is not much case law on this issue. In 2020, Court of Québec Judge Asselin was seized of a matter with many similarities to this case.[[33]](#footnote-34) Citing Superior Court Justice David,[[34]](#footnote-35) he first concluded that s. 163.1(1) *Cr.C* clearly includes objects. Judge Asselin then considered the dominant characteristic of the doll. He comments as follows on the distinguishing feature of the doll and on the context:

[translation]

[63] As suggested by Judge Richard Côté, the analysis of the dominant characteristic must be based on the content of the representation, taking into account its context. This leads us to consider the characteristics of the object itself as well as its context. In other words, what is the distinguishing feature of the doll, and what characterizes it?

[64] In the present case, the doll represents a female person. It has three orifices, i.e., a mouth, a vagina, and an anus, in which it is possible to insert an object or a male sex organ. With respect to the context surrounding the object, the addition of accessories – in this case underwear, a pump to retrieve bodily fluids, and a heating rod to replicate the warmth of a human body – emphasizes the sexual organs and anal region of the doll.[[35]](#footnote-36)

1. The difference is that no heating rod was seized in this case. The other accessories, that is, the underwear and the pump, were present, however.
2. In that case, Judge Asselin stressed the difference between the dominant characteristic of an object and its purpose. It is important to distinguish between these elements because even though the obvious purpose of the doll is to sexually stimulate certain people, the fact remains that the Crown must establish that the dominant characteristic of this object is the depiction of sexual organs.[[36]](#footnote-37) He concludes as follows on the dominant characteristic of the doll:

[translation]

[70] Although the parties did not really address the issue of the dominant characteristic of the object in their arguments, the Court is of the view that the Crown has proved beyond a reasonable doubt that the dominant characteristic of the doll is the depiction of a sexual organ or the anal region. The sex doll seized at the accused’s home must be assessed in its overall context and with reference to the objective of protecting children.

[71] It is important to distinguish *Ramlogan* from the case at bar. Although children were involved, three of the movies seized in that case featured clothed children who were not engaging in any sexual acts, and the videos showed no explicit images of the sexual organs or the anal region.

[72] The sex doll seized during the search on June 8, 2017, is a 100 cm object whose dominant characteristic includes three orifices – a mouth, a vagina, and an anus – which are functional and can receive an object or a body part, such as a penis. The doll’s only purpose is the sexual stimulation of a person. It is clear that a visual inspection of the doll, combined with the presence of particular accessories would lead a reasonable person to consider the doll’s dominant characteristic to be the depiction, for a sexual purpose, of a sexual organ or the anal region.[[37]](#footnote-38)

1. Unlike a photo or film, the doll’s sex organs are not highlighted as they are orifices that represent only a small part of the body and can easily be hidden by clothing. As for the mouth, considered in isolation, I doubt that it can be described as a sexual organ. However, I agree with Asselin J. that we must consider the functional aspect of the sexual organs or anal region of this doll.[[38]](#footnote-39) The doll is designed to reproduce a female child’s body and allow its user to obtain sexual satisfaction.
2. I therefore conclude that the judge did not err in determining that the dominant characteristic of the doll is a depiction of sexual organs and the anal region of a child for sexual purposes.[[39]](#footnote-40)

## Legitimate purpose

1. The appellant contends that the judge rendered an unreasonable verdict by rejecting his defence of a legitimate purpose related to art. He criticizes the judge’s assessment of his credibility concerning his planned photo project with the doll. She also allegedly erred as to the probative value of certain uncontested facts.
2. There is a low evidentiary threshold for a form of expression to be considered art by the court. In *Sharpe*, the Supreme Court analyzed for the first time the defence of “artistic merit” as follows:

[63] ... I conclude that “artistic merit” should be interpreted as including any expression that may reasonably be viewed as art. Any objectively established artistic value, however small, suffices to support the defence. Simply put, artists, so long as they are producing art, should not fear prosecution under s. 163.1(4).

...

[67] The third issue is how the artistic merit defence functions procedurally. The test, as mentioned, is objective. The wording of the section suggests that it functions in the same manner as other defences such as self defence, provocation or necessity. The accused raises the defence by pointing to facts capable of supporting it (generally something more than a bare assertion that the creator subjectively intended to create art), at which point the Crown must disprove the defence beyond a reasonable doubt: see *Langer*, *supra*.[[40]](#footnote-41)

1. “Artistic merit” can therefore be derived from any form of expression that can be considered art and this merit can be minimal. There is no doubt that photography can meet this definition.
2. Following *Sharpe*, Parliament amended s. 163.1(6) *Cr. C.*, which provides a defence against the offence of child pornography and now reads as follows:

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| **(6)** No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence  **(a)** has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and  **(b)** does not pose an undue risk of harm to persons under the age of eighteen years. | **(6)** Nul ne peut être déclaré coupable d’une infraction au présent article si les actes qui constitueraient l’infraction:  **a)** ont un but légitime lié à l’administration de la justice, à la science, à la médecine, à l’éducation ou aux arts;  **b)** ne posent pas de risque indu pour les personnes âgées de moins de dix-huit ans. |

1. The former wording of this section referred to the notion of “artistic merit,” while the new provision refers to a “legitimate purpose related to art.” This defence represents a balancing of the protection of children and the freedom of expression. As Sopinka J. noted in *R. v. Butler*, “Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression”:

The portrayal of sex must then be viewed in context to determine whether that is the dominant theme of the work as a whole. Put another way, is undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary, or other similar purpose? Since the threshold determination must be made on the basis of community standards, that is, whether the sexually explicit aspect is undue, its impact when considered in context must be determined on the same basis. The court must determine whether the sexually explicit material when viewed in the context of the whole work would be tolerated by the community as a whole. Artistic expression rests at the heart of freedom of expression values and any doubt in this regard must be resolved in favour of freedom of expression.[[41]](#footnote-42)

1. Following this judgment, the Supreme Court clarified that Sopinka J.’s admonition simply means that this defence must be construed broadly.[[42]](#footnote-43)
2. Finally, it emerges from *Sharpe* that certain factors may be examined to establish what can reasonably be regarded as art. These factors are: (i) the subjective intention of the creator, which will be relevant, although unlikely to be conclusive; (ii) the form and content of the work; (iii) its connections with artistic conventions, traditions or style; (iv) the opinion of experts; and (v) the mode of production, display and/or distribution.[[43]](#footnote-44) However, it is not appropriate to focus on compliance of the work with community standards, as this would deprive the defence of its substance.[[44]](#footnote-45)
3. In this case, the work is not the doll. It was intended to serve only as an accessory to the creation of the work. This raises the question of whether the defence of legitimate purpose can be invoked. In my view, it can be. Indeed, the appellant is charged with the offence of possession of child pornography (s. 613(4)(*a*) *Cr. C*.). However, the defence, provided in s. 613(6)(*a*) *Cr. C.*, applies where the act that constitutes the offence, in this case possession, has a legitimate purpose related to art. Because of the broad interpretation to be given to this defence, it is possible to consider an art project that will be created (but does not yet exist) using an object that constitutes child pornography.
4. In *Sharpe*, the Supreme Court explains the procedure to be followed when a defence based on a legitimate purpose related to art is raised:

[66] The third issue is how the artistic merit defence functions procedurally. The test, as mentioned, is objective. The wording of the section suggests that it functions in the same manner as other defences such as self defence, provocation or necessity. The accused raises the defence by pointing to facts capable of supporting it (generally something more than a bare assertion that the creator subjectively intended to create art), at which point the Crown must disprove the defence beyond a reasonable doubt: see *Langer*, *supra.*[[45]](#footnote-46)

1. When the air of reality of the defence of a legitimate purpose related to art is established, which the respondent acknowledges in this case, it is therefore up to the respondent to refute it beyond a reasonable doubt.
2. According to the appellant, the judge erred in her assessment of his credibility because she did not consider certain uncontested contextual elements corroborating his testimony about his artistic project and likely to raise a reasonable doubt regarding his defence. These elements are as follows:

* On the day of his arrest, he purposely brought a sample historical dress to the police station;
* No trace of sperm was found either on or in the doll, even though he was in possession of the doll for at least one month;
* On his return from Montreal on August 22, 2020, he had in his possession historical Chinese dresses, which were not in the apartment during the search on August 12, 2020;
* He cooperated fully with the police process and was described as appearing to be lost when he was arrested.

1. With respect to the fact that he brought a dress to the police station to explain his project, the appellant argues that the judge undermined the probative value of this evidence in taking into account the fact that he did not take it out of the backpack before the police officer discovered it when searching the backpack. The appellant then twice tried to put the dress back in the backpack.[[46]](#footnote-47) The interpreter was not present when this incident occurred even though there was an obvious language barrier. It is clear, however, that the appellant brought the dress on his own initiative. The respondent also acknowledges that the appellant appeared to be lost when he was arrested at the station.
2. This is a factual determination by the judge, and she was best placed to assess the whole of the evidence concerning the search of the backpack. She did not believe the appellant when he claimed to have brought the dress to explain his artistic project because he did not want to show it to the police officer who found it in the backpack. The appellant has not established any reviewable error in this regard.
3. The appellant also criticizes the judge for concluding that the absence of sperm on the doll was not likely to raise a reasonable doubt since he had admitted washing it and it was even probable that he did not have time to use it for sexual purposes before the seizure.[[47]](#footnote-48) The appellant argues that this is a misapprehension of evidence, since he admitted washing the doll with shower gel when it arrived simply to remove oily substances from the manufacturer. Nor could the judge speculate and state that there was no trace of sperm on the doll because he did not have time to use it. This statement is not based on any evidence.
4. It is true that the judge could not speculate on the appellant’s future intentions regarding the use of the doll for sexual purposes. This error was not decisive, however, since the respondent did not have to establish use of the doll, only possession without legitimate purpose. The absence of sperm on the doll has no impact on the judge’s finding.
5. The appellant also argues that the judge erred in rejecting his testimony about the fact that, on his return from Montreal, he showed the dresses to Ms. Lanfranc, and that this corroborates his explanation of their use in his artistic project. The judge considered this to be preconstituted evidence of low probative value because the appellant had been informed of the charge against him. He claims, however, that there is nothing in the evidence to establish that he knew of the nature of the charges prior to his arrest, which was subsequent to the meeting with Ms. Lanfranc.
6. Indeed, the evidence does not establish that the appellant was aware of the charge against him when he returned from Montreal. This error by the judge was not decisive, however, because when he showed her the dresses Ms. Lanfranc told him that such possession is illegal in Canada. He invited her into his apartment to convince her of the legitimate purpose of possession of the doll by showing her the historical dresses.
7. Finally, the appellant added that the judge erred in stating that if he wanted to create a work, he could have settled for a much lighter mannequin without a frame. The appellant argues that the judge could not decide what was necessary for his artistic project.
8. The judge’s comment is inappropriate. She could not determine what was necessary to create a photographic work. Once again, however, this error was not decisive for the judge’s finding on the appellant’s credibility.
9. Indeed, despite some of the criticism that can be aimed at the judge as regards to her reasons, she relied on several other pieces of evidence to conclude that she did not believe the appellant. To fully understand the judge’s reasons for rejecting the defence of a legitimate purpose related to art, it is helpful to reproduce the excerpt from the judgment in which she addresses the issue:

[translation]

Here are the reasons the Court does not believe him, first, he speaks of adult women when he refers to his desire to make, to share his culture. By, by publishing the photos of the doll wearing dresses corresponding to the Yan dynasty, Han, excuse me, not only does this doll bear none of characteristics of an adult woman, but the dresses and accessories leave no doubt as to their style’s child-like aspect. Moreover, if the accused’s purpose was solely artistic, why purchase underwear, in particular the two (2) Taïga panties to hide the doll’s private parts? If, if it is true that he takes photos without sexual connotations, why does he need to cover the doll’s genitals when the dresses seized completely cover this part of the body because of their length and design. It is also contradictory to state that he brought a dress to the station to try to explain to the police his purpose in possessing the doll, when he never took it out of the bag from the time of his arrest until his incarceration. Rather, it was the police officer who discovered it when searching the bag, and at that moment in fact the accused tried two (2) times to recover it to put it back in his backpack, the Court easily finds that his version is inconsistent with his spontaneous reaction at the time of the seizure. I have already said it, but on cross-examination, he admitted that several of the items seized, including, including certain dresses, Mickey Mouse hair decorations, with the artistic purpose he claims he had…

...

And despite the insistence of counsel for the, for the prosecution to discover the reason or the, the origin, the accused remained vague. This is why the Court also notes that the accused evaded several questions, provided absurd explanations, and contradicted himself, to name only those examples, he refused to answer the question when he was asked whether the doll represents a child, and after a long hesitation he stated that the women of his country, and from Japan more specifically, are small in stature, as a way of justifying the possession of the doll. His explanations are completely inconsistent, however, with the anatomy of the, of the doll, which does not have breasts, which does not have breasts, a hairless vulva and small, small lips and that is clearly the anatomy of a child and not an adult. He also states that he had this doll to take photos, but he did not do so, on the pretext that he still had not received the Han dynasty dresses, yet, is everything all right, Madam?

...

Yet, when he was arrested, he brought one to show the police officers to explain his purpose in possessing the doll. Finally, questioned about the doll, the smallest doll that has the appearance of a female adult, although he admitted that it belongs to him, he, he was unable to determine where it came from, first saying that it was in the box and, at another moment, saying that he had found it while putting things away when he moved. He also maintained that he does not intend to use it to take photos and we will therefore never know why it was in his possession. He also claims that this small doll, I’ll start over, Madam, I made a mistake, I’ll start over, I’ll start over, he also claims that the doll in question, the doll that is the subject of the trial today is small to reduce shipping costs, which is, which is inconsistent with its weight, which the police officer estimates to be about fifty pounds (50 lbs) which also...

...

Which alone generates significant costs. If, if we accept his rationale, his rationale of saving money, a much lighter, simple mannequin without a frame would have done the job and would have cost much less, this, this explanation is therefore absolutely outlandish. Finally, finally, the defence also argues that the neighbour witness corroborates him on the dresses and their use. Not only is this self-corroboration, it has low probative value because he was told of the charges against him, and the lack of sperm is also not likely to raise a reasonable doubt as to the sexual purpose, since the doll was washed at least once, according to the accused’s admissions, while it is equally possible and highly probable that he did not have the time to use it. Therefore, therefore the Court does not believe the accused, his version raises no reasonable doubt as to the explicitly sexual purpose that he, that he had in possessing this doll, since its dominant characteristic is the depiction of the sexual organs of a female child under the age of eighteen (18) years, his intentions therefore, because of the evidence described, could not have been innocent.[[48]](#footnote-49)

1. It is apparent from these passages from the judgment in first instance that the judge relied on several elements to conclude that she did not believe the appellant:

* The appellant stated that he wanted to share his culture, referring to adult women, but the doll and several accessories are childish in their style;
* His version was incompatible with the presence of two Tanga-style panties;
* His version was incompatible with Mickey Mouse hair decorations;
* The appellant appeared reluctant to admit that the doll depicted a female child;
* The appellant contradicted himself on the origin of the small doll (it was in the box with the other doll, or he found it while putting things aways when he moved);
* The appellant claimed that the doll was small so as to reduce shipping costs, which is incompatible with the delivery of a doll weighing 50 pounds;
* There was nothing materialized on the artistic project, which was vague.

1. As the Supreme Court points out in *R. v. Brunelle*, the trial judge’s assessment of the credibility of witnesses may be rejected only where it “cannot be supported on any reasonable view of the evidence.”[[49]](#footnote-50) In the case at bar, the judge’s conclusion on the appellant’s credibility is based on ample evidence. The verdict cannot be qualified as unreasonable. The judge made no reviewable error in dismissing the defence of a legitimate purpose related to art.
2. For these reasons, I propose to dismiss the appeal.

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| JULIE DUTIL, J.A. |

1. During her testimony, Ms. Lanfranc explained her memory gaps by the fact that she has had a stroke and two TIAs. [↑](#footnote-ref-2)
2. Mr. Tremblay died before the trial was held. [↑](#footnote-ref-3)
3. *R. c. Yan*, C.Q. Chicoutimi, No. 150-01-062871-208, September 15, 2022, at 13−14, Rouleau, J.C.Q., [Judgment on conviction]. [↑](#footnote-ref-4)
4. *Ibid.* at 15. [↑](#footnote-ref-5)
5. *Ibid.* [↑](#footnote-ref-6)
6. *Ibid.* at 16. [↑](#footnote-ref-7)
7. *Ibid.* [↑](#footnote-ref-8)
8. *Ibid.* 19. [↑](#footnote-ref-9)
9. *Ibid.* [↑](#footnote-ref-10)
10. *Ibid.* at 19−20. [↑](#footnote-ref-11)
11. *R. c. Yan*, C.Q. Chicoutimi, No. 150-01-062871-208, June 20, 2022, at 7, Rouleau, J.C.Q. [Judgment on the application to exclude evidence]. [↑](#footnote-ref-12)
12. *R. v. Araujo*, 2000 SCC 65 at para. 46. [↑](#footnote-ref-13)
13. *R. v. Morelli*, 2010 SCC 8 at para. 58. [↑](#footnote-ref-14)
14. *Latendresse* *c. R.*, 2022 QCCA 1162 at para. 43; *R. c. Audigé*, 2020 QCCA 1572 at para. 16. [↑](#footnote-ref-15)
15. *Cossette c.* *R.*, 2011 QCCA 2368 at para. 52. [↑](#footnote-ref-16)
16. *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166. [↑](#footnote-ref-17)
17. *R. v. Sadikov*, 2014 ONCA 72 at para. 81. [↑](#footnote-ref-18)
18. *R.* v. *Morelli*, *supra*, note 13 at para. 40; *R.* v. *Campbell*, 2011 SCC 32 at para. 14. [↑](#footnote-ref-19)
19. *R.* v. *Bridgen*, 2022 BCCA 429 at para. 3; *R.* v. *Spackman*, 2012 ONCA 905 at para. 219; *R.* v. *Nero*, 2016 ONCA 160 at para. 69, applications for leave to appeal to the Supreme Court dismissed, July 14, 2016, Nos. 36984 and 36985; *R.* *c*. *Audigé*, *supra*, note 14 at para. 14; *O’Reilly c*. *R.*, 2017 QCCA 1283 at para. 52, application for leave to appeal to the Supreme Court dismissed, 37737 (June 7, 2018). [↑](#footnote-ref-20)
20. *R.* *c*. *Audigé*, *supra*, note 14 at para. 14; *O’Reilly* *c*. *R.*, *supra*, note 19 at para. 52. [↑](#footnote-ref-21)
21. *R.* v. *Jones*, 2023 ONCA 106 at para. 11; *Simon* *c*. *R.*, 2022 QCCA 634 at para. 34, application for leave to appeal to the Supreme Court dismissed, 40294 (March 30, 2023); *R.* v. *Bridgen*, *supra*, note 19 at para. 7; *R.* v. *Spackman*, 2012 ONCA 905 at para. 220. [↑](#footnote-ref-22)
22. Judgment on the application to exclude evidence, at 7−8. [↑](#footnote-ref-23)
23. *R. c. Audigé*, *supra*, note 14 at para. 14. [↑](#footnote-ref-24)
24. *R. v. Brunelle,* 2022 SCC 5 at para. 8. [↑](#footnote-ref-25)
25. *Ibid*. at para. 7. [↑](#footnote-ref-26)
26. *R. v. Sharpe*, 2001 SCC 2. [↑](#footnote-ref-27)
27. *Ibid*. at para. 34. [↑](#footnote-ref-28)
28. *Ibid*. at para. 50. [↑](#footnote-ref-29)
29. *Ibid.* at para. 51. [↑](#footnote-ref-30)
30. *LSJPA — 1811*, 2018 QCCA 597 at para. 15. [↑](#footnote-ref-31)
31. *Ibid*. at para. 16. [↑](#footnote-ref-32)
32. See: *R. v Morellato*, [2023] O.J. No. 4428 (C.J. Ont.); *R. c. Gagnon*, 2020 QCCQ 2170; *R. v. Harrison*, [2019] N.J. No. 406 (NL PC); *R. c. Renaud*, [2013] J.Q. No. 10432 (C.S.). [↑](#footnote-ref-33)
33. *R. v. Gagnon*, *supra*, note 32. [↑](#footnote-ref-34)
34. *R. c. Renaud*, *supra*, note 32. [↑](#footnote-ref-35)
35. *R. c. Gagnon*, *supra*, note 32 at paras. 63−64. [↑](#footnote-ref-36)
36. *Ibid. at* para. 69. [↑](#footnote-ref-37)
37. *Ibid*. at paras. 70−72. [↑](#footnote-ref-38)
38. *Ibid*. at paras. 73 and 76. [↑](#footnote-ref-39)
39. Judgment on guilt at 14. [↑](#footnote-ref-40)
40. *R. v. Sharpe*, *supra* note 26 at paras. 63 and 67. [↑](#footnote-ref-41)
41. *R. v. Butler*, [1992] 1 S.C.R. 452 at 486. [↑](#footnote-ref-42)
42. *R. v. Sharpe*, *supra*, note 26 at para. 61. [↑](#footnote-ref-43)
43. *Ibid.* at para. 64. [↑](#footnote-ref-44)
44. *Ibid.* at para. 65. [↑](#footnote-ref-45)
45. *Ibid.* at para. 66. [↑](#footnote-ref-46)
46. Judgment on guilt at p. 16. [↑](#footnote-ref-47)
47. *Ibid.* at p. 19. [↑](#footnote-ref-48)
48. *Ibid.* at 15−20. [↑](#footnote-ref-49)
49. *R. v. Brunelle*, *supra* note 24 at paras. 7−9. [↑](#footnote-ref-50)