NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. K.J.C.*, 2021 NSCA 5

Date: 20210108
Docket: CAC 491459
Registry: Halifax

Between:

K.J.C.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Pursuant to Sections 486.4(1) and 486.5(1) of the *Criminal Code*

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	November 23, 2020, in Halifax, Nova Scotia
Subject:	Criminal law – sexual assault – credibility – sentence
Summary:	KJC was convicted of an historical sexual assault against his grandson's girlfriend, LON. LON testified to two incidents. KJC denied them. The trial judge accepted LON's evidence and rejected KJC's denials finding he had had the opportunity to commit the assaults as described. She reviewed the evidence as a whole and found no reasonable doubt. KJC appealed his conviction and sentence, arguing he should have received a conditional discharge.
Issues:	KJC submitted the trial judge made mistakes of fact and errors of law. He challenged certain factual findings saying the trial judge misapprehended the evidence. He said the trial judge failed to correctly apply *W.(D.)*, [1991] 1 S.C.R. 742; erred in finding the physical contact with LON was sexual in nature;

and erred in rejecting a conditional discharge as an appropriate sentence for KJC.

Result: The appeal against conviction was dismissed. Leave to appeal sentence was granted and the appeal against sentence was dismissed.

The trial judge did not misapprehend any of the evidence.

The trial judge correctly applied *W.(D.)*, did not treat the evidence of LON and KJC as a credibility contest, and properly considered all of the evidence in assessing whether the allegations had been proven beyond a reasonable doubt.

The trial judge took account of the appropriate factors and circumstances in determining the physical contact by KJC was sexual in nature.

The trial judge properly identified and applied the two-part test for a conditional discharge and was satisfied it was contrary to the public interest to grant one. She concluded the sentence sought by the Crown, a suspended sentence with probation, more appropriately addressed the seriousness of the offences and the public interest in respecting women's dignity and right to sexual integrity.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. K.J.C.*, 2021 NSCA 5

Date: 20210108
Docket: CAC 491459
Registry: Halifax

Between:

K.J.C.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Pursuant to Sections 486.4(1) and 486.5(1) of the *Criminal Code*

Judges:	Derrick, Scanlan, Beaton, JJ.A.
Appeal Heard:	November 23, 2020, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Derrick, J.A.; Scanlan and Beaton, JJ.A., concurring
Counsel:	Darlene MacRury, for the appellant Glenn Hubbard, for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Order restricting publication – victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Reasons for judgment:

Introduction

[1] On May 22, 2019, Justice Robin Gogan convicted KJC of an historical sexual assault, count 6 in a six-count Indictment. She acquitted him of the other five counts relating to two other complainants.

[2] The conviction was for two incidents of sexual touching involving his grandson's girlfriend, LON.

[3] KJC has claimed the trial judge made errors: by misapprehending evidence; by failing to correctly assess credibility and reasonable doubt; and by finding that his physical contact with LON was of a sexual nature. He has also appealed his sentence, saying he should have been granted a conditional discharge instead of a suspended sentence with probation.

[4] As I will explain, I find the trial judge did not commit the errors complained of by KJC. Her factual findings are supported by the record. She correctly applied the law in assessing credibility. She identified and applied the correct standard in her determination that KJC's physical contact with LON was sexual in nature. Her decision to impose a suspended sentence rather than a conditional discharge is entitled to deference. I would dismiss the appeal against conviction, grant leave to appeal sentence, and dismiss that appeal as well.

The Allegations by LON – Count 6

[5] KJC was charged with sexual assault on LON between January 1 and December 31, 2011. At the time he was 73 years old. LON was 20.

[6] **The first incident** – LON testified that in April or May 2011 KJC reached forward, and without saying anything, grabbed her left breast when they were standing outside a storage barn on the property where she lived with KJC's grandson, DJM. She had just passed KJC a tool from the barn.

[7] LON agreed on cross-examination that what happened could be described as touching. She did not consent to being touched. Although she felt disgusted and embarrassed, she chose not to tell DJM about the incident because it involved his grandfather.

[8] **The second incident** – A couple of months after the touching incident, DJM and LON needed to borrow KJC's van. LON testified that KJC picked her up from her mother's and they drove back to his house. On cross-examination LON said she felt awkward about being alone with KJC because of the earlier incident.

[9] LON testified that all seemed normal during the five-minute drive. At KJC's house they went inside for a reason LON did not recall. Once inside, KJC asked her for a hug. She agreed although she thought the request was "weird".

[10] LON described the hug: "I gave him a hug and he just, he had his arms around me and he was like pressing into me and he was kissing my neck". She had her arms around his shoulders. His arms were around her waist. She testified that while he was holding her waist and pushing into her, he said, "wouldn't [DJM] be upset if he knew we were doing this".

[11] LON said the interaction made her feel "gross". She "laughed it off and downplayed it a bit". She said she had the keys to the van and left right away. She told DJM somewhat later what had happened.

[12] LON made it clear in cross-examination she did not consent to KJC kissing and pushing into her.

[13] KJC testified in his own defence and denied all the allegations against him. He said at the material time he was the primary care provider for his wife who was very significantly disabled by Alzheimer's. He cared for all her needs at home with some homecare assistance three times a day. During these brief homecare visits of 15 minutes or so, KJC would go out to get a coffee or run errands.

[14] On cross-examination, KJC first said homecare only came once a week and stayed just long enough for him to get groceries. He then said they came every day, enabling him to get out of the house for "maybe ten minutes" to go to Tim Hortons. He also said it was "Maybe a half hour" during which time he did errands.

[15] In his testimony, KJC said: it was DJM who used to borrow his "truck"; he did not store any tools at DJM's; he never went to pick up a tool from DJM's; DJM borrowed his tools and when KJC wanted them back, he had DJM fetch them; he would not have loaned his van to LON because she did not have a driver's license; he never saw LON drive anything – DJM always did the driving; he never left his

wife other than to get a coffee or do errands; he did all the cooking and fed his wife at mealtimes, three times a day as these services were not performed by homecare.

[16] KJC made a statement to police on March 14, 2018. It was admitted into evidence by consent. In it KJC acknowledged some physical contact with LON. He denied it was sexual in nature.

[17] KJC admitted to police he might have given LON a hug, "Just my arms around her and just squeeze her. That's all". When asked where he would put his hands, KJC said, "Usually on her, around her back". He said he did not think he would have put them any lower. Shortly after saying this, KJC told the interviewing officer: "I mean I, I, I might have touched her rear end, I don't know… She didn't say anything at the time".

[18] The interviewing officer gave KJC a summary of LON's statement describing the kissing and hugging incident and asked him if he recalled making the comment LON said he had made about DJM. Although KJC said he did not recall that, he added, "But, it's not unlike me really so".

[19] Near the end of KJC's police statement he maintained he had not touched LON's breast. He said about kissing her on the neck that he did not "…recall ever doin it ah, anywhere other than her place… she did something (inaudible) and I just give her, give her a hug, you know, and I'm gonna give her a kiss on the cheek. I don't know". A little later in his statement, KJC said: "…and as far as [LON], well I gave her a hug. She's not related to me in any way. And I mighta kissed her on the cheek. I don't know".

The Trial Judge's Reasons

[20] The trial judge reviewed LON's testimony, including her acknowledgement that the breast-touching incident had happened in a split second. She noted LON confirmed on cross-examination her feeling that the kiss and hug by KJC was inappropriate as soon as it happened. She referenced KJC's responses in his police statement, his denials, and his partial admissions to some physical contact.

[21] The trial judge referred to the specifics of KJC's denials. She noted he claimed he did not have the opportunity to sexually assault LON as he was almost exclusively at home caring for his wife.

[22] Credibility was a central issue in the trial. The trial judge indicated her intention "to follow closely along with the analysis directed by *W.(D.)*". She noted that she was free to accept some, all, or none of KJC's evidence and that she had to "consider his evidence in the context of all of the evidence offered". She then said the following:

> …As already noted of all of the witnesses he was best positioned to recall the timing and order of certain events. He was able to offer some documentary support for his recollection. In those incidents where his evidence is consistent with other evidence or is about peripheral matters and is uncontradicted I do accept it. Beyond that, I am left with some doubt about the plausibility and therefore the credibility of his evidence, and I will refer to some examples.

[23] At this point in her reasons, the trial judge was assessing the evidence relating to the allegations by the other two complainants against KJC. And although she found she was "left with some doubts about [KJC's] credibility" as a result of her assessment of the evidence, and concluded she was "not able to accept his denial of the allegations made against him", she found "some basis in his evidence to doubt the evidence" of the other two complainants. She concluded she was left with a reasonable doubt about their allegations. On this basis, the trial judge acquitted KJC of the other five charges in the Indictment.

[24] The trial judge went on to consider LON's evidence. She believed LON and found that KJC would have had the opportunity to commit the sexual assaults as they each involved a very brief encounter. KJC would not have been gone from the house and his incapacitated wife for very long, "only about ten minutes". The trial judge noted that KJC admitted physical contact, including possibly kissing LON and making a remark about DJM.

[25] The trial judge accepted the evidence of LON that KJC came to her residence and grabbed or touched her breast as he collected a tool from the storage barn. She found this was intentional touching without consent that was sexual in nature.

[26] She also accepted that KJC asked LON to hug her and she agreed. She found KJC went "beyond her consent", pressed into her, kissed her on her neck and made comments of a nature that suggested DJM would be jealous: "I have no doubt from all of the circumstances of the second incident that this contact was also intended to be sexual in nature".

[27] Having assessed "the totality of the evidence presented", the trial judge was "unable to say that I am sure that the allegations made by [the other two complainants] are true and accurate". She properly resolved these doubts in KJC's favour. She was left with no reasonable doubt in relation to the allegations by LON and convicted KJC accordingly.

The Issues

[28] KJC has alleged the trial judge made mistakes of fact and errors of law. He says:

1) The trial judge erred by finding as a fact that:
   (a) LON had a good recollection of the allegations;
   (b) KJC had the opportunity to commit the offences;
   (c) KJC's recollection of LON not having a driver's license, as he stated in his evidence, was assisted by hearing her say this in her direct testimony.
2) The trial judge erred by failing to correctly apply *W.(D.)*, [1991] 1 S.C.R. 742.
3) The trial judge erred by convicting KJC without properly determining his motivation for touching LON.
4) The trial judge erred in her application of the test for a conditional discharge when rejecting it as a sentence for KJC.

[29] I will deal first with the issues relating to KJC's conviction following which I will address the appeal against sentence.

Standard of Review

Issue #1 – Misapprehension of Evidence

[30] As this Court held in *R. v. Dim*, 2017 NSCA 80, at para. 62:

> [62] A misapprehension of evidence may refer to a mistake as to the substance of evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence. A misapprehension of the evidence must have played an essential part in the reasoning process that led to conviction. It cannot be peripheral. Nor can it be confused with a different interpretation of the evidence than that adopted by the trial judge. (citations omitted)

[31] A trial judge's findings of fact are not to be lightly interfered with on appeal. Appellate intervention is only justified if the trial judge is found to have made "an egregious error either by failing to recognize or misinterpreting an important and relevant piece of evidence or by reaching an erroneous conclusion…" (*R. v. L.(D.O.)*, [1993] 4 S.C.R. 419, at para. 74).

[32] It is an error of law for a trial judge to make a finding of fact for which there is no evidence (*R. v. J.M.H.*, 2011 SCC 45, at para. 25).

Issue #2 – W.(D.) Analysis

[33] In assessing credibility where there is evidence from the accused, the trial judge must have correctly identified and applied the relevant law (*R. v. J.E.W.*, 2013 NSCA 19, at para. 7). An allegation of error in the judge's application of *W.(D.)* is a question of law, reviewed on a standard of correctness (*R. v. J.A.H.*, 2012 NSCA 121, at para. 7). Unless she erred in principle, a trial judge's credibility assessments are entitled to appellate deference (*R. v. Dinardo*, 2008 SCC 24, at para. 26).

[34] *W.(D.)* requires a trial judge to determine whether, having assessed the whole of the evidence, the essential elements of the charge have been proven beyond a reasonable doubt. A trial judge must not simply decide which version of the events they prefer. They must consider all of the evidence and only convict where they are satisfied it does not raise a reasonable doubt.

Issue #3 – The Nature of the Touching

[35] The nature of the acts committed by KJC is a question of mixed fact and law. As set out in *R. v. J.M.H.*, 2011 SCC 45, at para 28, the legal effect of findings of fact raises a question of law. Questions of law are reviewable on a standard of correctness.

Analysis

Issue #1(a) – The Reliability of LON's Recollection of the Incidents

[36] KJC has attacked the trial judge's finding that LON's evidence about the incidents with KJC was reliable. He says the trial judge should not have placed any confidence in LON's memory as there were a number of things LON did not recall. She did not recall the type of tool she said KJC was borrowing, which hand she used to pass it to him or which hand he used to take it. She did not remember what

hand he used to touch her breast. She was not entirely sure what she had been wearing, what the weather was like, except that it wasn't raining, and did not recall what conversation they had.

[37] KJC also says LON's evidence that she and DJM did not have a vehicle at the time was incorrect. He points to DJM testifying that KJC had purchased a car for him provided he made the payments and notes DJM's testimony that, "So for a while there was times I did use his vehicle but for the most part I did have my own transportation".

[38] I am satisfied KJC's criticism of LON's recall relates to minor details of the events she described. Of the sexual assault themselves, LON did indeed have a good memory. Even though the events had happened eight years earlier, she recalled the circumstances, time and location of her encounters with KJC, as well as their purpose, and the nature of the interactions.

[39] As for DJM's testimony about having a vehicle, he indicated there were times when he needed to use KJC's. LON's recall of borrowing KJC's van is consistent with this evidence.

[40] LON's memory did not have to be perfect. The fact that there were incidental details she could not recall does not mean her evidence about what KJC did to her was unreliable.

[41] The trial judge had sufficient evidence to support her conclusion that LON had a good memory. She made no error in so finding.

Issue #1(b) – KJC's Opportunity to Sexually Assault LON

[42] KJC says the responsibilities associated with caring for his severely disabled wife made the incidents that LON described impossible. He contends those opportunities just did not exist. He notes the trial judge accepted his evidence about caring for his wife and points out what she said in her reasons:

> …I found his testimony about his role as his wife's caregiver over a ten year period compelling. His evidence as to the small respite offered by the homecare workers, the time of day that they attended to his wife, and the use he made of his free time was consistent and it resonated…

[43] However, the trial judge found KJC had the opportunity to be out of the home long enough to have brief interactions with LON. She described how she assessed the evidence:

> I consider that LON said these events both happened around noon, and that [KJC] said that it wasn't possible for him to be out of the house, and I also recall his evidence that he had never been to LON's [*] Street residence and didn't even remember them [LON and DJM] living there. He also said that DJM didn't have tools of his own. He did say that DJM did borrow tools from him sometimes without asking, but he insisted that on those occasions he would make DJM return them to him.
>
> On these points I prefer the evidence of LON. It was her evidence that each incident only involved a very brief encounter. [KJC] wouldn't have needed to be out of the house for very long, only about ten minutes. His wife was confined to her bed and completely incapacitated. It would have been possible for him to leave for brief periods. His evidence on these points doesn't cause me to doubt LON's evidence.

[44] There was support in the evidence for the trial judge's finding that KJC had opportunities to have contact with LON. KJC's own testimony disclosed occasions when he went out while care providers attended to his wife. This respite help was a daily occurrence. As I noted earlier, KJC at first testified the home care workers attended his home once per week. He subsequently said they were there every day.

[45] KJC's wife was not mobile and could not communicate. Her condition would not have precluded KJC leaving her alone for brief periods.

[46] The trial judge was entitled to reject KJC's claim there were no opportunities for him to have been alone with LON.

Issue #1(c) – The Significance of KJC's Evidence about LON Not Having a Driver's Licence

[47] KJC says the trial judge improperly drew a negative inference from his trial testimony that he would not have loaned his van to LON because she did not have a driver's license. The judge said in her reasons that KJC had made no reference to this in his police statement and only gave the matter some significance after he had heard LON admit during cross-examination that she had not been licensed when she borrowed his van.

[48] The trial judge referred to this evidence in her reasons:

> …When [KJC] was asked about lending the van to LON, in his initial statement to police he didn't mention that he wouldn't have because she had no license. This detail came from [KJC] after he heard LON candidly admit this during her testimony.

[49] KJC made no mention of the driver's license issue when he was interviewed by the police. In his police statement he only said that he had no recollection of LON ever driving his van. He said he knew DJM "used to drive it" but he did not know if LON ever did.

[50] DJM testified that he recalled one occasion when LON went to borrow KJC's van, evidence that was consistent with LON's description of doing so.

[51] In direct examination at trial, KJC testified he would not have loaned his van to LON whom he knew was unlicensed:

> Q. And do you ever recall a circumstance where you would have made arrangements to allow [LON] to drive your van?
>
> A. I don't think she drove my van, [DJM] use to drive my van, but I don't recall [LON] ever driving the van. I don't think she had a licence for one thing.
>
> Q. Would you allow her to drive the van without a license?
>
> A. Not likely no.
>
> Q. Why do you say not likely?
>
> A. Because that's putting me in a bad position, you know if she went out and had an accident I'm responsible. So she had to have a license to drive my van.

[52] LON had acknowledged on cross-examination being without a driver's license at the time she said she had borrowed KJC's van. Ms. MacRury brought this fact out after taking a momentary pause in her questioning which enabled her to get the information from her client.

[53] The trial judge concluded KJC was being opportunistic when he said he would not have loaned his van to LON because she did not have a license. This basis for challenging LON's testimony had not emerged previously. KJC had not mentioned this in his statement to police. His reliance at trial on this detail contributed to the trial judge's finding that he was not being forthright. This was an inference about KJC's credibility she was entitled to draw.

Conclusion on Issue #1

[54] I find the trial judge did not misapprehend any evidence. There was support in the record for her factual findings. Her credibility assessments are entitled to deference. I would dismiss this ground of appeal.

The Trial Judge's W.D. Analysis

[55] The trial judge started out with a correct statement about the burden of proof in a criminal proceeding. She recited the *W.(D.)* test correctly, explicitly recognizing it was not a credibility contest. She did say on two occasions in her reasons that she "preferred" the evidence of LON. However, a review of her reasons as a whole indicate she applied *W.(D.)* properly.

[56] She reviewed the evidence. She ultimately found KJC's evidence left her "with some doubt about the plausibility and therefore credibility of his evidence" and referred to some examples. She reviewed discrepancies between KJC's testimony at trial and the statement he gave to police. She expressed difficulties with KJC's evidence. She concluded with an assessment that shows she properly applied the *W.(D.)* analysis:

> Broadly speaking, I would say that I am left with some doubts about [KJC's] credibility as a result of my assessment of the evidence. On this basis I am not able to accept his denial of the allegations made against him. However, as I already referenced I find some basis in his evidence to doubt the evidence of [the other two complainants]. Let me briefly explain where I am left with some doubt.

[57] As required by *W.(D.)*, the trial judge went on to assess the whole of the evidence. This analysis led her to conclude she had a reasonable doubt in relation to the allegations of the other two complainants.

[58] The trial judge then assessed the evidence of LON. She found LON to be a credible witness. She concluded the testimony of KJC did not cause her to have a reasonable doubt about the allegations of LON.

[59] The trial judge's statement that she "preferred" LON's evidence did not represent error. She did not simply choose between LON's and KJC's evidence, preferring LON's and convicting KJC on that basis. She did not treat the evidence as a credibility contest. She undertook a proper analysis according to the requirements of *W.(D.)*. She remained focused on whether there was reasonable doubt. She assessed KJC's evidence, rejected it and then considered the rest of the evidence to determine if it raised a reasonable doubt. She found that in respect of

LON's allegations it did not. As I have noted, she did find reasonable doubt when assessing the allegations of the other two complainants.

[60] The respondent Crown has referenced *R. v. McAughey*, [2002] O.J. No. 4862. In *McAughey*, the Ontario Superior Court of Justice reviewed the decision as a whole and concluded that despite the judge stating he had "no reservation in preferring the evidence of the complainant over that of the accused…", *W.(D.)* had been correctly applied.

[61] The relevant passage in *R. v. McAughey* states:

> [27] The second branch of *R. v. W.D.* requires that the trial judge must acquit if he does not believe the testimony of the accused but is left in reasonable doubt by it. The third branch requires that even if the trial judge is not left in doubt by the evidence of the accused, he must ask himself whether, on the basis of the evidence which he accepts, he is convinced beyond a reasonable doubt by that evidence of the guilt of the accused. In my opinion, a pathway to the trial judge's conviction took him through the second and third branches of *R. v. W.D.*, given his careful analysis of all of the evidence, referenced to the burden of proving guilt beyond a reasonable doubt, and his conclusion that the actions of the appellant on the date in question constituted a sexual assault that had been proven beyond a reasonable doubt.
>
> [28] Put differently, a fair reading of the trial judge's reasons leads me to the conclusion that he did not resolve this case, on the basis of which of the complainant and appellant's versions was true, but rather, whether on the totality of the evidence, viewed as a whole, the Crown had proven the guilt of the appellant beyond a reasonable doubt…

[62] The trial judge here also followed the correct pathway and focused on the question of reasonable doubt in relation to the charges against KJC. Her correct application of *W.(D.)* is evidenced by how she examined the totality of the evidence after finding she did not accept KJC's denials. Out of that process she acquitted KJC of five sexual offences in relation to the two other complainants. She found no such reasonable doubt when it came to the charge relating to LON.

Conclusion on Issue #2

[63] I find the trial judge correctly applied *W.(D.)*. I would dismiss this ground of appeal.

The Nature of KJC's Physical Contact with LON

[64] KJC argues there was insufficient evidence for the trial judge to conclude the touching of LON was sexual in nature.

[65] The test for determining whether touching is sexual in nature is an objective test. The touching is assessed from the perspective of the reasonable observer (*R. v. Chase*, [1987] 2 S.C.R. 293, at para. 11). *Chase* addresses the considerations for making this assessment:

> [11] …The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all the other circumstances surrounding the conduct…The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

[66] The trial judge accepted LON's evidence and took account of the appropriate factors and circumstances. She held:

> …in this case I accept that [KJC] came to LON's residence and grabbed her breast, or touched her breast as he collected a tool from the barn. He did not ask, nor did he receive consent to this touching and there was no question about the fact that the touching was intentional in the circumstances, nor about the sexual nature of touching a breast. I also accept that [KJC] later asked to hug LON and she agreed. But he went beyond her consent, pressed into her, kissed her on her neck and made comments of a nature that suggested DJM would be jealous. I have no doubt from all of the circumstances of the second incident that this contact was also intended to be sexual in nature.

Conclusion on Issue #3

[67] There was sufficient evidence for the trial judge to conclude, on an objective standard, that KJC's unwanted touching of LON on both occasions was sexual in nature. I would dismiss this ground of appeal.

Appeal against Sentence

[68] The trial judge rejected the defence submission that KJC should receive a conditional discharge.

[69] In the trial judge's sentencing decision she discussed at length KJC's personal and family history and circumstances. He was 84 years old at the time of trial and 73 at the time of the offences against LON. He had no criminal record. He had been partnered in a lengthy marriage and was the primary caregiver for his wife until her death following a protracted illness. He volunteered in his community for many years.

[70] KJC remarried and moved to another province where his wife had a job. The trial judge noted the charges had been difficult on his new wife and caused discord within the stepfamily. KJC had endured the hardship of travelling back and forth to Nova Scotia to deal with the charges, with the attendant stress, cost and logistical challenges.

[71] The trial judge properly considered and applied the principles of sentencing. She noted that: "Denunciation and deterrence are the paramount considerations in sentencing offenders for sexual offences". She found there was no need to address specific deterrence, observing that: "Pre-sentence or extrajudicial consequences can also have a collateral denunciatory and deterrent impact".

[72] The trial judge emphasized the seriousness of sexual assault offences. She placed KJC's conduct and moral culpability on "the very low end of the sexual assault continuum".

[73] In her consideration of the mitigating and aggravating factors, the trial judge noted she had already referred to many of the mitigating factors. As for the aggravating factors, she pointed to the "nature of the conduct" and the fact there were two incidents. She referred to one incident occurring at LON's place of residence "where she was entitled to feel safe and secure" and commented on KJC's status as LON's "*de facto* position of a father-in-law".

[74] The trial judge considered the two criteria that must be satisfied for a conditional discharge: that it be in the offender's best interest and not contrary to the public interest (s. 730, *Criminal Code*). She found no specific evidence that established a conditional discharge was in the best interest of KJC "or would see him avoid significant adverse consequences".

[75] Of greater significance to the trial judge was the issue of whether a conditional discharge would not be contrary to the public interest. KJC failed to persuade her on this second branch of the test:

> And more significantly I am not persuaded that a discharge would not be contrary to the public interest. As the cases reference discharges in sexual assault cases are rarely found to comply with the public interest requirement. There is no surprise in this. A woman's dignity as well as her right to sexual integrity must be respected and decisions of the court should reflect and support this important public interest consideration.
>
> …
>
> In this case proportionality and the objectives of denunciation and general deterrence support a suspended sentence…

Standard of Review

[76] The scope for appellate intervention in a sentence is restricted. This Court explained in *R. v. Espinosa Ribadeneira*, 2019 NSCA 7:

> [34] Sentencing involves the exercise of discretion by the sentencing judge. An appellate court should only interfere if the sentence was demonstrably unfit or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of the appropriate factors. An error of law or an error in principle will only justify appellate intervention if the error had an impact on the sentence. …

The Appellant's Complaints

[77] KJC says that the trial judge erred in fact and law in not properly applying the test for a conditional discharge. He says that consideration of the factors in his case should have caused the trial judge to conclude that a conditional discharge was the appropriate disposition.

[78] KJC complains that the trial judge disregarded submissions made at sentencing in support of a conditional discharge being in his best interest. Those submissions referred to KJC, who had been accompanying his wife to the U.S. in the summertime, being refused entry at the border when he last tried to make the trip. Ms. MacRury suggested to the trial judge the charges were likely the reason. KJC says the judge was therefore in error when she said she had "no specific evidence" on the issue of his best interest.

[79] While KJC did not directly address the "not contrary to the public interest" factor in his factum, he did recite para. 25 from Judge Tax's decision in *R. v. J.W.*, 2010 NSPC 40, which refers to this branch of the test.

[80] In *J.W.*, Judge Tax, citing the decisions in *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (BCCA) and *R. v. Meneses* (1974), 25 C.C.C. (2d) 115 (Ont. C.A.), noted:

> …Moreover, Mr. Justice Dubin [in *Meneses*] commented that, in some circumstances, the need for deterrence can be fulfilled by the fact that the accused was arrested, compelled to appear in court and face the notoriety that comes with an appearance and the fulfillment of judicially imposed probation requirements. Thus, while general deterrence is to be considered, the public interest also encompasses other factors.

Analysis

[81] The Crown says there was no evidence before the trial judge that KJC would be unable to travel to the U.S. if he was not granted a conditional discharge. There was no evidence that being unable to travel to the U.S. would constitute a "significant adverse repercussion" for KJC. There was evidence that travel itself has been challenging for KJC, now in his eighties. Submissions were made that travelling to Nova Scotia for the trial was onerous for him.

[82] In its factum, the Crown has described how the trial judge's reasoning could be viewed:

> The Trial Judge ultimately reasoned that the Appellant's case was composed of too many aggravating circumstances and too few mitigating circumstances to warrant a conditional discharge.

[83] I agree this is an accurate reflection of the trial judge's reasoning that led to her rejecting a conditional discharge for KJC.

The "Not Contrary to the Public Interest" Criterion for a Conditional Discharge

[84] An offender does not have to establish that a discharge is in the public interest (*R. v. Sellars*, 2013 NSCA 129, at para. 27). An offender has to show that a discharge will not be "deleterious" to the public interest (*R. v. D'Eon*, 2011 NSSC 330, at para. 25). A discharge will be deleterious to the public interest if it fails to satisfy the objectives being pursued in sentencing.

[85] In *Sellars*, this Court found that the factors to be considered in relation to the "public interest" component and the weight to be given to them "will vary depending on the circumstances of the offence and of the offender" (at para. 37). The Court referenced the Newfoundland Court of Appeal's comments in *R. v.*

Elsharawy, [1997] N.J. No. 249, that the "public interest" component involves "a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law" (at para. 3).

[86] In considering KJC's submissions on sentence, the trial judge explicitly addressed the "not contrary to the public interest" requirement for a conditional discharge. Her statements about the gravity of sexual assault indicate why she found the public interest would not be served by a discharge in KJC's case. She essentially found that a conditional discharge would not give sufficient effect to the sentencing principles of denunciation and general deterrence.

Conclusion on the Appeal against Sentence

[87] There is no basis for appellate intervention in KJC's sentence. The trial judge's reasons show she was persuaded by the seriousness of the offence and the public interest in respecting women's dignity and right to sexual integrity that a conditional discharge was inappropriate in this case. Her concerns and the emphasis she gave them in imposing a suspended sentence with probation are entitled to deference.

Disposition

[88] I would dismiss the appeal from conviction. I would grant leave to appeal the sentence and dismiss the appeal.

Derrick, J.A.

Concurred in:

Scanlan, J.A.
Beaton, J.A.