NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. DeSutter*, 2025 NSCA 18

Date: 20250311
Docket: CA 527628
Registry: Halifax

Between:

His Majesty the King

Appellant

v.

Robert Joseph DeSutter

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	February 6, 2025, in Halifax, Nova Scotia
Facts:	The case involves Robert Joseph DeSutter, who was charged with multiple sexual offences involving three complainants, identified by initials. The charges included sexual assault, sexual exploitation, and obtaining sexual services from minors. The incidents allegedly occurred between May and October 2021. The trial judge acquitted DeSutter of all charges except for common assault, finding insufficient evidence of a sexual purpose in his actions and the lack of an exploitative relationship (paras 1-3, 26-31).
Procedural History:	Nova Scotia Provincial Court, September 28, 2023: Robert Joseph DeSutter was acquitted of all charges except for common assault (para 3).
Parties Submissions:	Crown: Argued that the trial judge erred in excluding evidence from a USB stick found at DeSutter's residence, which contained images that could demonstrate a sexual purpose. They also contended that the trial judge failed

to recognize an exploitative relationship between DeSutter and one of the complainants, J.R. (paras 5-6, 10, 37).

Respondent: Argued that the USB images had little probative value and were prejudicial. They maintained that the interactions with the complainants were not for a sexual purpose and that there was no exploitative relationship (paras 14, 20, 66).

Legal Issues: Did the trial judge err in excluding the USB images from evidence?

Did the trial judge err in concluding there was no exploitative relationship between DeSutter and J.R.?

Disposition: The appeal was dismissed. The court upheld the trial judge's decision to exclude the USB images and found no error in the assessment of the relationship between DeSutter and J.R..

Reasons: Per Wood, C.J.N.S. (Beaton, J.A. concurring): The trial judge's decision to exclude the USB images was within her discretion, as she properly assessed their probative value against potential prejudice. The Crown did not establish that the alleged legal error might have impacted the outcome. The trial judge's findings regarding the lack of an exploitative relationship were supported by the evidence, and the Crown failed to demonstrate any legal error in her analysis. The trial judge's conclusions were reasonable and entitled to deference (paras 37-49, 51-61).

Derrick, J.A., dissenting: The trial judge erred in her analysis of the USB images' probative value and prejudicial effect. The images were relevant to establishing a sexual purpose, and their exclusion was a legal error. Additionally, the trial judge failed to properly assess the exploitative nature of the relationship between DeSutter and J.R., given the power imbalance and J.R.'s vulnerability. These errors could have materially

affected the verdicts, warranting a new trial on the charges related to M.H. and J.R. (paras 64-147).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 147 paragraphs.

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Restriction on Publication: s. 486.4 of the Criminal Code

Judges:	Wood, C.J.N.S., Derrick and Beaton, JJ.A.
Appeal Heard:	February 6, 2025, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Wood, C.J.N.S.; Beaton, J.A. concurring, and Derrick, J.A. dissenting
Counsel:	Timothy O'Leary, for the appellant James Giacomantonio, 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).

Reasons for judgment:

[1] By Information dated October 25, 2021, Robert DeSutter was charged with 14 offences involving three complainants who were identified by the initials M.H., S.H. and T.R. The Information was subsequently amended to refer to the third complainant as J.R.

[2] The Information alleged the following offences under the *Criminal Code*:

- Section 151 (2 counts) – touching a person under sixteen for a sexual purpose;
- Section 271 (2 counts) – sexual assault;
- Section 153(1)(a) (2 counts) – sexual exploitation of a person under eighteen;
- Section 172.1(a) (3 counts) – communicating with a person under eighteen for purposes of facilitating an offence;
- Section 286.1(2) (2 counts) – obtaining sexual services of a person under eighteen for consideration;
- Section 286.3(2) (2 counts) – procuring person under age eighteen to provide sexual services;
- Section 266 – assault.

[3] The trial took place before Judge Catherine Benton of the Nova Scotia Provincial Court over eight days between March 2023 and July 2023. By oral decision given on September 28, 2023, the trial judge acquitted Mr. DeSutter of all charges except assault contrary to s. 266 of the *Code*.

[4] The Crown appealed Mr. DeSutter's acquittal in relation to the following three counts:

> 3. And furthermore, between the 20th day of July 2021 and 20th day of October 2021, at Clarksville, East Hants, in the province of Nova Scotia, being in a relationship with MH, a young person, that is exploitative of MH, did for a sexual purpose touch the body of MH, contrary to section 153(1)(a) of the **Criminal Code**;

> …
>
> 8. And furthermore, between the 1st day of May, 2021 and the 20th day of October, 2021, at Clarksville, East Hants, in the province of Nova Scotia, did for a sexual purpose touch SH, a person under the age of 16 years, contrary to section 151 of the **Criminal Code**;
>
> …
>
> 14. And furthermore, between the 1st day of May, 2021 and the 20th day of October, 2021, at Clarksville, East Hants, in the province of Nova Scotia, being in a relationship with TR, a young person, that is exploitative of TR [now J.R.], did for a sexual purpose touch the body of TR, contrary to section 153(1)(a) of the **Criminal Code**;

[5] The grounds of appeal set out in the Notice of Appeal are:

> 1. That the learned Trial Judge erred in law by excluding from evidence images of women, found on a USB stick that was located during a search of the Respondent's residence;
>
> 2. That the learned Trial Judge erred in law concluding that the Respondent was not in an exploitative relationship with MH, SH or TR;

[6] In its factum, the Crown indicated the second ground of appeal was limited to the finding of no exploitative relationship with J.R. (formerly T.R.) set out in Count #14. At the hearing, the Crown requested dismissal of the appeal in relation to Count #8 because the Notice of Appeal did not challenge the trial judge's finding the Crown had not proven S.H. was under 16 years of age.

[7] If the appeal is granted the Crown seeks a new trial on Counts #3 and #14.

[8] For the reasons which follow, I would dismiss the appeal.

Crown Appeal from Acquittal

[9] This appeal is brought pursuant to s. 676(1)(a) of the *Criminal Code* which limits Crown appeals to questions of law. The burden on the Crown is well known and significant. Even if an error of law can be identified, the acquittal will not necessarily be set aside. In *R. v. T.J.F.*, 2024 SCC 38, the Supreme Court of Canada described the Crown onus this way:

> [42] Lastly, in a criminal legal system built on the presumption of innocence, acquittals are not set aside lightly. **Even when errors of law are made, appellate courts should only set aside an acquittal when "the verdict would not**

> **necessarily have been the same had the errors not occurred**" (*R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2, citing *Vézeau v. The Queen*, 1976 CanLII 7 (SCC), [1977] 2 S.C.R. 277, at pp. 291-92; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14). Our Court will thus have to determine if the alleged error(s) of law might have had a material bearing on the verdicts of acquittal (*R. v. Hodgson*, 2024 SCC 25, at para. 36).
>
> [emphasis added]

[10] In its factum, the Crown argued that, in relation to the second ground of appeal, the trial judge erred because she did not "fully appreciate the evidence or give legal effect to undisputed facts". The Supreme Court of Canada in *R. v. Morin*, [1992] 3 S.C.R. 286 described what is required for a Crown appeal alleging failure to give legal effect to undisputed facts (at page 294):

> **If a trial judge finds all the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge**. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute. In this situation, the court can arrive at the correct conclusion in law without ordering a new trial because factual issues have been settled.
>
> [emphasis added]

[11] The *Morin* decision also says failure to appreciate the evidence cannot amount to an error of law unless it is based upon a misapprehension of some legal principle. Mere failure to refer to a piece of evidence does not establish a legal error. The Supreme Court described it this way (at page 296):

> A jury does not record its deliberations, and its assessment of individual pieces of evidence is not known. On the other hand, a trial judge will frequently record in his or her reasons the process by which the decision is reached, or at least some of it**. There is, however, no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts**. To apply *Morin, supra*, as a basis of review of a trial judge's findings of fact whenever the reasons for judgment fail to deal with a particular piece of evidence, or the inference from such evidence would require a trial judge to record each piece of evidence and his or her assessment of it. This would be a misapplication of *Morin* to the trial process when the trial is by judge alone**. A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect.**

[emphasis added]

[12] *Morin* summarized the principles applicable to a Crown appeal from acquittal as follows (at pages 296-297):

> In my opinion, none of the principles outlined above entitled the majority of the Court of Appeal to reverse the acquittal in this case. First, this was not a case of undisputed facts to which a correct interpretation of the law could be applied so as to yield a different result. The majority disagreed with the facts to which the trial judge directed herself and with her inferences from those facts. This is evident from the observations of the majority that "it was open to the trial Judge" to take a different view of the facts. It is also evident from the fact that a new trial was ordered. A new trial would not have been necessary if all necessary findings of fact had been made.
>
> Second, there was no misdirection in respect of any legal principle. The trial judge referred to the evidence which in her opinion was important. This was part of the weighing process, and stressing one item over another was not the result of the misapplication of any legal principle. Finally, there is no basis for concluding that the trial judge failed to consider the evidence in its totality in arriving at the ultimate result. **In summary, the majority of the Court of Appeal had a different theory of the facts and the inferences that could be drawn from those facts. While I might agree that the majority's view of the facts is preferable, this was a matter for the trial judge to determine and, absent an error of law, the Court of Appeal should not have interfered**. In accordance with the order made at the conclusion of the appeal, the appeal is allowed and the acquittal restored.
>
> [emphasis added]

Application to Admit the USB Images

[13] After completion of the Crown's evidence, the trial judge heard an application by the Crown for admission of the contents of a USB and cell phone seized from Mr. DeSutter's residence. She determined these were not admissible. On appeal the Crown alleges the trial judge erred in law by not admitting the USB which was found under a mattress in Mr. DeSutter's bedroom.

[14] The Crown's application brief said admissibility should be assessed using the principles in *R. v. Handy*, 2002 SCC 56 with appropriate modifications (*Handy* involved the admissibility of similar fact evidence). They argued the probative value of the images on the USB exceeded any prejudice to Mr. DeSutter and ought to be admitted. The brief filed on behalf of Mr. DeSutter submitted the images had little probative value, were prejudicial and should not be admitted.

[15] The Crown witnesses who testified prior to the application provided evidence which, if accepted by the trial judge, could have established:

1. Mr. Desutter was obsessed with magic and, in particular, the illusion of a magician cutting a woman in half with a saw.

2. In his residence, Mr. DeSutter, had a cardboard saw with a collapsible centre portion.

3. Mr. DeSutter asked M.H., S.H. and J.R. if he could use the cardboard saw and pretend to cut them in half.

4. M.H., S.H. and J.R. gave permission for Mr. DeSutter to place his cardboard saw on their abdomen. This took place once with each of the complainants, and during the activity there was no other touching by Mr. DeSutter nor any conversation or comments of a sexual nature.

5. When Mr. DeSutter placed the saw on the abdomens of M.H., S.H. and J.R. they were clothed. For M.H. and S.H. they pulled up their shirt so the saw rested on the skin of their abdomen.

[16] For most of the charges against Mr. DeSutter, the Crown was required to prove that when he placed the saw on the abdomens of the complainants he did so for a sexual purpose. They were relying on the USB to establish this purpose.

[17] The majority of the images on the USB were illustrations, computer generated images or photographs depicting the illusion of a woman being sawed in half. In most, the women wore clothing, such as lingerie, which exposed their midriff. In a few, they were fully or partially naked.

[18] In oral argument on the admissibility application, Crown counsel said images which included items similar to those found at Mr. DeSutter's residence should be admitted because of their "situation-specific relevance". According to the Crown this included any showing fake saws or rope because these items were found in the house. The evidentiary connection between these images and the use of the cardboard saw for a sexual purpose was outlined in the Crown brief:

> It is anticipated that the accused will assert that touching the complainants' belly buttons with his hands and with the cardboard saw was not sexual and solely connected to an interest in magic. The images on the USB and cellphone rebut any such assertion not only by the obvious sexual nature of most

> of these images but also by the amount of images. The court is entitled to draw an inference based on the content of the USB the accused's intention in touching in this case was sexual.
>
> Secondly, during cross-examination of witness MH, questions were raised about the accused's maturity or intelligence. The court is entitled to draw an inference that the location of the USB stick – hidden between the mattresses – demonstrates an awareness on the part of the accused that his interest was sexual. The contents are similarly relevant to whether the accused's contact with the complainants was merely innocent association.

[19] In oral argument, Crown counsel said the USB images could be used for "situation-specific propensity reasoning" but not for the prohibited "general" propensity reasoning. The Crown brief discussed the evaluation of potential prejudice as follows:

> **Evaluating prejudice**
>
> Introduction of extrinsic act evidence risks creating moral and reasoning prejudice against the accused in the mind of the trier of fact. The greater the probative value of the proposed evidence, the less likely it is to be misused by the trier. The risk of prejudice is diminished in cases where the extrinsic evidence comes from the complainant herself, as it cannot be said that third party witnesses are improperly shoring up the complainant's credibility even where there is a risk that the complainant's evidence will be rejected.

[20] Mr. DeSutter argued the Crown was introducing bad character evidence to infer he had the propensity and disposition to engage in the illusion of sawing for sexual purposes. He said the probative value was completely outweighed by the potential prejudice.

[21] The Crown repeatedly urged the trial judge to review the USB contents from a "situation-specific" perspective because of the "unique" nature of the alleged criminal conduct. They submitted there were four potential ways in which the USB contents might be relevant, one of which was to prove the use of the saw was for a sexual purpose. They left it to the trial judge to parse through the USB images and decide which should be admitted and for what purpose.

[22] In her decision to refuse admission of the USB, the trial judge reviewed the cases provided by counsel including *R. v. Handy*. She assessed the probative value of the images by grouping similar ones together. She described the Crown's argument that the location of the USB under the mattress demonstrated a sexual

interest in the images as “far reaching”. She said the location was at most suggestive of an interest in “safe-keeping” the USB.

[23] Images related to Pokémon, females in swimwear or lingerie and naked women were determined to be irrelevant as were those showing clothed women participating in the illusion of being cut in half. The latter point was described by the trial judge as follows:

> The images contained in either the cell phone or the USB depicting females in what can be described as magic situations, being sawn in half while dressed in clothing, lingerie, or swimsuit attire cannot in itself lead to the conclusion that they were sex— that there was a sexual interest in same by Mr. Desutter possessing the images. Thus I cannot find these types of images are either relevant or material to the matters before the Court.

[24] The trial judge concluded that images showing naked or partially naked females being cut in half might suggest an interest of a sexual nature. With respect to these images, she said:

> The remaining images found on the USB, wherein the females depicted are partially or fully undressed while being sawn or already sawn in half **could, however, suggest an interest in this type of behaviour that is sexual in nature**. As a result these particular images are relevant in relation to the circumstances of the offences before the court. Specifically being the use of a pretend or cardboard saw on a female. These images are also material in that they suggest a sexual interest in engaging in a specific type of behavior, a sexual interest in pretending to saw a female in half. This could potentially provide for a motive or intention on the part of Mr. Desutter's actions with the complainant. However the images on the USB are discreditable to Mr. Desutter. Accordingly I must consider whether its probative value is enough to outweigh its prejudicial effect.
>
> [emphasis added]

[25] After deciding the naked images could be relevant, the trial judge undertook an assessment of their probative value in the circumstances described by the Crown’s witnesses. She concluded the inference sought by the Crown, that Mr. DeSutter used the saw for a sexual purpose, did not arise. For this reason, the potential prejudice of the USB images outweighed any possible probative value. The hearing judge summarized her analysis on this issue as follows:

> In considering same, I refer back to the comments made from our Court of Appeal in *R v C.J.*, and the Ontario Court of Appeal in *R. v L.O.* Specifically does this proposed evidence allow me to make the inference that the Crown seeks. Which is

> essentially, because these images depicted on the USB involved females being sawn in half or, or in partial or for states of dress — undress. Mr. Desutter viewed same, had a sexual interest in same, and his actions with the complainant are motivated by same. In reviewing the circumstances outlined by the complainant, it's believed both complaints were clothed. Only exposing the areas of their midsections at the time that Mr. Desutter used the fake saw**. In my view, without further evidence on whether this supposed interest was in fact sexual, and that because of that interest Mr. Desutter was interested in recreating the scenarios in the images with real individuals, I find that it would be extremely prejudicial to Mr. Desutter to admit this evidence.**
>
> The probative value of this evidence is outweighed by it's prejudicial effect and therefor the application for admission is denied.
>
> [emphasis added]

Trial Judge's Decision to Acquit

[26] My review of the trial judge's decision will focus on the acquittals relating to Counts #3 and #14 because they are the only ones engaged on this appeal. Both Counts required the Crown to prove Mr. DeSutter touched the complainant for a sexual purpose. For M.H., the touching was the use of the cardboard saw on one occasion. For J.R., it was the use of the saw as well as kissing her without consent. With respect to M.H., the trial judge reviewed the evidence concerning the saw incident:

> I'll next deal with the evidence concerning the incidences with the fake saw. M.H. testified Mr. Desutter offered her $80 and S.H. $40 to let him pretend to saw them in half after earlier in the day they, they — where they had been swimming. She noted she was 16 years at the time. S.H. did not testify. M.H. described that she was wearing shorts and a bathing suit top, and S.H. was wearing a two-piece bathing suit. They each laid down on the bedroom floor. Mr. Desutter placed the fake saw on each of their stomachs and pretended to saw each of them. This occurred for a couple of seconds each. She does not recall if he said anything. Afterwards he paid them the money as agreed. M.H. advised she was too drunk to recall if this occurred on any other occasion. However, E.A. described an occasion where she observed M.H. and S.H. in Mr. Desutter's bedroom laying on his bed with their knees hanging over the edge of the bed. They each lifted their shirts up over their bras. Mr. Desutter placed the fake saw on their stomachs for maybe five minutes each. No one said anything, and Mr. Desutter just stared intently at the saw.

[27] The evidence concerning use of the saw with J.R. was described as follows:

> …With respect to J.R., she described an evening at Mr. Desutter's residence, Mr. Desutter lifted her shirt to just below the area of her bra and pretended to saw her stomach with the fake saw, for about maybe one to two minutes. Mr. Desutter did not say anything before, during or after this incident.

[28] The trial judge explained why the Crown's evidence did not prove touching for a sexual purpose:

> In each of the incidences with the fake saw, both complainants noted Mr. Desutter only touched their stomach areas of their bodies with the fake saw. **Neither of them described Mr. Desutter doing anything else during or after the sawing experience**, other than sleeping, as J.R. testified, and paying them, as M.H. testified.
>
> With respect to the complainants M.H. and S.H., M.H. testified that there was a discussion and an agreement before he actually pretended to saw her and S.H. in half. It appeared to be matter of fact. He only touched their stomach areas with the fake saw. **There was no other touching described whatsoever before or after the use of the saw. And specifically, there was no other touching that could be considered sexual in nature.**
>
> Additionally M.H. indicated that there was **nothing said that could be considered sexual in nature before, during or after the sawing.** There was nothing in her testimony either directly or indirectly that would allow the court to find that she or S. H. were somehow pressured or coerced into agreeing to be sawed in half.
>
> M.H. did recall that maybe on two occasions when she first started going to Mr. Desutter's residence that he asked her to wear his ex-girlfriend's lingerie. She advised she had said no and did not indicate that he had asked again. She, after she referred to a statement to the police that she had given, she agreed that the wearing of the lingerie was related to the request to saw her in half.
>
> **Although some would consider the wearing of lingerie while pretending to saw someone in half could have a sexual connotation, without something further in terms of physical actions or verbal expressions or perhaps expert evidence, I'm unable to find that the incidences with M.H. and S.H . were sexual in nature, affecting their sexual integrity or for a sexual purpose.**
>
> I am also mindful that **M.H. could not recall Mr. Desutter saying anything sexual in nature throughout their relationship**, and, in fact, even though asking her to go out, he indicated he would wait until they were 18 years of age.
>
> Given I'm not satisfied that the touching in relation to M.H. and S.H. was sexual in nature, for a sexual purpose or interfered with the sexual integrity of the complainants, I'm unable to find that the Crown has discharged the burden of the

> following charges beyond a reasonable doubt. Counts 1 to 3, 151, 271 and 153 in relation to M.H., and counts 8 to 9, section 151, 271, in relation to S.H..
>
> [emphasis added]

[29] The trial judge accepted the testimony of J.R. that Mr. DeSutter kissed her without permission. She said this would have been a violation of s. 151 or s. 271 of the *Code*. However, Mr. DeSutter was not charged with those offences in relation to J.R. The s. 151(1)(a) charge alleged an exploitative relationship between J.R. and Mr. DeSutter, and the trial judge found the Crown had not established this.

[30] The trial judge concluded the Crown had not proven Mr. DeSutter touched M.H. for a sexual purpose. As a result, she was not required to consider whether the Crown had proven an exploitative relationship between them.

[31] With respect to J.R., the trial judge noted she first met Mr. DeSutter around October 2021 when she was 16 years old. She was introduced by S.H. In assessing the nature of the relationship between J.R. and Mr. DeSutter, the trial judge referred to the factors set out in s. 153(1.2) of the *Code*:

> **Inference of sexual exploitation**
>
> (1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including
>
> (a) the age of the young person;
>
> (b) the age difference between the person and the young person;
>
> (c) the evolution of the relationship; and
>
> (d) the degree of control or influence by the person over the young person.

[32] The trial judge found J.R. initiated contact with Mr. DeSutter when she wanted him to purchase alcohol and cigarettes for her. She said the following with respect to their relationship:

> I do not find that there was evidence to suggest that there was a relationship of dependency created between Mr. Desutter and J.R. as a result of these purchases, or as a result of his interactions with J.R..
>
> I also cannot find, in reviewing the circumstances before the Court, that there was any power imbalance that made J.R. vulnerable to Mr. Desutter. Neither did it appear that Mr. Desutter created a relationship whereby he was able to take advantage of J.R..

> In my view, Mr. Desutter was not in a situation where he could be considered in a power of trust, or in a position of power, trust, or authority over J.R.. Accordingly, I'm not able to find that the Crown has proven beyond a reasonable doubt that Mr. Desutter committed this offence.

[33] J.R.'s testimony about the requests she made of Mr. DeSutter for drives, liquor or cigarettes was:

> Q. Okay, it's text, okay. Did you communicate with him through any other way?
>
> A. I have him on Snapchat.
>
> Q. You had him on Snapchat?
>
> A. I did, yeah.
>
> Q. Okay. And what were the natures of, of the, the type of conversations you were having on Snapchat?
>
> A. I don't remember. It was mostly us asking him to pick us up and to get us liquor and stuff.
>
> …
>
> Q. Do you have a sense of how much alcohol or how much cigarettes he provided?
>
> A. I don't remember.
>
> Q. And how often was that in terms of like the times that you spent with him? How often during those times was there cigarettes or alcohol?
>
> A. Oh, almost a hundred percent of the time.
>
> Q. At that time did you have access to your own money?
>
> A. No.
>
> Q. No?
>
> A. No.
>
> Q. Did you have access to a car?
>
> A. No.
>
> Q. Other than Mr. Desutter driving you?
>
> A. No.
>
> Q. Did you have access to alcohol or cigarettes other than what he provided?
>
> A. Cigarettes some, but alcohol, no.
>
> Q. How did it feel to be receiving these things from him?

A. I don't know. It's just like, it's just kind of like, ooh, free shit. Like, I don't know. Like I just feel like it was nice to be able to just get those things and not have to pay for them.

…

Q. Most of the conversations, you said to my friend, most were us asking him to pick us up and get us liquor and stuff?

A. Yeah, for the most part, it was just us asking him for stuff.

Q. Okay. And so would it be that once he's picked you up and not necessarily just you, but whatever group was that night, he's already been asked to get some liquor, is that right, usually?

A. Yeah, like usually we'd message him beforehand or sometimes ask while we're there. I don't know, it was like...

Q. Yeah.

A. Yeah.

Q. Yeah. So, okay. Not just, of course, liquor, but also asking for drives too or...

A. Yeah.

Q. ...to other places or...

A. Mostly just Windsor. Yeah.

Q. Mostly Windsor. Okay.

A. He also took me to Truro once to see my mother.

Q. Okay. And again, you reached out to him and asked him for the drive?

A. Yes.

[34] J.R. also testified about being present when M.H. was speaking with Mr. DeSutter on the telephone and asking him to buy liquor. When he refused she threated to call the police on him.

Analysis

[35] The Crown seeks a new trial for Counts #3 and #14. In order to obtain this relief with respect to Count #3 they must demonstrate the trial judge erred in law in her decision not to admit the contents of the USB. In addition, they must establish that, had she admitted the USB, it might have had a material bearing on the verdict of acquittal.

[36] In order to obtain a new trial in relation to Count #14, the Crown must show the judge committed an error in law in the analysis which led to her finding there was no exploitative relationship between Mr. DeSutter and J.R. The Crown alleges her error was the failure to consider all relevant evidence or give legal effect to undisputed facts.

Refusal to Admit the USB

[37] The application to admit the USB came at the end of the Crown's case, after all of the witnesses had testified. As a result, the trial judge had the benefit of the trial evidence in her assessment of probative value and prejudice. The legal error alleged by the Crown was summarized in their factum as follows:

> 91. The trial judge's weighing of the probative value versus the prejudicial effect should not be given deference in this case. It should not be given deference because the trial judge erred in principle by, in effect, requiring a striking similarity between the Respondent's actions and the USB stick evidence. As this was not a case where the evidence was being used to identify the Respondent, it did not have to be strikingly similar.
>
> 92. As well, the trial judge's finding that the USB stick evidence was "extremely prejudicial" was unreasonable. It was unreasonable given this was a judge-alone trial.

[38] In oral argument, Crown counsel explained the second point by reference to *R. v. J.W.,* 2022 ONCA 306. They submitted since it was a judge alone trial there were methods to mitigate potential prejudice which should have been considered, as described in *J.W.:*

> [30] In light of the rule and the dangers that the admission of discreditable conduct evidence pose, trial judges should assess the prejudicial effect from three perspectives: moral prejudice, reasoning prejudice, and the presence of any factors that might reduce the impact of prejudice in the specific circumstances of the case.

[39] There is no dispute the trial judge accurately summarized the applicable legal principles. These are found in the cases provided by counsel including *R. v. Handy* and *R. v. L.O.*, 2015 ONCA 394. One of the issues in *L.O.* was the admissibility of the appellant's possession of child pornography in a trial for sexual assault, sexual interference and invitation to touch for a sexual purpose in relation to a child. The court outlined the appellant Crown's argument with respect to relevance and admissibility in the following passage:

[65] Motive is a kind of circumstantial evidence. Motive is relevant if, considered in the context of the rest of the evidence, the alleged motive has "a logical tendency to contribute to a finding about the material fact": D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law Inc., 2015), at p. 32. The Crown's argument that the appellant's possession of child pornography is relevant and therefore *prima facie* admissible on counts 1-3 can succeed only if three inferences are reasonably available on the totality of the evidence.

Inference #1:

> It can be inferred from the appellant's possession of child pornography that the appellant had an interest in watching sexual activity involving adults and young children.

Inference #2:

> It can be inferred from the appellant's interest in watching sexual activity involving children and adults that he had an interest in engaging in sexual activity with young children.

Inference #3:

> It can be inferred from the appellant's interest in engaging in sexual activity with young children that he sexually abused L.F., as alleged in counts 1-3.

[66] The first inference does not present any difficulty. While possession of child pornography may not conclusively establish that the possessor has an interest in watching sexual activity involving children, it provides a reasonable basis for the inference that he has that interest.

[67] The second inference assumes a correlation between sexual activities that a person is interested in watching and sexual activities that the same person is interested in doing. It may be that the correlation exists. However, I think the existence of the correlation, and its nature, if one exists, is beyond the experience and knowledge of the normal judge or juror. Evidence of the relationship between an interest in watching sexual activity with children and an interest in engaging in that activity falls within the expertise of the social scientists. The second inference is the kind of inference that can only be drawn with the assistance of a qualified expert. If the Crown wanted to rely on that inference, it was incumbent on the Crown to lead proper expert evidence to support the availability of the inference: see *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, at pp. 20-25; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] S.C.J. No. 23, at paras. 19-23.

[68] My conclusion that the second of the three inferences outlined above cannot be drawn renders the evidence of the appellant's possession of child pornography inadmissible on counts 1-3. However, for the sake of completeness, I will consider the availability of the third inference, assuming the second inference can be drawn.

> [69] When one speaks of motive in the sense of an emotion that compels an act, one can use the word to refer to a very specific emotion, e.g. the anger a person feels towards a spouse at the moment he learns of the spouse's infidelity, or to a much more general emotion, e.g. a person's dislike of persons in authority. The former kind of motive can be very probative of the accused's conduct toward the target of his anger at the point in time close to the event giving rise to the anger. The latter kind of motive, because of its generality, says little about the conduct of an accused toward a specific person at a specific time. Motive used in this latter sense is essentially indistinguishable from evidence of disposition and should, for the purpose of admissibility, be analyzed as evidence of disposition: see *Morris v. The Queen*, 1983 CanLII 28 (SCC), [1983] 2 S.C.R. 190, per Lamer J. (dissenting in the result, but for the court on this issue), at pp. 202-204; *Cloutier v. The Queen*, 1979 CanLII 25 (SCC), [1979] 2 S.C.R. 709, at pp. 735-36; see also *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 87-89.

[40] The trial judge adopted and applied the same approach with respect to the inferences the Crown argued should arise from the USB:

> In considering same, I refer back to the comments made from our Court of Appeal in *R v C.J.*, and the Ontario Court of Appeal in *R. v L.O.* Specifically does this proposed evidence allow me to make the inference that the Crown seeks. Which is essentially, because these images depicted on the USB involved females being sawn in half or, or in partial or for states of dress — undress. Mr. Desutter viewed same, had a sexual interest in same, and his actions with the complainant are motivated by same. In reviewing the circumstances outlined by the complainant, it's believed both complaints were clothed. Only exposing the areas of their midsections at the time that Mr. Desutter used the fake saw. In my view, without further evidence on whether this supposed interest was in fact sexual, and that because of that interest Mr. Desutter was interested in recreating the scenarios in the images with real individuals, I find that it would be extremely prejudicial to Mr. Desutter to admit this evidence.

[41] The Crown submits there is significance to the trial judge's comment that images of naked or semi-naked women being cut with a saw "could" be indicative of a sexual interest in such activities. They argued this represented a determination these had probative value and should be admitted. The trial judge also said images showing clothed women in similar circumstances did not demonstrate a sexual interest. Both of these inferences were potentially available to the trial judge and there was nothing unreasonable in her making them.

[42] Determining which inferences may arise from the evidence is within the purview of the trial judge and should be afforded a high degree of deference.

Similarly, deference is owed to the assessment of admissibility. In *R. v. Harvey*, 2001 CanLII 24137(ONCA) (aff'd 2002 SCC 80), Doherty, J.A. said:

> [42] …**The determination of probative value is based on the trial judge's individual impression of the evidence and is, to some degree at least, an intuitive assessment that reflects that individual judge's experience and sense of what is fair. The test for the admissibility of similar fact evidence inevitably means that in some cases different judges could come to different conclusions with respect to the admissibility of the same similar fact evidence.**
>
> [43] The fact that the admissibility of similar fact evidence turns on assessments as to the probative value of the evidence and its prejudicial effect explains the high degree of deference which appellate courts must give to trial judges' rulings on the admissibility of similar fact evidence. In R. v. B. (C.R.), supra, at p. 733 S.C.R., p. 23 C.C.C., McLachlin J. said:
>
> > A third feature of this Court's treatment of the similar fact rule since Boardman [[1975] A.C. 421 (H.L.)] is the tendency to accord a high degree of respect to the decision of the trial judge, who is charged with the delicate process of balancing the probative value of the evidence against its prejudicial effect. . . . This deference to the trial judge may in part be seen as a function of the broader, more discretionary nature of the modern rule at the stage where the probative value of the evidence must be weighed against its prejudicial effect. As a consequence of the rejection of the category approach, the admissibility of similar fact evidence since Boardman is a matter which effectively involves a certain amount of discretion. . . . Generally, where the law accords a large degree of discretion to a trial judge, courts of appeal are reluctant to interfere with the exercise of that discretion in the absence of demonstrated error of law or jurisdiction.
>
> [emphasis added]

[43] The Crown's argument on appeal relies on the proposition the images on the USB demonstrate a sexual interest in the illusion of cutting a woman in half. They say the trial judge's error was in failing to transpose that interest to Mr. DeSutter's use of the cardboard saw. Two paragraphs from the appellant's factum illustrate the point:

> 99. A more accurate way to consider the USB stick evidence's purpose is to consider it evidence of the Respondent's motive. The USB stick evidence demonstrated the Respondent had a unique sexual interest, a fetish. This sexual fetish was connected to sawing women in half. Therefore, the USB stick evidence

> was probative of the Respondent's motive behind carrying out the peculiar acts of pretending to saw MH, SH and JR in half. His motive to carry out a sexual fetish.
>
> …
>
> 132. **The USB stick evidence was so peculiar, it was so unique, it demonstrated the Respondent had a sexual fetish related to magic. Given that fetish, the only rational inference was that the Respondent was trying to satisfy his fetish when he pretended to saw MH and SH. He was motivated to obtain sexual gratification.**
>
> [emphasis added]

[44] The trial judge's decision is clear. She was not prepared to find the USB images established Mr. DeSutter had a sexual fetish involving touching women with a cardboard saw. In addition, the trial evidence showed Mr. DeSutter did not ask the complainants to undress nor did he make comments of a sexual nature during the activity. The complainants testified he did not say anything at all while using the saw.

[45] The arguments advanced by the Crown are similar to those rejected by the Ontario Court of Appeal in *R. v. Harvey*:

> [49] Crown counsel also argued that even if the trial judge did not misapprehend the evidence and did apply the correct legal test, her ruling is so clearly wrong that this court should interfere. Counsel contends that the similarities between the similar fact evidence and this alleged offence are so many and so distinctive that a proper application of the test for admissibility could result only in a ruling that the evidence was admissible. I take this to be a submission that the trial judge's ruling is unreasonable.
>
> [50] In advancing this submission, Crown counsel must contend with the deference doctrine. I think that doctrine can accommodate Crown counsel's argument. **If an appellate court is satisfied that on a proper appreciation of the evidence and a proper application of the applicable test for admissibility there is only one reasonable result, either admission or exclusion, the appellate court should intervene if the trial judge did not arrive at that result. If, however, the case is one in which the evidence is such that different trial judges acting reasonably could come to different conclusions as to the admissibility of the evidence depending on their assessments of probative value and prejudicial effect, then the appellate court must defer to the decision of the trial court.**
>
> …

> [53] **The fact that this trial judge was not prepared to give the similar fact evidence the probative value that other trial judges acting reasonably might well have given it does not constitute reversible error.** I think the trial judge's ultimate assessment that the probative value did not clearly outweigh the prejudicial effect was within the broad range of what should be considered reasonable in the circumstances. I would defer to her decision.
>
> [emphasis added]

[46] The appellant has not established an error in law on the part of the trial judge in refusing to admit the USB. Her assessment of the probative value and relative prejudice is entitled to significant deference and falls within the broad range of what could be considered reasonable in the circumstances.

[47] On appeal, the Crown advanced a new argument which was not made to the trial judge. They say she erred by not considering possible methods to minimize the potential prejudice arising from the images. The trial judge did not discuss this in her decision because it was not raised in the hearing. As an experienced trial judge she would have been cognizant of the importance of excluding propensity reasoning in her analysis. She would also have known this is not always a simple exercise, even in a judge alone trial. As the Ontario Court of Appeal observed in *J.W.*:

> [34] The third perspective is whether there are ways in which the possible prejudicial effects can be mitigated in the circumstances of the case. It has been said by this court that the risk of prejudice is "considerably reduced" in judge-alone trials.[28] But Paciocco et al. note that: "there is controversy over how much lower the risk of prejudice is in judge-alone trials".[29] They add that: "[e]ven judges can struggle to overcome the tainting effect of discreditable information and may give it undue focus during a trial".[30] This observation is true to experience. Judges can by training and experience steel themselves against moral and reasoning prejudice, but only if they actively advert to the very point in the moment of decision.

[48] While the trial judge's discussion concerning the potential prejudicial effect of the images is brief, I am satisfied, based on a review of the evidence and submissions of counsel, she was aware of the applicable legal principles. The admissibility analysis involved considering probative value as well as potential prejudice. The trial judge's decision clearly shows she did this and it is to be given significant deference. The Crown has not demonstrated she made an error in law in assessing probative value nor that her assessment of potential prejudice was unreasonable.

[49] Even if the Crown had shown an error by the trial judge in refusing to admit the USB, they have not demonstrated this might have had a material bearing on the verdict of acquittal. To the contrary, the comments in the admissibility decision, combined with her decision on the merits, show she was not prepared to draw the inferences sought by the Crown from the USB images – that Mr. DeSutter had a sexual fetish which he acted upon with M.H. and J.R. In the absence of those inferences the Crown had no evidence Mr. DeSutter's use of the cardboard saw was for a sexual purpose and his acquittal on Count #3 was inevitable.

[50] I would not allow this ground of appeal.

The Lack of Exploitative Relationship with J.R.

[51] A charge under s. 153(1) of the *Code* requires the Crown to prove the nature of the relationship between the accused and young person. The relationships which potentially give rise to culpability are:

1. One of trust or authority towards the young person;

2. A relationship of dependency on the part of the young person; and

3. A relationship which is exploitative of the young person.

[52] The characterization of the relationship flows from the trial judge's factual findings. Each case will depend upon the particular circumstances. The Supreme Court of Canada in *R. v. Audet*, [1996] 2 S.C.R. 171 described it as follows:

> 38 **It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship between a young person and an accused, whether the accused was in a position of trust or authority towards the young person or whether the young person was in a relationship of dependency with the accused at the time of the alleged offence**. One of the difficulties that will undoubtedly arise in some cases concerns the determination of the times when the "position" or "relationship" in question begins and ends. It would be inappropriate to try to set out an exhaustive list of the factors to be considered by the trier of fact. The age difference between the accused and the young person, the evolution of their relationship, and above all the status of the accused in relation to the young person will of course be relevant in many cases.
>
> [emphasis added]

[53] An error of law which would support a Crown appeal from acquittal can arise from a trial judge's assessment of the evidence in some circumstances. As outlined in *R. v. Hodgson*, 2024 SCC 25:

> [34] In other situations, drawing the line between questions of law and questions of fact or of mixed fact and law can become more challenging. This is often the case when the alleged error concerns a trial judge's assessment of the evidence. As this Court explained in *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, "[a]n appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof" (para. 10 (citations omitted)). There are, however, situations in which a "trial judge's alleged shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal" (*J.M.H.*, at para. 24).
>
> [35] In *J.M.H.*, the Court identified four non-exhaustive such situations:
>
> 1. Making a finding of fact for which there is no evidence — however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule;
>
> 2. The legal effect of findings of fact or of undisputed facts;
>
> 3. An assessment of the evidence based on a wrong legal principle;
>
> 4. A failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence.

[54] In a Crown appeal alleging failure to consider relevant evidence, it is not sufficient to demonstrate the trial judge neglected to refer to some of the evidence. This was emphasized by the Ontario Court of Appeal in *R. v. Gordon*, 2024 ONCA 576:

> [7] Nor do we think that the trial judge failed to consider all the relevant evidence relating to the complainant's capacity to consent. **While the short oral decision given by the trial judge could have benefitted from including greater detail as to evidence considered, a trial judge is not required to address explicitly every item of evidence relied on by the Crown.**
>
> [8] In *R. v. Walle*, 2012 SCC 41, Moldaver J. said, at para. 46:
>
> A failure of a judge to consider all the evidence relating to an ultimate issue of guilt or innocence constitutes an error of law: *R. v. Morin*, 1992 CanLII 40 (SCC), [1992] 3 S.C.R. 286, at p. 296; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 31-32. However, as Sopinka J. made clear in *Morin*, there is "no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts", and "unless the reasons demonstrate that [a consideration of all the evidence in relation to the ultimate issue] was not done, the failure to record the fact of

> it having been done is not a proper basis for concluding that there was error in law in this respect" (p. 296). I see no failure to consider all the relevant evidence in this case.
>
> [emphasis added]

[55] In this appeal, the Crown alleges the trial judge failed to consider all relevant evidence or give legal effect to undisputed facts. The Crown argues the following circumstances were not considered by the trial judge:

1. J.R. was picked up by Mr. DeSutter a few times a week over a month or month and a half.

2. When at Mr. DeSutter's home, J.R. would drink, smoke weed, listen to music and hang out.

3. Mr. DeSutter would buy alcohol and cigarettes for J.R.

4. J. R. was in the custody of the Minister of Community Services and resided in a group home.

5. J.R. had no access to money, a car or alcohol and was dependent on Mr. DeSutter for these.

6. Mr. DeSutter provided a location for J.R. to use marijuana and alcohol.

7. Mr. DeSutter was J.R.'s only access for transport, marijuana and alcohol.

[56] Although not relied on by the Crown, J.R. testified to the following:

1. The incident involving kissing without permission and the use of the cardboard saw took place when she had not consumed any alcohol or drugs.

2. She, or one of the other complainants, initiated the requests for drives and alcohol from Mr. DeSutter.

3. She initiated most of the Snapchat communications with Mr. DeSutter where he was asked to provide drives, liquor and "stuff".

4. She and Mr. DeSutter had a shared interest in Pokémon.

5. When asked about how she felt concerning receiving alcohol and cigarettes from Mr. DeSutter, she said it felt nice to be able to get those things and not have to pay for them.

[57] Based upon her consideration of the evidence, the trial judge made findings which were fatal to a conviction on Count #14. She reached the following conclusions about the relationship between J.R. and Mr. Desutter:

1. J.R. was introduced to Mr. DeSutter around October 2021. The charges against Mr. DeSutter were filed on October 21, 2021.

2. There was no dependency created between Mr. DeSutter and J.R.

3. There was no power imbalance that made J.R. vulnerable.

4. Mr. DeSutter did not create a relationship whereby he was able to take advantage of J.R.

5. Mr. DeSutter was not in a position of power, trust or authority over J.R.

[58] The evidence which the Crown says was not considered was raised by counsel in their submissions and is referred to in the trial judge's decision. The Crown argument starts with the outcome and reasons backwards to say the trial judge must have ignored the evidence because of the conclusion she reached. The appellant factum summarizes their position:

> 177. The trial judge did not fully appreciate the evidence or give legal effect to undisputed facts. If she had, the trial judge would have recognized the exploitative relationship between the Respondent and JR.

[59] The Crown wants this Court to review the evidence and make our own assessment about the nature of the relationship between J.R. and Mr. DeSutter. That is not our function and runs counter to the direction from the Supreme Court in *Morin* quoted at paragraph 11 above.

[60] The role of an appellate court on a Crown appeal differs from a conviction appeal where there is a concern about avoiding unreasonable verdicts. The Supreme Court of Canada described the difference at pages 294-5 in *Morin*:

> *R. v. B. (G.)*, *supra*, proceeded on the basis (conceded by the Crown at p. 72) that failure by the trial judge to direct himself to all the evidence is only a question of

> law if based on legal misdirection. In this regard, reliance on *Harper v. The Queen*, [1982] 1 S.C.R. 2, must be treated with caution. In that case the appeal was from conviction and the trial judge treated as irrelevant the evidence of several witnesses without an adverse finding with respect to their credibility. This was held to be an error of law by this Court. See Estey J. at p. 14**. That decision must be applied in light of the principle that in an appeal from conviction, the Court of Appeal has the duty of reviewing the evidence in order to determine whether the conviction is unreasonable and cannot be supported by the evidence. In an appeal from acquittal, the Court of Appeal has no such power.** See *Sunbeam Corporation (Canada) Ltd. v. The Queen*, [1969] S.C.R. 221.
>
> [emphasis added]

[61] At trial, the Crown was required to prove beyond a reasonable doubt that the relationship between Mr. DeSutter and J.R. fell within the scope of s. 153(1) of the *Code*. The trial judge found they had not done so. The Crown has not met the heavy burden of showing a legal error on the part of the trial judge in assessing this relationship. The trial judge's factual findings are supported by the evidence. The Supreme Court of Canada in *R. v. T.J.F.*, 2024 SCC 38 made the following comments which are equally applicable in this case:

> [49] I see no error that warrants our intervention on this issue. The trial judge considered all the evidence. The fact that he did not discuss in greater detail the influence that specific evidence had on his reasoning is not an error of law. The trial judge was not required to "set out every finding or conclusion in the process of arriving at the verdict", nor did he have to detail his finding on each piece of evidence before him (*R.E.M.*, at paras. 18 and 20).

[62] I would not allow this ground of appeal.

Conclusion and Disposition

[63] For the above reasons, I am not satisfied the Crown has met its burden of establishing an error of law on the part of the trial judge justifying appellate intervention. I would dismiss the appeal.

Wood, C.J.N.S.

Concurred in:

Beaton, J.A.

Dissenting Reasons:

Introduction

[64] As my colleague has noted, the Crown is only entitled to appeal an acquittal on a question of law alone.[1] For an acquittal to be overturned and a new trial ordered, not only must a legal error be established, the Crown must show, to a reasonable degree of certainty, that it could have had a material effect on the verdicts.[2] "While the Crown need not persuade the appellate court that the verdict would necessarily have been different, its burden in this respect is a very heavy one".[3]

[65] Contrary to my colleagues, I am of the view that heavy burden has been met in this case. With respect, I am unable to agree with my colleagues that the trial judge made no error in her probative value/prejudicial analysis of the USB images, those of clothed females being sawed in half and the ones with females with little or no clothing. I am also of the view the trial judge committed legal error in her analysis of the nature of the relationship between the respondent and J.R. I am satisfied to a reasonable degree of certainty that the verdicts would not necessarily have been the same had the errors not been made. I would set aside the acquittals and order a new trial for the charges under s. 153(1)(a) – Counts 3 (M.H.) and 14 (J.R.) on the original Information.

[66] At trial the Crown said the USB images were probative of a sexualized intention when the respondent pretended to saw the complainants M.H. and J.R. by touching their exposed midriffs with the cardboard saw. The respondent said the images had no probative value, represented an interest in illusion and magic, and were significantly prejudicial. In the respondent's submission neither sexual purpose nor exploitation could be proven beyond a reasonable doubt.

[67] The following reasons explain why in my opinion the trial judge erred in law (1) in her analysis of the admissibility of the images on the USB, and (2) in her assessment of the nature of the relationship between the respondent and J.R. I will use the term "bad character evidence" in referring to the USB images.[4]

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[1] s. 676(1)(a) *Criminal Code*.
[2] *R. v. Hodgson*, 2024 SCC 25 at para. 36.
[3] *R. v. Hodgson*, 2024 SCC 25 at para. 36.
[4] A common term in the caselaw is "discreditable conduct" evidence. I prefer to use "bad character" evidence as the USB images do not constitute "conduct".

[68] My colleague has explained that the acquittal on Count #8 relating to S.H. did not proceed due to the appellant's concession at the appeal hearing. Appellant's counsel noted the Crown had not appealed the finding by the trial judge that she "was not satisfied that the evidence established that…S.H. [was] under the age of 16 at the time". The Crown had in fact led evidence that S.H. was 15 during the material time. The appellant did not appeal the trial judge's "no evidence" finding and conceded at the appeal that, having not done so, there was no basis for seeking a new trial on the s. 151 charge for S.H.

An Overview of the Facts

[69] At the material times, May through October 2021, the respondent was 31 years old. He became acquainted with M.H., S.H. and J.R., all of whom were in the care of the Department of Community Services ("DCS"). M.H. turned 16 in July 2021 and J.R. turned 16 in early September, 2021. The girls knew how old the respondent was because he told them.

[70] J.R. lived in a group home and met the respondent through S.H., who also lived there. M.H. was living in a place of safety in a nearby community.

[71] M.H., S.H. and J.R. would hang out together with E.A., another teenage girl who lived in the same place of safety as M.H.

[72] E.A., who met the respondent through M.H., had the impression he wanted to date M.H. She never observed the respondent make any sexual comments to M.H., other than him wanting M.H. to wear lingerie when he used the cardboard saw. She responded on cross-examination to the question about whether the respondent had ever made sexual comments to M.H. with, "No. Other than the lingerie thing".

[73] M.H. made short work of the respondent's dating interest in her by pointing out that she was dating S.H. When asked if the respondent had said anything sexual to her, M.H. testified he said he would wait until she was 18.

[74] H.R., who lived in the same group home as S.H. and J.R., also testified as a Crown witness. In 2021 she was 13 years old and friends with J.R. whom she looked upon as a big sister. She knew the respondent through M.H. and J.R. She went for a drive with the respondent, M.H. and J.R. on one occasion only. While they were all together, the respondent asked J.R. if he could saw H.R. in half. J.R. said no. H.R. also heard the respondent ask J.R. if he could saw her in half and

play with her belly-button. These inquiries seemed weird to H.R. and made her feel quite uncomfortable.

[75] The general pattern for the interactions between the respondent and the girls involved him picking them up at a location away from where they were living. This was due to staff being on site at both J.R.'s group home and M.H.'s place of safety. Activities with the respondent included driving around, hanging out at his trailer, drinking alcohol and smoking cannabis he supplied, and listening to music.

[76] The respondent would buy alcohol and cigarettes for the girls: in E.A.'s case she had access to her own money from Money Mart. J.R. and M.H. testified they would contact the respondent to pick them up and get them "liquor and stuff". M.H. told the respondent on one occasion in a telephone call that if he did not purchase liquor for them, she would call the police.

[77] M.H. testified that her reason for spending time with the respondent once she moved to live at the place of safety was to get free liquor. He gave her cannabis from his supply and drove her around. The girls did not have access to alcohol, cannabis or a car otherwise.

[78] An activity the girls found peculiar involved the respondent pretending to saw them in half using a large cardboard saw. There is no dispute this happened and a cardboard saw fitting the description provided by M.H., J.R., and E.A. was seized by police from the respondent's residence.

[79] E.A. testified she saw the respondent ask M.H. to pull her shirt up, exposing her midriff, and he then effected the motion of using the large cardboard saw on her stomach to pretend to saw her in half. E.A. witnessed him doing this to S.H. on the same occasion. E.A. was present on one other occasion when the respondent pretended to saw M.H.

[80] E.A. testified the sawing happened in the respondent's bedroom while M.H. and S.H. lay flat on their backs on his bed and pulled their shirts up over their breasts. They were wearing bras. E.A. observed the respondent was closely focused on the sawing activity and stared very intensely while he did it.

[81] M.H. recalled getting $80 from the respondent as payment for letting him use the saw on her. She testified the respondent gave S.H. $40 for the same purpose. When this happened, she and S.H. were in two-piece swimwear—M.H.

said she had shorts and a bathing suit top on and S.H. was in a two-piece bathing suit. The respondent used the saw on the girls' abdomens.

[82] M.H. testified the respondent would ask "us all the time if he could saw us in half". When it was put to her in cross-examination that he was talking about that "because he would say to you he was obsessed with magic", she responded: "Yeah". [AB I, p. 401]

[83] M.H. recalled the respondent asking her to wear his ex-girlfriend's lingerie, a lacy one-piece item. Her description matched the item of lingerie seized by police from the respondent's trailer. M.H. testified she was "pretty sure" the respondent made the request on a subsequent occasion as well. Both times she said no. In response to the respondent's lawyer suggesting to her the context was the respondent asking to do a magic trick while she was wearing the lingerie, M.H. said: "I don't know what he was going to do, but I told him no". [AB I, p. 402] Her memory was refreshed with her statement to police where she had said the respondent asked if he could saw her in half with it on.

[84] E.A. testified the respondent had wanted to buy her lingerie and a bikini to wear while he used the cardboard saw.

[85] J.R. described an evening when she went with the respondent to his trailer. M.H. and S.H. were not there. After lying on top of J.R. and kissing her, the respondent got up and took the cardboard saw out of a closet. He lifted J.R.'s shirt up to just under her breasts and started to saw her stomach. J.R. testified the respondent did not ask her permission before he did this. She did not give permission, was scared and "just kind of froze".

[86] A series of text messages between the respondent and J.R. on September 16, 2021 were introduced into evidence by the Crown. In them the respondent referred to sawing J.R. in half at her belly-button. He posed questions about wishing it was a real saw, wondering if it would hurt, and said: "Keep sawing through your guts, then put you back and do it again". J.R. responded by saying: "I'd be dead by then LOL".

[87] The respondent also had physical contact with M.H., S.H. and E.A. by touching their belly-buttons. E.A. testified the respondent would preface doing this by saying he was experiencing really bad anxiety—"stressing and freaking out"—and then moved his hand over and put his finger in her belly-button under her clothes. He did not ask for permission to do this. It happened to E.A. once when

she was in the front passenger seat of the respondent's car. She observed the respondent touch M.H.'s belly-button in the same manner. J.R. testified the respondent also touched her belly-button under her clothes on one occasion.

[88] M.H. recalled the respondent asking to touch the girls' belly-buttons to help him calm down. She did not think she had ever let him touch hers. She saw the respondent touch E.A.'s when they were in his car together.

[89] The respondent did not testify or call evidence.

The USB Evidence

[90] The evidence the trial judge refused to admit were images and some video contained in five folders on a USB. The appellant sought admission of the evidence to show the respondent's intent in his interactions with the complainants.

[91] Crown counsel had anticipated the defence would assert there was no sexual aspect to the respondent's contact with the complainants and argued a review of the USB images would indicate otherwise. The defence said the images did not relate to what the respondent was doing with the complainants and would animate propensity reasoning. He said the negligible probative value in the proposed evidence was heavily outweighed by its prejudicial effect.

[92] Defence counsel acknowledged a few of the USB images were "almost like mature subject matter" and "possibly pornographic". He said a limited number of images did not have to do with "the illusion" of being sawed in half and were "perhaps…misogynistic or violent-orientated. Again, still not explicitly sexual".

The Trial Judge's *Voir Dire* Decision

[93] The trial judge correctly found that bad character evidence is generally inadmissible and cannot be introduced to attack an accused person's character or to show the accused is the type of person to commit the offences charged. As she noted, such evidence can be admitted where its probative value outweighs its prejudicial effect. She went on to cite the leading case of *R. v. Handy*[5] and referenced the principle that "whether or not probative value exceeds prejudicial

[5] 2002 SCC 56.

effect can only be determined in light of the purpose for which the evidence is proffered".[6]

[94] The trial judge listed what the Crown had identified as live issues to which the evidence was relevant: (1) the accused's intention—that the respondent's conduct had a sexual purpose and was not related to magic as the defence was expected to argue; (2) to rebut any suggestion of innocent association—the Crown argued the USB's location, discovered by the police hidden between his mattress and box spring indicated a sexualized interest; (3) to corroborate the testimony of the girls including about the lingerie and the touching described by M.H.; and (4) to establish the phone and the USB were owned by the accused.

[95] The trial judge found after a review of the contested material there was nothing relevant or material to the belly-button touching allegations. Those touching allegations are not encompassed by the charges which the appellant is seeking to re-try. The appellant does not take issue with the trial judge's finding.

[96] As my colleague notes, the trial judge was not persuaded there was any significance in the hidden location of the USB. As for corroboration of the complainants' testimony, the trial judge found the complainants' testimony about the pretend sawing and the offer to purchase lingerie was already corroborated by E.A.'s evidence.

[97] The trial judge said that establishing the USB belonged to the respondent depended on whether the contents were admissible. I infer she was saying ownership of the USB was only relevant if she admitted its contents.

[98] The trial judge correctly identified that bad character evidence can be relevant to the issue of an accused's motive or intent in relation to the offences charged. She went on to describe the factors that a trial judge should consider in assessing the probative value of the evidence in relation to intent. She found the Crown was not seeking to introduce the evidence for the impermissible purposes of showing bad character or propensity but to show that the respondent's actions were for a sexual purpose. Referencing *Handy* again she noted that situation-specific evidence can have compelling probative value.[7]

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[6] *Handy* at para. 69 citing *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949.
[7] *Handy* at para. 48.

[99] The nuts and bolts of the trial judge's probative value/prejudicial effect reasoning is captured by my colleague in paragraphs 23-25 above.

The Trial Judge's Acquittal of the Respondent on the s. 153(1)(a) Charges

[100] The trial judge's reasons were delivered orally. She quoted from *R. v. D.M.*, a decision of the British Columbia Court of Appeal:

> [34] Whether an accused touches a complainant for a sexual purpose can be established by direct evidence, by circumstantial evidence or from the nature of the touching itself…One aspect of such direct or circumstantial evidence can be the words used by an accused either when the touching occurs or more broadly in the general circumstances that surround the conduct in issue.[8]

[101] The trial judge observed that touching "can involve a wide range of touching, not necessarily considered sexual at first blush".[9]

[102] The trial judge then set out the elements of the offence under s. 153(1): touching for a sexual purpose any part of the body of a young person where the accused is,

> …in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative…

[103] As the trial judge noted, s. 153(1.2) entitled her to infer from the nature and circumstances of the relationship that it was exploitative having regard to: (a) the age of the young person; (b) the age difference between the accused and the young person; (c) the evolution of the relationship; and (d) the degree of control or influence by the accused over the young person.

[104] The trial judge went on to quote from *R. v. Audet*[10] and *R. v. Anderson*[11]. She referred to paragraph 74 in *Anderson*, a decision of the Prince Edward Island Court of Appeal:

> [74] I consider an exploitative relationship to exist where there is a power imbalance between the accused and the younger person in circumstances other than where the accused is in a position of trust or authority or circumstances

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[8] 2022 BCCA 120. (The trial judge omitted the case citations in the middle of the quote.)
[9] The trial judge referred to *R. v. T.K.B.*, 2021 NSSC 221 for this proposition.
[10] [1996] 2 S.C.R. 171. (The trial judge quoted from paras. 16 and 23.)
[11] 2009 PECA 4.

> where the young person has developed a reliance on the accused who has assumed a position of power over the young person. The evidence must demonstrate or, it must be possible for the court to draw the inference from all the circumstances of the relationship and in particular those factors listed in s. 153(1.2) that the young person is, as the result of this power imbalance, vulnerable to the actions and conduct of the accused who is taking advantage of the young person for his or her own benefit.

[105] With respect to the facts relevant to the two charges that are the subject of this appeal, the trial judge found as follows:

- The respondent used his fake saw on at least one occasion on each of M.H., S.H. and J.R. in the manner described by M.H. and J.R.

- The respondent paid M.H. and S.H. as M.H. described to permit him to pretend to saw them in half.

- The respondent only touched the complainants' stomachs with the fake saw. There was no other touching before or after the use of the saw. "And specifically, there was no other touching that could be considered sexual in nature".

- There was nothing said by the respondent that could be considered sexual in nature before, during or after the sawing.

- M.H. was not pressured or coerced into agreeing to be pretend-sawed in half.

[106] The trial judge referred to M.H.'s testimony about the respondent wanting her to wear his ex-girlfriend's lingerie and said this related to his request to saw her in half. The judge found:

> Although some would consider the wearing of lingerie while pretending to saw someone in half could have a sexual connotation, without something further in terms of physical actions or verbal expressions or perhaps expert evidence, I'm unable to find that the incidences with M.H. and S.H. were sexual in nature, affecting their sexual integrity or for a sexual purpose.

[107] Concluding she was "not satisfied that the touching in relation to M.H. and S.H. was sexual in nature, for a sexual purpose or interfered with the sexual integrity of the complainants", the trial judge acquitted the respondent of Count 3 (s. 153(1)(a)) in relation to M.H. and Count 8 (s. 151) in relation to S.H.

[108] The trial judge acquitted the respondent of Count 14 (s. 153(1)(a)) in relation to J.R., after finding the evidence failed to prove the relationship had been exploitative. She found no evidence of a relationship of dependency or any power imbalance "that made J.R. vulnerable to Mr. Desutter". She also concluded that "…it did not appear that Mr. Desutter created a relationship whereby he was able to take advantage of J.R." or that he was in a position of power, trust or authority over J.R.

Standard of Review

[109] As stated earlier, Crown appeals from acquittal must clear two hurdles to be successful: the appellate court must be satisfied an error of law was committed and that the verdict would not necessarily have been the same if the error had not been made.

[110] The parties agreed on the standard of appellate review for the admissibility of bad character evidence issue. They each cited the recent decision of *R. v. Ukabam* from the Saskatchewan Court of Appeal:

> [23] Generally speaking, the admissibility of evidence is considered a question of law and is, therefore, reviewed on appeal on the standard of correctness. This includes the question of whether the trial judge applied the proper legal test to decide the evidentiary issue. However, a determination of the admissibility of similar fact evidence turns, as it must, on a balancing of the probative value of such evidence against its prejudicial effect. This process engages the exercise of discretion, which courts have repeatedly said is entitled to substantial deference: see *R v Handy*, 2002 SCC 56 at para 153, [2002] 2 SCR 908; *R v Shearing*, 2002 SCC 58 at para 73, [2002] 3 SCR 33; and *R v Arp*, [1998] 3 SCR 339 at para 42. Absent an error in principle, "appellate courts owe deference to a trial judge's assessment of the comparative probative value and prejudicial effect of the proffered evidence".[12]

[111] However, no deference is owed where a trial judge has committed legal error in their probative value/prejudicial effect analysis, as in my view happened in this case.

[112] The standard of review in relation to the trial judge's conclusion the respondent was not in an exploitative relationship with J.R. requires the Crown to

[12] 2024 SKCA 15.

establish she misapplied the legal principles in her analysis or assessed the evidence in a way that indicates she failed to properly apprehend the law.[13]

The Admissibility of Bad Character Evidence – General Principles

[113] The reason evidence of an accused's general disposition or bad character is presumptively inadmissible is because it can create the risk of conviction for reasons unrelated to proof of guilt beyond a reasonable doubt on the charges before the court.

[114] Whether, on a balance of probabilities, the probative value of the evidence outweighs its prejudicial effect can only be determined once the issue or issues in question to which the evidence is said to be probative have been determined:

> Probative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact.[14]

[115] Determining the issue/issues in question is the first step in the admissibility analysis. The issues "derive from the facts alleged in the charge and the defences advanced or reasonably anticipated".[15] The USB evidence was directed to the issue of whether the respondent's conduct, which the trial judge found had occurred—touching the complainants with the cardboard saw—was simply magic play-acting or for a sexual purpose. "Touching is done for a sexual purpose, if it is done for one's sexual gratification…".[16]

[116] The second step in the analysis is the assessment of the probative value of the evidence which will be very case-specific. The value of the evidence will lie in its cogency, strength, and connection to a live issue in the trial. A situation-specific propensity may provide the evidence with sufficient probative value.

[117] The third step is assessing the prejudicial effect of the bad character evidence. Admitting bad character evidence risks distracting the trier of fact from their proper focus on the charge and undermining the presumption of innocence (reasoning prejudice). It may also lead the trier of fact to infer guilt from an accused's character or propensity (moral prejudice). However such evidence may

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[13] *R. v. Chung*, 2020 SCC 8 at para. 11.
[14] *Handy* at para. 73.
[15] *Handy* at para. 74.
[16] *R. v. Morrisey*, 2011 ABCA 150 at para. 21.

be highly relevant and cogent such that its probative value offsets the risks of misuse.

[118] The final step involves weighing the probative value of the bad character evidence against its prejudicial effects. This requires the trial judge to address conflicting demands that "pull in opposite directions on the admissibility issue" and "must be resolved".[17] I agree with the Ontario Court of Appeal's rejection in *R. v. J.W.* of "balancing" as an appropriate metaphor for the analysis as it is not in harmony with Binnie, J.'s observation in *Handy* that probative value and prejudicial effect do not "operate on the same plane".[18]

[119] Bad character evidence will be admissible where it is probative of a properly identified issue material to the charges and sufficiently cogent and strong to outweigh any prejudicial effect.

The Exclusion of the USB Evidence Issue

[120] I am of the view the trial judge's exclusion of the USB images, both the clothed females and the unclothed ones in the first four folders, was based on a legally flawed analysis of their probative value and prejudicial effect.[19] Deference is not owed to the conclusions reached by a trial judge whose analysis is marred by legal error.

[121] The trial judge understood she had to assess the admissibility of the USB images in accordance with the probative value/prejudicial effect analysis. Her *voir dire* decision indicates she singled out those images she regarded as sexualized—females in little or no clothing—as probative. She did not explain why she found the images of females being sawed in half "while dressed in clothing, lingerie, or swimsuit attire" could not support a finding of a sexual interest on the part of the respondent and therefore not probative.

[122] The respondent submits the trial judge's probative value analysis of the clothed images makes logical sense because as he says in his factum,

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[17] *Handy* at para. 149.
[18] *R. v. J.W.*, 2022 ONCA 306 at para. 36 referring to Binnie, J.'s comment in *Handy* at para. 148.
[19] The trial judge found the images in Folder 5 to be "irrelevant and is immaterial to the matters before the court". The police had been able to contact the woman in the photos who provided a statement and was not called as a witness. The Crown is not appealing the trial judge's exclusion of this folder of images.

> …Clothed women are not sexual objects. Women in lingerie depicted as willing participants in magic tricks are not inherently sexual objects.

[123] I cannot agree with these categorical statements. Females dressed in lingerie or swimsuits and in a subservient position to a man wielding a saw can be said to be objectively sexualized. I regard the trial judge as having taken a too restrictive view of the clothed images evidence, deeming them not strong enough to be capable of properly supporting the "for a sexual purpose" inference contended by the Crown. As with the unclothed images, the clothed images had potential to be probative to the issue of whether the touching by the respondent had a sexual purpose. It was an error for the judge to effectively limit probative value to images with a striking similarity to the circumstances of the respondent's touching of M.H. and J.R. where their clothing had been displaced to reveal their bare midriffs.

[124] Where the issue is identity, a high degree of similarity is required between the evidence and the offence alleged.[20] The issue here was not identity, it was the respondent's intention in touching the complainants. Was the nature of the touching sexual? The "drivers of cogency in relation to the desired inferences"[21] are different where the issue is whether the respondent's touching of the complainants was sexual in nature or for a sexual purpose. The trial judge subjected the "clothed females" images on the USB to a standard of distinctiveness required in identity cases. She fell into error by doing so.

[125] I consider the more critical error to have occurred at the prejudicial effect step of the analysis. Although earlier in her *voir dire* decision the trial judge had referenced moral and reasoning prejudice as components of prejudicial effect, she never discussed how they factored into her determination. She simply made a conclusory statement that admission of the sexualized USB images would be "extremely prejudicial" to the respondent and therefore should be excluded. Her failure to conduct the prejudicial effect assessment was an error of law.[22]

[126] The focus for the prejudicial effect analysis is the potential for the evidence to be prejudicial to the proper determination of the issues in the trial. Will it animate moral prejudice? Will it lead to reasoning prejudice? This was addressed by *Handy*:

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[20] *R. v. Arp*, [1998] 3 S.C.R. 339.
[21] *Handy* at para. 78.
[22] *R. v. C.(Z.W.)*, 2021 ONCA 116 at para. 119.

> (a) Moral Prejudice
>
> [139] It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a wrongful conviction. The forbidden chain of reasoning is to infer guilt from general disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.
>
> …
>
> (b) Reasoning Prejudice
>
> [144] The major issue here is the distraction of members of the jury from their proper focus on the charge itself...

[127] Evidence is not prejudicial merely because it supports an inculpatory inference.[23] It is the risk of improper use that makes bad character evidence prejudicial. The trial judge should have assessed the USB evidence in relation to moral and reasoning prejudice but did not do so, committing legal error.

[128] The trial judge did not examine, as she should have, how, because of the nature of the proposed evidence, she could have been distracted from a proper focus on the charges (reasoning prejudice) or how the USB evidence might have inclined her to leap to an inference of guilt (moral prejudice).

[129] The trial judge's prejudicial effect legal error cannot be excused on the basis that trial judges know the law. The presumption that trial judges know the law cannot shelter important deficiencies in trial reasons. "A judge who knows the law may still make mistakes in a particular case".[24]

[130] The trial judge's lack of prejudicial effect analysis also meant she did not examine the issue of whether any potential prejudicial effect could be mitigated. This would have been a necessary part of the analytical process for determining the extent of any potential prejudice. However there was no analytical process to trigger it.

[131] The respondent suggested to us that the trial judge believed herself to be unable to overcome the tainting effects of the USB evidence. With respect, there is nothing in the record to support that proposition.

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[23] *R. v. Delorme*, 2021 ABCA 424 at para. 43.
[24] *R. v. Sheppard*, 2002 SCC 26 at para. 54.

[132] Given her considerable experience as a trial judge, there was no risk of either moral or reasoning prejudice in this case. I agree with Paciocco, J.A. who said in *R. v. Houle*: "…moral prejudice is lessened by judicial experience. Similarly, judicial experience lowers the risk of reasoning prejudice…".[25]

[133] The trial judge plainly understood she had a singular focus which she articulated in her *voir dire* decision. As she said: [p. 744]

> …the Crown seeks to have the materials depicting women being sawn [*sic*] in half in various states of dress or undress introduced to allow the court to consider same in assessing the motive or intent of Mr. Desutter's actions in these matters.

[134] Nothing in the trial judge's reasons suggests she would have been distracted by the USB images from focusing on the charges or drawn into prohibited reasoning and jump to an inference of guilt.

[135] The admissibility analysis errors impacted both charges the appellant seeks to re-try. The trial judge acquitted the respondent of the charge relating to M.H. on the basis of finding there was no sexual purpose or intention in his use of the cardboard saw. I am persuaded the USB evidence could have led to a different result, a finding that there was a sexual purpose to the respondent's touching of the girls on their bare abdomens. The trial judge's finding no evidence of sexual purpose foreclosed an examination of whether the relationship between the respondent and M.H. was exploitative.

[136] A legally correct probative value/prejudicial effect analysis would have considered the strength and cogency of the USB images in the context of the other evidence that suggested the respondent had a sexual interest in the girls. He wanted to date M.H. He lay on top of J.R., kissing her. He wanted M.H. to wear lingerie for the sawing activity. The sawing with the cardboard saw involved exposing the girls' midriffs.

[137] I am also satisfied the basis for the respondent's acquittal on the s. 153(1)(a) charge relating to J.R.—that the Crown had not proven an exploitative relationship—would not necessarily have been the same but for probative value/prejudicial effect legal errors on the part of the trial judge. Furthermore, I am of the view that the trial judge erred in misapprehending the law pertaining to the determination of an exploitative relationship.

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[25] 2022 ONCA 325 at para. 38.

The Exploitative Relationship Issue

[138] As has been noted, the trial judge did not find the evidence disclosed a relationship between the respondent and J.R. She concluded that:

- Contact between the complainants and the respondent was initiated by the complainants.
- There was no evidence to suggest a relationship of dependency created between the respondent and J.R. as a result of his purchases (e.g., of alcohol) or his interactions with her.
- There was no power imbalance that made J.R. vulnerable to the respondent.
- It did not appear that the respondent created a relationship whereby he was able to take advantage of J.R.
- The respondent was not in a position of power, trust or authority over J.R.

[139] For exploitation to be found,

> [72] …It is sufficient that there be a power imbalance between the complainant and the accused, that the complainant be vulnerable to abuse, and that the accused take advantage of the complainant sexually for his own benefit.[26]

[140] The fact that a complainant receives a "benefit" from the relationship with the accused does not negate its exploitative nature.[27] A power imbalance can still exist in a relationship where a vulnerable young person is taking what they can get from an older adult with money.

[141] J.R.'s circumstances underscored her vulnerability to exploitation. She lived in a group home under the care of the Department of Community Services. She turned 16 in early September, 2021. The respondent, aged 31, was 15 years older. An under-age minor, she relied on the respondent for drives and alcohol. He facilitated her drinking and access to free cigarettes. What he had to offer—alcohol, time out of the group home, a place where J.R. could drink and hang out—afforded him access to her. If his purpose in touching her with the cardboard saw was sexual, the circumstances were such that J.R. was vulnerable to being

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[26] *R. v. Hooper*, 2023 BCSC 2212.
[27] *R. v. Beckers*, 2012 ONSC 6709 at para. 128.

exploited for that purpose. The fact that she and M.H. initiated contact with the respondent and took what they could get from the relationship did not neutralize its exploitative nature.

[142] Other than stating them, the trial judge did not undertake a proper assessment of the specific factors of the age difference, J.R.'s vulnerability as a teenager in care living in a group home, her lack of money and access to alcohol, and whether they cumulatively defined an exploitative relationship. She did not examine the relationship between the respondent and J.R. in the context of the incentivization he offered. Incentivizing J.R. provided him access to her. The trial judge did not apply a proper legal analysis to the broader context in which the relationship operated.

[143] I am persuaded the error made by the trial judge is comparable to the error identified in the Supreme Court of Canada's decision of *R. v. Barabash*:

> [55] Reviewing the trial judge's findings, it is apparent that he did not turn his mind to whether or not the broader relationship was one of exploitation within the meaning of s. 153. **Where the trial judge did consider evidence that would be relevant to exploitation, he did so in isolation, looking at the factors one at a time.** For example, he identified the age of the complainants and the substantial difference in age between them and the appellants, but found this was an insufficient basis for concluding that this difference was "intrinsically exploitive or abusive" (para. 226). However, he did not assess this age difference in light of other aspects of the relationship, such as the impact of the complainants' addictions, their need for shelter, or their past and ongoing experiences with homelessness and prostitution. **In short, he did not consider the specific factors in light of the broader context or whether they cumulatively resulted in an exploitative relationship**.[28]
>
> [emphasis added]

[144] I do not regard any factual differences in the circumstances of the teenage girls in *Barabash* to be material to the issue of what constitutes the proper legal analysis under s. 153.

[145] In addition, the USB evidence, if admitted, could have cast the relationship between the respondent and the girls—J.R. and M.H.—in a different light. These girls were vulnerable to being taken advantage of for a sexual purpose. By excluding the USB evidence, the trial judge was not equipped to do a proper

[28] *R. v. Barabash*, 2015 SCC 29 at para. 55.

assessment of the full circumstances of the relationship and any power imbalance between the respondent and the girls.

[146] As with the errors in her evidence admissibility analysis, I am satisfied the trial judge's error in assessing the nature of the relationship with J.R. had a material bearing on that s. 153(1)(a) acquittal.

Conclusion

[147] I would allow the appeal and order a new trial on Counts 3 and 14 in the original Information laid on October 25, 2021.

Derrick, J.A.