IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. P.T.,2010 NSPC 49

Date: July 26, 2010

Docket: 2166884, 2166885

Registry: Halifax

Her Majesty the Queen

v.

P.T., a young person, and

A.D., a young person

DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	July 26, 2010
Decision:	July 30, 2010
Charges:	Sexual Assault (s. 271(1)(a) Criminal Code)
Counsel:	Terry Nickerson - Crown Attorney
	Elizabeth Buckle - Defence Counsel: P.T.
	David Grant – Defence Counsel: A.D.

By the Court:

[1] P.T. and A.D. are charged with the sexual assault of M. between May 11 and May 14, 2006. The Crown's allegations arise from a sleepover M. went to at the home of her friend, C.. C. is the older sister of the defendant, P.T..

[2] The sleepover was to celebrate C.'s 15th birthday. M. was at the T. home from May 12 after school until sometime on May 13.

[3] C.'s birthday was a modest affair. M., P.T., and his friend, A.D., were at the house. C.'s and P.T.'s mother, whom I will call T., was home with her niece. The adult women seem to have been relaxing on a deck overlooking [the lake]. The evidence did not indicate them having any interaction with the young people.

[4] According to M., during the night of May 12 extending into the morning hours of May 13, she was sexually assaulted by P.T. and A.D.. In her testimony, she described the events in some detail: P.T. and A.D. also testified to remembering what happened that night and they both categorically deny sexually assaulting M..

[5] The events that have been described at this trial happened over 4 years ago. At the start of the trial, P.T.'s counsel advised her client was not advancing any argument of recent fabrication. A.D.'s counsel, although not initially prepared to unequivocally concede the issue, in the final analysis did not make out a case for recent fabrication and I consider the issue to have no currency in this case. The evidence does not support any suggestion that M.'s complaint to police in April 2009 was a recently concocted story. A.D. testified that he heard within a day or so of May 12, 2006 that M. had told some friends that something had happened at

the sleepover. P.T. testified that M.'s father, W., contacted his mother which resulted in his parents speaking to him two or three weeks after May 12 "about this", causing him to realize M. was saying something about the sleepover. M. testified that she had told five close girlfriends about the events at the sleepover the next day.

[6] W. explained that M. had told him sometime in May 2006 that she had been sexually assaulted while at a sleepover at P.T.'s home. She was distraught and gave him a detailed account but did not want to go to the police. He respected her decision, wanting to let her chart her own course. He felt she was mature enough to do so. He did take some time to find a suitable therapist and in early September 2006, M. met with E.S.. Ms. S., a psychotherapist, testified that she attempted to assist M. deal with her psychological stress around a traumatic incident which M. identified as a sexual assault.

[7] M. did eventually speak to the police in April 2009 about being sexually assaulted by P.T. and A.D. in May 2006 and a sexual assault charge under section 271(1)(a) of the *Criminal Code* was laid. M. testified that she decided to disclose to the police because her younger brother was making a complaint about A.D. threatening him and she "wanted to stand up for myself and stand up for my brother." She said she had been "carrying it around with me." She said she had thought about doing something about it but had "not really wanted it to be a big part of my life anymore…I tried to put it in the past." When M. spoke with police she was 17.5 years old.

[8] On May 12, 2006, M. was 14. P.T. and A.D. were each 13. M. was quite good friends with C. and friendly with P.T.. In fact, she and P.T. had a slight crush on each other which they both acknowledged in their evidence.

[9] Four witnesses testified about events at the T. home on the night of the sleepover: M., C. and the defendants. C., her brother and A.D. disputed or did not recall some details of the evening that M. described. There was evidence from M. that she and C. each took a beer to the lake and then returned to the house. C. has no recollection of that. She says that only she and M. were ever hanging out in the upstairs bedroom whereas M. testified the boys were there too and on the telephone. P.T. said the only phone in the home was downstairs. M.'s evidence is that she went down to P.T.'s bedroom because she wanted to sleep and he and A.D. were occupying the bed upstairs just hanging around.

[10] This issue of whether the two defendants were ever up in C.'s bedroom, which is denied by them and C., seems insignificant to me. Whether they were or they weren't, all these young people – M., C., P.T. and A.D. - ended up downstairs in P.T.'s bedroom with P.T. and A.D. playing video games. No one disputes that. Nothing turns on whether they were in another room earlier.

[11] It is also not in dispute that while the video games were being played, M. was in the upper bunk in P.T.'s room. C. came and went, by her own account bored with watching the boys play video games.

[12] There was some evidence about a beer finding its way into P.T.'s bedroom. Only he and A.D. testified to seeing it: neither C. nor M. mentioned it in their evidence. It was a half-full bottle according to P.T.. M. said she had taken a beer to the lake earlier but after a sip threw it out because she didn't like the taste. M. acknowledged that the beer she took had come from T.'s supply: if there was a beer in P.T.'s room at any point, presumably it did too.

[13] M. testified that upon returning from the lake, C. told her brother and A.D. that she and M. had drunk a lot of beer. The boys plainly didn't believe this lie.

None of the other witnesses were asked specifically about C. making this claim so it was not addressed: as noted, C. has no recollection of going to the lake at all that night.

[14] M.'s evidence is that she climbed into the upper bunk in P.T.'s bedroom to sleep. She did fall asleep and when she woke up the door was shut and the defendants were playing video games. She heard them starting to talk about her and was curious as to what would be said so she did not let on that she was awake. The comments were about her looks; that she had nice legs but her breasts, referred to as "boobs", were not big enough. She described what started to happen after this.

[15] "They", she said, started to graze her arms and touch her legs. "They" lifted up her sweatpants and tried to run their hands down her legs and her "ass", to use her words. She began to make it obvious that she was awake. "They" started trying to touch around and "get into" her vagina with their fingers and also were touching her "ass". She moved her legs together to try and block the attempts to touch her vaginal area. She made grunting noises as though she was waking up. She heard the sounds of the defendants masturbating and then felt something being rubbed on her arm and face which she said was ejaculate. She kept her eyes closed but testified that it felt like two people touching her.

[16] M.'s evidence was that she was not looking at whomever was touching her; she assumed it to be both P.T. and A.D..

[17] M. testified that she then heard P.T. say "it" was "gross" and he "didn't want to do that." She said he went to get a washcloth and wiped her off. M. was not asked if she saw P.T. leave the room or just assumed he must have done so from

the fact that he wiped her with a wet cloth. There is no evidence that M. looked at where P.T. was at this point so it appears she is describing an assumption.

[18] The next event according to M. was A.D. climbing the ladder to the upper bunk and straddling her. He pulled her into him and touched her face and hair. She heard P.T. “freak out” saying, “what are you doing?!” A.D. let her go and M. rolled over and scrunched herself up against the wall. She testified that A.D. then got on his knees, undid his pants, and pinned her shoulders with his legs. She could not move and felt his penis touch her face. She kept her lips tightly closed and would not open her mouth. P.T. did not touch her while A.D. was in the top bunk.

[19] M. testified that various events then occurred. A.D. got down from the upper bunk. C. came into the room. M. used the opportunity to run to the bathroom because she needed very badly to pee. She yelled to C. to guard the door. She heard C. ask the defendants what they had done. When she emerged from the bathroom, C. and the boys were in the hallway; they told M. to calm down. They started to suggest she was drunk: even C. went along with this charade although she knew it wasn’t true. M. climbed back into the upper bunk and got C. to get in with her. The teasing and fooling around about her being drunk continued. M. went along: she testified she did so because she was scared. Eventually she fell asleep and when she woke up C. was gone.

[20] M. testified that the video game was still on and she said out loud to turn it off. A.D. replied “you do it” and then suggested she sleep with him in the chair he was occupying. She climbed into the lower bunk where P.T. was sleeping and asked him to keep A.D. away from her. She curled up at his feet and when she woke up again she was alone in the room.

[21] It was her evidence she then called her dad right away to come and get her.

[22] Much of what I have just related was denied by C. and the defendants. The defendants expressly denied sexually assaulting M..

[23] C.'s recall of the events of May 12, 2006 was quite patchy. She does recall the defendants playing video games in P.T.'s bedroom and watching them do that for awhile before getting bored. She then went to bed in her own room upstairs. She testified that when she left, M. was by herself in the top bunk in P.T.'s room. C. testified that her next recollection was waking up on the morning of May 13. She says she saw M. in her brother's room around 10 a.m. that morning. A.D. was still there as well, lying on the floor. C. said there was no chair in the room, contradicting M.'s claim that there was and that A.D. ended up occupying it. Her evidence also contradicts A.D.'s: as I will review shortly, he testified that he wound up sleeping on a couch in another room and was not still in P.T.'s room the next morning.

[24] C. had no recall of being asked to stay with M. in the upper bunk or of being asked to guard the bathroom door. She said the door worked properly, implying that she would not have been required to provide security for M. anyway and that M.'s claim of a broken lock or door is false. C. testified that M. said nothing to her about being sexually assaulted or touched and had many opportunities to do so.

[25] M. did not suggest she had told C. anything about the events in the room. She testified that when she went to the bathroom she would have liked C. to have asked her what happened but she didn't. She described C. going along with the charade that she was drunk. In M.'s words: "She didn't feel like a friend at that time."

[26] M. also responded to questions about why, if she was being sexually assaulted, she hadn't just left the room. Her evidence on this point was that she was

scared and did not want anyone to know or to get angry with her as she thought the defendants might. She admitted that she was not sure why she had not left. She didn't go home because she thought that "when she woke up it would be different, like nothing happened."

[27] P.T. testified in his own defence. He described playing video games in his room with A.D. on May 12. They were good friends, having gone to school together in the same grade. C. and M. were in the room too although C. did not stay long. P.T. testified that it "was obvious M. was drunk or pretending to be drunk." P.T. testified that M. could have been putting on an act because she seemed more intoxicated than she would have been from drinking even a whole beer.

[28] P.T. also confirmed by his evidence that M. was in the upper bunk. He acknowledged there was some "flirty" talk which might have involved a brief reference that he now cannot recall about M.' physical attributes. He testified nothing negative was said and also, that the talk in the room included M. being asked and answering questions.

[29] P.T. denied any sexual touching of M.. He said he touched her only once: while she was lying in the upper bunk facing the wall he touched her arm or her shoulder to shake her in order to see if she was awake. He might have given her a "wet willie", an annoying poking of her ear with a wet finger which was something he could have done although does not now recall.

[30] P.T. spent the night on the lower bunk. He saw A.D. climb into the upper bunk where he said A.D. just talked to M. for an hour or so. He could hear some conversation involving the same kind of "silly" questions M. had been being asked

earlier, the “flirty” talk. It was mostly the sound of voices he heard, not the content of what was being said.

[31] P.T. was asked how he, having a bit of a crush on M., felt about A.D. being in the upper bunk with her. He responded by saying his feelings were, “Whatever: what happens, happens.” He did not explain what he thought might “happen.” He was not fully sexually active himself at the time although he was sexually aware, indicating that the furthest he had gone with a girl was “maybe put my hands in someone’s pants.”

[32] P.T. got up a couple of times and saw A.D. with M. in the upper bunk but nothing physical happening. For a significant amount of time, he did not see what A.D. was doing in the upper bunk. He testified he observed the upper bunk maybe 20 percent of the total time A.D. was up there. He did not know what was being said or done when he was not observing. He did not masturbate or see A.D. do so. He did not leave the bedroom to wet a face cloth to wipe M. off with. He does not recall M. getting into the foot of his bed. He thinks the video game would have shut off although the television was usually left on. It was his evidence that when he woke up the next morning, M. was no longer in the room and he next saw her in the kitchen. He does not recall where A.D. was.

[33] A.D. testified that he arrived at the T. home after school, meeting P.T. there. M. was already at the house visiting C.. A.D. and P.T. talked and played video games and went for a long walk, returning to the house around 10 p.m. According to A.D., the boys then went into P.T.’s bedroom and A.D. sat in a lawn chair. It was his evidence that there was no hanging out in C.’s bedroom. A.D. testified that video-game playing was the primary activity of the night, that they played “pretty much all night ‘til we fell asleep.” C. and M. came in and watched the boys play.

A.D. described M. being in the upper bunk apparently sleeping. The boys tried to wake her up by shaking her. She didn't awaken. He had earlier thought she seemed intoxicated. There was no putting of hands in her pants and no masturbating.

[34] Although A.D. said he saw a beer in the room, he did not see anyone drinking beer that night. He did not know who had brought the beer into the room.

[35] A.D. testified that he climbed into the top bunk with M. because he found the lawn chair uncomfortable. He had no physical contact with her there. He denied the penis incident M. described. He said there was not much conversation other than him asking her "stupid questions like are you awake."

[36] On cross-examination A.D. testified that while in the upper bunk he had continued to play the video games with P.T.. He said: "We played 2 player the whole night."

[37] At some point, A.D. must have got out of the top bunk because he described falling asleep in the lawn chair. Waking up halfway through the night he went downstairs to sleep on a couch. The video game had not been paused and had awakened him. He noticed that M. was curled up on the bottom bunk at the end of the bed. He did not see her again. When he woke up late on May 13, she was gone from the house.

[38] The evidence of P.T. and A.D. makes this a *W(D)* case. R. v. *W.(D.),[1991] 1 S.C.R. 742* requires that an accused must be acquitted if:

- The judge believes the accused's evidence;
- The judge does not believe the accused's evidence but is left with a doubt by it;

- The judge does not believe the accused's evidence and is not left in a doubt by it but on the whole of the evidence, has a doubt.

[39] Assessing the evidence and engaging with the issue of reasonable doubt is an exercise that must be undertaken for each of P.T. and A.D.. The presumption of innocence holds unless I am satisfied for each of these defendants that the Crown has proven the charge of sexual assault beyond a reasonable doubt. Both of them could be acquitted, or only one of them, or both of them could be convicted, depending on what I conclude about reasonable doubt.

[40] The starting point in any trial is the presumption of innocence. P.T. and A.D. are presumed to be innocent until there is proof beyond a reasonable doubt they are not. *W(D)* requires me to determine if I have a reasonable doubt based on the evidence of the defendants or if not, whether that doubt still emerges on the basis of my assessment of all the evidence.

[41] The Supreme Court of Canada has been clear. I must "direct [my] mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt." *(R. v. Dinardo, [2008]1 S.C.R. 788, paragraph 23)* If any of the evidence raises a doubt the accused gets the benefit of that doubt and must be acquitted. The burden of proving every element of the offence beyond a reasonable doubt never shifts from the Crown to the accused. Even disbelief in an accused's evidence does not end the judge's task: all the evidence must be scrutinized for doubt and if doubt emerges on an examination of all the evidence then even the accused who has had his own testimony disbelieved is entitled to be acquitted. *(R. v. D.W.S, [2007] N.S.J. No. 47, paragraph 15)* As the Supreme Court of Canada stated in *R. v J.H.S., [2008] 2*

S.C.R. 152 at paragraph 13: "…lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt."

[42] It is not however simply a matter of determining that an accused's denial is "plausible": where there is conflicting evidence, reasons are necessary to explain why certain evidence is accepted or rejected, even recognizing that "…the exercise [of determining credibility] may not be purely intellectual and may involve factors that are difficult to verbalize." *(R. v. R.E.M., [2008] 3 S.C.R. 3, paragraph 49)*

[43] While it is a clear error to convict on the basis of preferring a complainant's evidence to an accused's, it is not an error

> …for a judge to make a finding of credibility as between the complainant and the accused, particularly where they provide the bulk of the evidence as to what happened. This is a necessary part of the judge's duty. While it is not the end of the journey of decision-making, it is a necessary intermediate step along the way. *(R. v. D.S.C., [2004] N.S.J. No 432, paragraph 23)*

[44] As my earlier recitation of the facts will have disclosed, some important details about the events of May 12 are not in dispute. M. did spend the late night-time hours in the upper bunk in P.T.'s room. For a period of time A.D. was up there with her. I also accept that at some point in the night she climbed down and curled up in the bottom bunk, at P.T.'s feet. P.T. would have been unaware of this if he was asleep. These are facts M. testified to that are supported by the evidence of A.D. and as far as the upper bunk is concerned, by P.T. and his sister as well.

[45] There is no agreement about what happened while M. was in the upper bunk. Both versions of events cannot co-exist. The critical parts of M.'s evidence are disputed by the defendants. By saying that she has no recall of the bathroom visit

by M. or getting into the upper bunk with her at her request, and that she would have remembered these events, C. is saying they could not have happened.

[46] At this point I want to indicate that I did not find C.'s evidence to be particularly helpful overall. By her own admission, her recollection was very limited. She spent very little time in P.T.'s bedroom and so her testimony that she observed nothing out of the ordinary does not help me determine what occurred in that bedroom. And where her evidence conflicts with M., I prefer M.'s evidence which I found to be clear and consistent notwithstanding the significant amount of detail she provided. I do not regard C. to be a reliable or independent witness. I note that her evidence conflicts even with A.D.'s on the presence of a chair in P.T.'s bedroom and A.D.'s whereabouts on the morning of May 13.

[47] Even on the defendants' accounts, particularly P.T.'s, I find that the atmosphere in the bedroom was to some degree, sexually charged. I accept that there was talk about M.'s body: what P.T. said was "flirty" talk was what M. described as a discussion concerning her physical attributes. P.T. testified that M. was asked questions about who she would be inclined to date, given the choice between celebrities and P.T.. There was, according to P.T., more of this kind of talk when A.D. climbed into the upper bunk. A.D. said about his upper bunk conversation with M. that it was "stupid questions" such as asking her if she was awake. I do not accept that as a forthright description. Even A.D.'s own description of the upper bunk visit, and certainly P.T.'s evidence, indicates that A.D. knew M. was awake.

[48] I do not accept that the bedroom environment was two 13 year old boys playing video games and engaging in occasional teasing and innocent chat with a 14 year old girl whom they had been discussing. The evidence indicates to me that

there was sexual talk, whether I accept M.'s version or P.T.'s description of "flirty" talk. There was no indication of parental supervision or the regular presence of a slightly older sister. There were just the boys and M.. She was an object of interest to them. And she had some interest at least in what they might be saying about her and to some extent, in P.T.. There is nothing unusual or unnatural about a situation of close proximity of teenage boys and a teenage girl involving some sexual currents. P.T., already sexually aware, seems to have contemplated that some sexual activity might occur in the upper bunk with A.D.; he testified that his feelings about M. and A.D. being there together were: "Whatever; what happens, happens."

[49] I am not making a leap from finding that there was a heightened sexual atmosphere in P.T.'s bedroom to concluding that there must therefore have been a sexual assault. What I draw from my conclusion about the atmosphere in the bedroom is that P.T. and A.D. downplayed it in their testimonies. This is one of the reasons I do not simply believe their versions of the events. It seems to me that their descriptions of the events in the room were not entirely forthcoming, that they have held back on some details, starting with the details about the sexualized conversation.

[50] There are some specific details that cause me to disbelieve A.D.'s evidence about what he said was happening in the top bunk. I do not believe that he was having an hour long chat with M. and was also still playing video games. P.T. did not mention any video game playing with A.D. while A.D. was in the upper bunk. That detail simply does not have any ring of truth. It is a significant detail because it is what A.D. purports to have been doing while he was in the upper bunk.

[51] As I noted earlier however, not accepting the defendants' evidence is not a determination of guilt. There may be reasonable doubt to be found in the balance of the evidence I have to consider.

[52] As will be evident from my earlier comments, I do not find that C.'s evidence either on its own or taken together with all the evidence undermines the Crown's case or otherwise raises a doubt.

[53] Considering all the evidence brings me squarely to a consideration of M.'s testimony. In addition to the evidence that supports her testimony about first being in the upper bunk and then the lower one, certain details she provided are corroborated by description, if not by timing, in the evidence of P.T.. P.T. testified that in the bedroom it "was obvious M. was drunk or pretending to be drunk." This is consistent with M.'s description that she was treated as though she had been drinking. P.T. described a question and answer session which was also something M. testified about although P.T. suggested this had occurred earlier on and M. gave evidence that there were questions and answers after her return from the bathroom. These very similar details make the versions of the events as described by the defendants and M. not so different, with the significant conflict being the sexual assaults.

[54] What I must now do is carefully consider M.'s evidence and whether there is a reasonable doubt raised by it. There is no other evidence for me to consider although it will be necessary to compare and contrast the defendants' evidence in this exercise.

[55] M. was a sure-footed and credible witness but not over-confident or prone to exaggeration. She offered a clear and coherent recall, including details that emerged from the evidence of the defendants. She described events, clearly

troubling and painful for her to relate, in a consistent and unvarnished manner. She had very good recall for detail. She described having thought a lot about the events and replaying them in her mind. She was candid; for example, admitting that she did not know why she had not just left the room. The explanation she did give for staying put in the room was reasonable, as was her description of climbing into the bottom bunk for greater safety. There was a coherency in her explanation for why she trusted P.T. more in the circumstances. Her reasons for not telling C. anything make sense: she didn't trust her to be an ally. There is independent evidence, from A.D. himself, that M. did indeed finish the night in P.T.'s bunk. M. was also unshaken by cross-examination which left her version of events intact.

[56] It was suggested by A.D.'s counsel that M. had a motive to get A.D. at least in trouble because of her belief that he had been bullying her little brother. I already described the history of M.'s reporting to police. There is nothing in the evidence to support the allegation that she made up a story of sexual assault as an act of revenge against A.D. for anything he may have done to her brother. To the contrary, M.'s evidence, which I accept, is that what motivated her to tell the police about being sexually assaulted was her decision to finally stand up for herself in relation to what she had experienced.

[57] I accept M.'s evidence that she was sexually assaulted on May 12 and 13. I accept that she was sexually touched and groped by what she thought were two sets of hands. I also accept that she was subjected to an assault by A.D. involving his penis in the upper bunk. And I accept that P.T. did not touch her or otherwise participate in this assault. I find that during the penis assault, P.T. was a mere presence in the room and was not a party to the assault being perpetrated by A.D..

[58] Believing M.'s evidence that she was sexually assaulted does not finally resolve the issue of reasonable doubt with respect to the sexual groping while she was in the top bunk and both defendants were by the bed. She did not see who was touching her. She did not see who was masturbating. She was not asked how she knew the boys were masturbating other than she said she heard "them" doing so. She did not see what was wiped on her or who did the wiping. From the evidence it would appear that it was something that P.T. found disgusting and wiped off. I accept that happened as M. described. I do not accept P.T.'s denial. As I mentioned earlier, I find that both defendants downplayed the events in the room and I do not believe their flat denials about sexual contact with M..

[59] Having said that, the evidence about the sexual groping gives me little to work with in determining who was involved. Is it possible that P.T. was not, as he intervened on a couple of occasions according to M.: once to wipe her off and later to decry A.D.'s actions in the upper bunk? I do not know what that evidence may indicate about whether P.T. would have gone beyond the sexualized talk. More importantly, I do not have anything more than M. saying that the sexual groping felt like it was being done by two people. This was never fleshed out by the Crown: why did it feel to M. like two people? Could she feel three or four hands on her at once? How could she differentiate between the hands touching her so as to know it was more than one person? With the evidence "it felt like two people", I have nothing beyond a bald statement that, without more, amounts to an impression.

[60] I do not want to be interpreted as saying that for proof beyond a reasonable doubt I would require evidence that M. actually saw who was touching her. She testified that her eyes were closed. There are other senses she presumably was

employing to determine what was happening. She was not asked how those other senses told her that both P.T. and A.D. were touching her.

[61] I accept the evidence from M. that she was sexually touched before the penis assault in the upper bunk. I find it to have been proven beyond a reasonable doubt that hands were touching her sexually before A.D. climbed up into the upper bunk. But I have to be satisfied beyond a reasonable doubt who did the touching, was it one or both of the defendants? And if it was one of them, which one of them was it? I certainly think it is possible that both P.T. and A.D. touched M. sexually. And I think it is highly probable that A.D. did, given what happened later in the top bunk. I am not able to say more than I think it was “possibly” both defendants, or “maybe” P.T. alone although I am less confident that he would have done this without A.D. participating, or “most probably” that it was A.D.. “Possibly”, “maybe” and even “most probably” fall below the standard required for conviction of a criminal offence. I cannot say that the evidence establishes beyond a reasonable doubt who did the touching. I do not find that the simple statement that “it felt like two people” without anything more, can satisfy the rigorous standard of proof beyond a reasonable doubt. M. may have been able to say why she thought she was bring touched by both P.T. and A.D. but she was not asked to elaborate so there is no evidence to help me assess the reliability of her belief.

[62] The result of my analysis is that I am acquitting P.T. of sexual assault: I find the Crown has not proven beyond a reasonable doubt that he sexually assaulted M. either by touching her or as a party to the penis assault. I am convicting A.D. of sexual assault as I find that the Crown has proven beyond a reasonable doubt that he assaulted M. with his penis in the upper bunk as she described.