PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Pettipas*, 2016 NSPC 62

Date: 2016-10-24
Docket: 2917983
Registry: Pictou

Between:

Her Majesty the Queen

v.

Gregory Allan Pettipas

VERDICT—CORRECTED DECISION

Editorial Notice: *The text of the original decision has been corrected according to the following erratum dated November 3, 2016*

Restriction on Publication: Any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

ERRATUM

The date of the decision was incorrectly listed as September 7, 2016; it has been changed to October 24, 2016
Para. 44—change "issue" to "issues" and "that" to "they".
Para. 46—change final clause to read "but to address more fulsomely".
Para. 52—change first clause of second sentence to read "The proposition advanced by the prosecution is that the agreement".

Judge:	The Honourable Judge Del W. Atwood
Heard:	28 July, 24 August, 7 September, 24 October 2016 in Pictou, Nova Scotia
Charge:	Section 271 of the Criminal Code of Canada
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Gregory Allan

Pettipas

By the Court:

[1] There is a s. 486.4 publication ban in effect in this case protecting the identity of the complainant.

[2] Gregory Allan Pettipas is alleged to have sexually assaulted N.G. on 20 June 2015 while driving her home. The prosecution elected to proceed summarily with a single count under s. 271 of the *Criminal Code*, and Mr. Pettipas pleaded not guilty.

[3] Proof of a sexual-assault charge does not require DNA evidence; it does not require a metaphorical smoking gun. What is required is that the prosecution prove beyond a reasonable doubt each element of the offence.

Evidence of the complainant, N.G.

[4] The first witness for the prosecution was N.G. She is a 29-year-old female who works at a local restaurant as a dishwasher. I was told later on in the trial by her sister that N.G. is handicapped mentally to a mild degree; however, the court was not presented with a qualified medical or psychological diagnosis on this point.

[5] The direct examination of N.G. by the prosecution began somewhat problematically. This is because the prosecutor prefaced his questions concerning the charge with what I assume was intended to be a primer for the witness on the need to tell the truth and the difference between telling the truth and lying. I gather the prosecutor felt this was necessary because of what he understood to be N.G.'s intellectual limitations. This is how the briefing unfolded:

> Q. Okay. Now truth and lie, do you know the difference between a truth and lie?
>
> A. Yes.
>
> Q. Okay. And if I was to say that my jacket is pink, would that be the truth or a lie?
>
> A. Lie.
>
> Q. Okay. And if I was to say that this courthouse is in Pictou, Nova Scotia, would that be a truth or a lie?
>
> A. Truth.

[6] I have encountered such exchanges in the past when viewing audio-video recordings of police conducting interviews with children, presented to the court pursuant to s. 715.1 of the *Code*. In my view, this method of preparing child witnesses, or witnesses with disabilities, for forensic questioning projects a real risk of inaccuracy into the fact-finding process. This is because it presents the witness with a false dichotomy of declaratory statements as being either the

truth, or a lie. But the fact is that a declaration might be something other than the truth or a lie. It might be a joke. Or a trick. It might be based on a delusion. Or—and this is what causes my concern to kick in—it might be a mistake. A witness, just as any other fallible human being, is capable of being mistaken. An integral trial process should be one that encourages witness accuracy; this includes fostering a willingness in witnesses to let the court know when the witness thinks he or she might have made a mistake in giving an answer to a question. The problem with the truth-or-lie dichotomy is that it might lead a witness—particularly one who is very young, or intellectually or emotionally vulnerable—to lock in a mistaken answer. Such a witness, upon recognizing a mistake, might feel very reluctant to reveal it to the court. If one has not told the truth, then it must have been a lie—isn't that what the policeman in the interviewing room or the lawyer at the court house said? But who would want to admit to a lie? Truth or consequences, after all. This truth-or-lie method of witness preparation poses real risks to the court's fact-finding duty. However, as Mr. Pettipas' trial progressed, and as N.G. was examined and then cross-examined, I was able to satisfy myself that this initial misstep was of no consequence, as I found N.G. to be very thoughtful, attentive and reflective as she answered questions asked of her.

[7] N.G. told me that she was 29 years of age. On 20 June 2015 at around 1700hrs, N.G. went to the home of Mr. Pettipas and his partner, J.C., at a trailer court in Blue Acres, Pictou County. N.G. had lived at one time with a roommate who knew J.C.; it was through meeting J.C. and visiting her home that she had come to know Mr. Pettipas.

[8] After spending time on 20 June with Mr. Pettipas, J.C. and other friends, N.G. decided to return to her home; this was around 2330hrs. At first, N.G. was going to take a cab; however, she changed her mind after Mr. Pettipas offered to give her a drive. It was just she and Mr. Pettipas in the car; Mr. Pettipas was at the wheel, and N.G. was in the front passenger seat.

[9] N.G. testified that, not long after leaving, Mr. Pettipas took his right hand and held her left hand; he then placed his right hand on N.G.'s leg, over her pants, and began rubbing her vaginal area. N.G. then described Mr. Pettipas as unzipping his denim shorts and exposing his penis. According to N.G., Mr. Pettipas encouraged her: "Come on now . . . touch it . . . I won't tell anybody if you touch it." Mr. Pettipas was holding N.G.'s left arm around the wrist at this point. As N.G. described it: "He was trying to put my arm toward his penis. I was trying to pull away and let loose." Furthermore: "I said 'no' three times."

[10] N.G. was questioned in some detail on the sequence of things that Mr. Pettipas did to her:

> Q. Okay. So you mentioned that Greg reached out with his right hand and he touched your . . . was it your left hand or left arm, what was it?
>
> A. Left arm.
>
> Q. Okay. What part of your . . . .
>
> A. The wrist.
>
> Q. Around your wrist?
>
> A. Yeah.
>
> Q. Okay. And as he did that, was anything said, did he say anything to you?
>
> A. Oh, he unzipped his pants . . . they're his jean shorts . . . with his left hand and showed me his penis and then he asked me to touch it and I said "no" three times and he took my left arm trying to get me to touch it and I said "no" again and he said "I won't tell nobody if you touch it. If I . . . if you touch my penis.

[11] N.G. told the court that Mr. Pettipas dropped her off at home, and they said good-bye to each other. The next day, Mr. Pettipas texted her, asked what was wrong and whether everything was okay.

[12] On cross examination, N.G. stated that Mr. Pettipas had, on previous occasions, held her hand. Defence counsel sought to question N.G. about "sexualized dancing" with Mr. Pettipas. I stopped the cross-examination of N.G. at that point, as there had been absolutely no application in accordance with s. 276.1 of the *Code* to have the court hear evidence of sexual activity other than that forming the subject matter of the alleged offence. This got

replayed when defence counsel asked N.G. about whether she had ever flirted with Mr. Pettipas.

[13] Defence counsel cross-examined N.G. on the sequence of events:

> Q. Alright, let me ask you this then, what did you see Mr. Pettipas do, that is what did you actually see him do just before you saw his penis?
>
> A. I seen him or . . . he rubbed his or . . . hand down my leg, left leg, on the outside of my pants, I seen him do that.
>
> Q. So you saw him touch your leg, correct?
>
> A. Yes.

[14] Defence counsel zeroed in on this point:

> Q. And that was . . . correct me if I'm wrong . . . that was the last thing you saw him do before you noticed that his penis was exposed, is that correct?
>
> A. Yes.

[15] N.G. acknowledged that she returned to Mr. Pettipas home in July 2015 for a bachelorette party, but still felt uncomfortable.

Evidence of N.G.'s older sister, B.G.

[16] N.G.'s older sister, B.G., gave evidence for the prosecution. She testified that she learned for the first time about what had happened to N.G. on 13 July 2015 when N.G. confided in her what had unfolded on the drive home the previous month. The prosecution did not inquire into the details of what N.G.

had told her sister; as to have done otherwise would have offended the rule against oath helping.[1]

[17] N.G.'s sister told the court that N.G. had not wanted to report what Mr. Pettipas had done to her; she had told N.G. that she would report it if N.G. did not. N.G.'s declaration to her sister was not presented in truth of what N.G. had revealed about what Mr. Pettipas had done; rather, it was narrative which explained to the court how the complaint got made to the police.

Evidence of M.N.

[18] The next witness for the prosecution was M.N. M.N. told me that she had been dating N.G.'s father for some time, and spoke with N.G. very often. M.N. described how she and her boyfriend had dropped off N.G. at Mr. Pettipas' trailer on 20 June. She told that court that she had taken a call from N.G. about a month later; N.G. had revealed to her at that time what Mr. Pettipas had done to her. M.N. took N.G. to the police station; she described N.G. as "upset" and "not wanting to tell her father, but she knew she had to."

[1] *R. v. Gallie*, 2015 NSCA 50 at para. 83.

Audio-video statement of Mr. Pettipas

[19] The prosecution tendered in evidence as Exhibit 1 a transcript of an audio-video statement Mr. Pettipas made to police, recorded 24 September 2015; Exhibit 2 was a DVD disk on which the statement had been recorded. Defence counsel waived a voluntariness *voir dire* in accordance with *R. v. Park*.[2]

[20] In his statement to police, Mr. Pettipas admitted that his penis was exposed but that the exposure was accidental. He told police was that he had not worn underwear and that, unbeknownst to him, his zipper was unzipped.

[21] Mr. Pettipas acknowledged that he had touched N.G.'s thigh but "it wasn't up close to the private area . . . I'm not sure what she thought of it".

[22] Mr. Pettipas admitted also to having held N.G.'s hand, but did not pull her hand toward his crotch.

[23] Defence elected not to call evidence.

[2][1981] 2 S.C.R. 64.

Theory of the prosecution

[24] The prosecution argues that the court should accept N.G.'s testimony as a credible and accurate account of what Mr. Pettipas did to her: touching her thigh and genital area over her clothing, and forcing her hand toward his exposed penis; Mr. Pettipas did this without N.G.'s consent and knew it; finally, Mr. Pettipas' actions were, viewed objectively, sexual in nature.

Theory of the defence

[25] Mr. Pettipas denied touching N.G. to the extent she had alleged; all he did was touch her thigh and hold her hand briefly. To the extent he admitted touching N.G., he felt it was permissible as he had done it before, he did not do it in an objectively sexual manner, and he had no malicious or criminal intent.

Analysis—presumption of innocence

[26] In *R. v. Lifchus*, the Supreme Court of Canada provided a concise definition of proof beyond a reasonable doubt:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;

- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a court which were to find only an accused probably guilty must acquit.[3]

[27] In *R. v. Starr*, the Court developed this definition by observing that the burden of proof placed upon the prosecution lies much closer to absolute certainty than to a balance of probabilities.[4]

[28] Later, in *R. v. J.M.H.*, the Court stated that a reasonable doubt need not be based on the evidence; it might arise from an absence of evidence or a simple

[3] [1997] 3 S.C.R. 320 at para. 36.
[4] 2000 SCC 40 at paras. 96 and 242.

failure of the evidence to persuade the trier of fact to the requisite level of proof beyond a reasonable doubt. [5]

[29] The prosecution places weight in its brief that the court did not hear from Mr. Pettipas—"other than his statement to Cst. Reid." I have addressed this sort of argument before. In *R. v. Gillis*,[6] I stated that a denial rendered by an accused during the course of giving a statement made to police, and then tendered in evidence at trial, must be considered by the court as it would consider all other evidence: the court must assess it for credibility and reliability based on a review of circumstances under which the statement was made. Axiomatically discounting such a statement simply because an accused might have chosen not to testify at trial would strip the accused of the right to silence, a right that runs throughout a criminal trial of the presumptively innocent, as described by Abella J. in *R. v. Turcotte*,[7] and as elaborated upon by White J.A. in his very instructional opinion in *R. v. Adams*.[8]

[30] Given that I have heard from Mr. Pettipas, I apply the law as set out in *R. v. W. (D.)*: if I were to believe Mr. Pettipas, I must find him not guilty; even if

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[5] 2011 SCC 45 at para. 39.
[6] 2012 NSPC 122 at para. 14.
[7] 2005 SCC 50 at para. 55.
[8] 2012 NLCA 40 at paragraph 18.

were not to believe him, but his evidence should leave me in a state of reasonable doubt, I must find him not guilty; even if I were not to believe Mr. Pettipas and his evidence not leave me in a state of reasonable doubt, I must still ask myself whether, based on the evidence I do accept, I am satisfied that the prosecution has proven each and every element of the offense beyond a reasonable doubt, and, if not, I must find Mr. Pettipas not guilty.[9]

Analysis—sexual assault—elements of the offence

[31] Sexual assault is penalized in s. 271 of the *Code*:

> 271. Everyone who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of one year; or
>
> (b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding 18 months and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of 90 days.[10]

[32] Sexual assault is comprised of an assault within any one of the definitions in sub-s. 265(1) of the *Code*, committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.[11]

[33] Assault is defined in sub-s. 265(1) of the *Criminal Code* in these terms:

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[9] [1991] 1 S.C.R. 742 at para. 28.
[10] Later amended by S.C. 2015, c. 23, s. 14, in force 17 July 2015 in virtue of SI/2015-68, which changed the penalty provisions. The amendment has no effect on this case.
[11] *R. v. Ewanchuk*, [1999] S.C.J. No. 10 at para. 24.

> A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

[34] An assault pursuant to section 265(1)(a) of the *Criminal Code* involves the intentional touching of another person, directly or indirectly, without the consent of the person being touched. The slightest touching without consent can constitute an assault within that definition. The Ontario Court of Appeal put it this way in *R. v. A.Z.*:

> The "force" required for an assault may be no more than a touching of the person of the complainant in circumstances which interfere with the bodily integrity of the complainant. In the context of the definition of assault, "force" does not necessarily connote some minimum level of violence or any animus towards the complainant by the perpetrator: *R. v. Burden* (1981), 64 C.C.C. (2d) 68 (B.C.C.A.); *R. v. Cadden* (1989), 48 C.C.C. (3d) 122 (B.C.C.A.). A friendly but unwanted kiss may be an assault.[12]

[35] In *R. v. J.A.*, [13], the Supreme Court of Canada held that a person commits the *actus reus*—or the physical act—of a sexual assault if he touches another person in a sexual way without her consent. The Court stated that, for the purpose of ascertaining whether the prosecution has proven the *actus reus*

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[12] [2000] O.J. No. 4080 at para. 6.
[13] 2011 SCC 28 at para. 23.

beyond a reasonable doubt, a trier must regard consent as the actual and subjective consent in the mind of the complainant at the time of the sexual activity in question.[14]

[36] Section 273.1 of the *Code* defines "consent" as follows:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> *Where no consent obtained*
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> *Subsection (2) not limiting*
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[37] What might constitute “consent” is a question of law; however, whether one actually consented to something being done, within the context of that meaning, is a question for a trier of fact.

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[14] Id.

[38] In *R. v. Lutoslawski*, the Supreme Court of Canada decided that the test to be applied in determining whether the allegedly criminal conduct has the requisite sexual nature is an objective one. Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer? Furthermore, sexual assault does not require proof of an improper or ulterior purpose.[15]

[39] The Court had said pretty much the same thing in *R. v. Litchfield*, when it found that the test to be applied in determining whether an accused's conduct had the requisite nature to constitute a sexual assault was an objective one; all circumstances surrounding the conduct in question will be relevant to the question of whether the touching was of a sexual nature and whether it violated the complainant's sexual integrity. [16]

[40] The Court in *J.A.* ruled that a person might be found to have had the required mental state—or *mens rea*—for the offence if he knew at the time of his voluntary and intentional act that the complainant was not consenting to it, or was reckless or wilfully blind to the absence of consent.

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[15] 2010 SCC 49.
[16] [1993] 4 S.C.R. 333 at para. 8.

[41] From this, it is important for the court to recognize that people make mistakes. Mistakes about the law are generally inexcusable. Section 19 of the *Code* says so. But a mistaken belief in a fact is different. This is because a mistaken belief about the state of things may negative the knowledge component of the mental element of a crime. In that sense, mistake of fact is not so much a defence as it is a potential obstacle to the ability of the prosecution to prove beyond a reasonable doubt an essential element of a crime. Triable issues pertaining to knowledge can, I suppose, arise in two ways. First: take for example the offence of unauthorized possession of a firearm in a motor vehicle under section 94 of the *Code*; an occupant of a vehicle in which a firearm was being illegally transported could profess complete lack of knowledge that anyone had a gun on board. Second: consider the same charge against the same vehicle occupant; only this time, the accused admits he saw something that resembled a firearm, but thought it was a toy or some other harmless replica. Accordingly, a trier might be faced with an accused who professes complete lack of knowledge, or partial, but mistaken knowledge.

[42] Section 273.2 of the *Code* places limitations on the defence of mistaken belief in consent in sexual-offence trials:

> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from the accused's
>
> (i) self-induced intoxication, or
>
> (ii) recklessness or wilful blindness; or
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[43] With these legal predicates established, a person charged with a sexual assault under s. 271 of the *Code* may be found guilty of that offence if the prosecution can prove beyond a reasonable doubt that:

- the person charged with the offence committed the acts that formed the subject matter of the offence;
- the person charged intentionally touched the complainant in an objectively sexual manner;
- the touching was without the complainant's consent; and,
- and the person charged knew or was willfully blind or reckless as regards the lack of consent.

[44] I feel it appropriate to deal with an intimation made by the prosecution in its brief regarding the issues of consent and honest but mistaken belief in consent and how they came to be live issues in this trial.

[45] At the conclusion of oral argument, I invited written submissions from counsel on the issue of honest but mistaken belief in consent. The prosecution in its brief seems to regard this as the court having snatched a defence out of thin air and having forced counsel to deal with it by a "direction" of the court. If I have misinterpreted the position being taken by the prosecution, then I apologize; however, that is the way the brief reads to me.

[46] Here is how the case unfolded. At the end of oral argument, defence counsel asserted that Mr. Pettipas be acquitted as the court should be in a reasonable doubt whether he had malicious or criminal intent. What else could this be, other than an assertion of honest but mistaken belief in consent? Mr. Pettipas admitted touching N.G. to a limited extent—on her thigh, but not near her genital area—and holding her hand; he admitted that he touched N.G. intentionally, not accidentally, as in an inadvertent jostling as described in *R. v. Palombi*. [17] Thus, Mr. Pettipas admitted to an intentional touching; no

[17] 2007 ONCA 486 at para. 35.

argument was made that the touching was a self-protective or self-defensive act; there was no argument advanced that Mr. Pettipas was suffering from a mental disorder so as to excuse criminal responsibility; although Mr. Pettipas had been drinking, there was no argument made regarding the inapplicability of s. 33 of the *Code* which restricts the use of the defence of self-induced intoxication in the trial of general-intent offences. And so what is left after all that? What is left that would negative criminal intent or fault for an intentional touching of another person? Nothing, other than consent or an honest but mistaken belief in it. This is why the court sought further submissions from counsel: not to conduct the defence, but to address more fulsomely an issue raised by the defence.

[47] Furthermore, while I agree with the prosecution that the court ought not to consider a defence found to carry no air of reality,[18] I cannot simply dismiss such a defence out of hand, as I must consider whether the air-of-reality test has been met.

[48] A further matter which I must raise deals with how I ought to assess the credibility of N.G. The prosecution posits that I should consider N.G.'s

[18] *R. v. Esau*, [1997] 2 S.C.R. 777 at paras. 14-15; *R. v. Howe*, 2015 NSCA 84 at para. 55.

credibility to have been elevated by the evidence of Mr. Pettipas as recorded in the audio-video statement. I am told that this is because much of Mr. Pettipas' evidence agrees with the evidence of N.G.: they were in Mr. Pettipas' car together, Mr. Pettipas drove N.G. home, Mr. Pettipas touched N.G., Mr. Pettipas' penis was exposed, and so forth.

[49] This is an argument which I encounter regularly, and I have stated consistently that I reject it. The syllogism is constructed validly:

> When the evidence of an accused is similar to the evidence of a complainant, the complainant's account is more likely; in this case, the evidence of the accused is similar to that of the complainant, so that the complainant's version is more likely.

[50] The problem with this argument is that the premise is unsupportable. From the perspective of the court, the complainant and the accused are two witnesses, of unproven credibility and accuracy. As Farrar J.A. stated in *R. v. Downey*:[19]

> In *R. v. Thain*, 2009 ONCA 223 the Ontario Court of Appeal reviewed a similar passage. The court stated at para.18-19:
>
> > For ease of reference, I repeat here the impugned passage from the trial judge's reasons:
> >
> > > The accused's credibility must be assessed bearing in mind that his explanation comes long after disclosure was available to him and having regard to the totality of the evidence. In the accused case [sic] I am not convinced that his evidence has not been influenced by his desire to extricate himself the situation [sic]. *While any witness is presumed to tell the truth such a presumption can be*

[19] 2013 NSCA 101 at paras. 11-20.

> *displaced by inconsistencies, contradictions and the evidence as a whole.*
>
> In my respectful view, each of the three sentences in this passage contains a significant legal error. (Emphasis in original)

The Ontario Court of Appeal continued at para.32:

> *Witnesses are not "presumed to tell the truth". The evidence of each witness is to be assessed in the light of the totality of the evidence without any presumptions except the general and over-riding presumption of innocence*. Perhaps a generous reading of the final sentence in the impugned passage could be that, as it was applied to the evidence of the accused, it somehow resurrected the presumption of innocence apparently ignored in the preceding sentence. However, as we are dealing here with basic and fundamental rights essential to a fair trial, I do not think it appropriate to salvage what appears to me to be a clear error with a strained and generous reading of this final sentence. (Emphasis in original)

[51] N.G. and Mr. Pettipas appear before the court with accounts of an event that occurred at a particular time and place. If they happen to agree on certain points, but disagree on others, how do the points of agreement make one or the other of them more credible? Consider a scenario of an eyewitness-validation experiment, with two neutral and passive observers being shown a re-enactment of a crime event. Each provides a narrative afterwards of what was seen; they agree on some things, but not on others. How do the points of agreement make the recollection of one more credible or accurate than the other? The argument is faulty; the congruency does not make any one account more credible. The counterpoint that I tend to hear when I raise this concern is that the scenario is not a representation of what the court has before it, as the accused is invested

heavily in the outcome of the trial. That might be true; but then it is not the congruency of the testimony that is in play, but the stake in the result.

[52] The other problem with this sort of argument is that it invites the court to assess the evidence of the accused and the evidence of the complainant unequally, which is impermissible.[20] The proposition advanced by the prosecution is that the agreement between Mr. Pettipas and N.G. on a number of points makes N.G. more credible; if agreement enhances credibility, then why is Mr. Pettipas' credibility not enhanced by it? The reason is that I am being asked to apply what should be a uniform criterion to one, and not to the other. That is the essence of unequal application of the law.

[53] With these legal propositions and legal issues now resolved in my mind, I shall return to the evidence.

[54] I found N.G. to be a very credible and reliable witness. She testified in a matter-of-fact manner, without histrionics or embellishment. I was left with the distinct impression that she bears no ill-will against Mr. Pettipas; certainly, it was not her idea to go to police: her sister had given her an ultimatum to report

[20] *R. v. Rhayel*, 2015 ONCA 377 at para. 96.

what had happened, and it was her father's partner who drove her to meet with the investigator.

[55] It was proposed by defence counsel that N.G. was motivated to make a false complaint by resentment against Mr. Pettipas and J.C. over not having gotten picked as a bridal-party member for their nuptials. However, N.G. attended J.C.'s bachelorette party, and so the ill will, if it existed at all, was quite muted.

[56] As in any trial when the credibility of a complainant is at the core of the case for the prosecution, it is proper for the court to consider the motivation of the complainant in implicating the accused in the commission of a crime. In doing so, I direct myself firmly that the court must never place a burden of proof upon an accused to offer up evidence of a complainant's motive to lie. To do otherwise would be contrary to the presumption of innocence.[21] Nonetheless, it is appropriate to note that, in assessing N.G.'s credibility, there is no evidence before me that would allow me to infer in any way a motive to fabricate a complaint of sexual abuse against Mr. Pettipas. In *R. v. A.J.S.*, Steele J.A. of the Newfoundland and Labrador Court of Appeal dealt with this very issue:

> Counsel for the appellant concedes that an irrelevant cross-examination or one that oversteps the limits of a proper cross-examination does not automatically

[21] (1996), 146 Nfld. & P.E.I.R. 27 at para. 15.

result in a successful appeal, and that an adequate jury instruction on the point may negate or minimize the harm, if any. Counsel objects to the language and tone of Crown counsel's closing address to the jury. He argues that the "focus of the Crown's argument", lack of motive for the complainant to lie, was objectionable and that the trial judge ought to have called the jury back and recharged them as defence counsel had requested. The following is that portion of Crown counsel's address that appellant's counsel contends is objectionable:

> Now one of the questions that arises from this situation that's presented to you is why would someone deliberately fabricate? Now, keep in mind, this would have to be a very deliberate and calculated fabrication, in my submission to you, by N.W. Why would someone deliberately fabricate a sexual assault in these circumstances? Why would they place themselves in that particular spot and fabricate an allegation that has no basis in reality, potentially any number of witnesses to contradict what she's saying; and there's only one answer to that. No one -- no one with the ability to come up with a fabricated story like this, follow it through and show the kind of emotion that she does when she explains it would choose to do that, certainly no one as bright as N.W. It just doesn't make any sense whatsoever. The only explanation as to why she describes an assault in that particular circumstance occurring is that it's true. That's the reasonable explanation for it. ...
>
> Why would this young lady, who has, it appears, a lot going for her, school activities, public speaking, excels at bowling, friends with her next-door neighbours who she participates in those activities with, why would she put herself -- and her family -- through such an obviously traumatic experience based on nothing? I want you to keep in mind there's absolutely no evidence of any motive to fabricate in this case. Now I want to make it clear as well that Mr. S. doesn't have to prove one, in fairness to him. However, the complete absence of any apparent reason why she would do this is definitely a factor that you have to consider in assessing her credibility; and there simply isn't anything in the evidence, I submit to you, that even remotely hints at a motive to fabricate. ... She was motivated by the truth; ...

It must have been clear to the jury that the credibility of the 14 year old female complainant was very much in issue. She had described the circumstances and nature of the sexual assault by the appellant. It was for the jury to decide on her veracity. Crown counsel in his address to the jury merely points out the reasons and circumstances that tend to suggest the absence of any motivation on her part to fabricate such a story, implying therefore it was true. He emphasizes the lack of evidence suggesting a motive for the complainant to make up such an allegation, but he specifically acknowledges in the course of his remarks that "Mr. S. does not have to prove" a motive to lie. It may be that the language chosen by Crown counsel was not flawless, and at times blunt, yet, I fail to see that it was

> prejudicial or unfair. Crown counsel was merely stating that the complainant told the truth, having no motivation to do otherwise.
>
> Finally on this point, I do not interpret the cross-examination by Crown counsel objected to by the appellant as having the effect of placing a burden on the appellant to refute the Crown's argument, that is, the credibility of the complainant. The trial judge's instructions to the jury on the questions of credibility of witnesses, the burden of proof and reasonable doubt were quite explicit. The trial judge was not in error in refusing to call the jury back and re-charge them on this issue, especially in light of Crown counsel's unambiguous statement to the jury in his closing address that there was no obligation on the appellant to prove a motive to lie.[22]

[57] I affirm that there is no burden on Mr. Pettipas to present evidence suggesting N.G. might have a motive to lie; however, I find, as the evidence leads me, that there is no evidence before the court to suggest that N.G. would have an *animus* -- any *animus* at all -- against Mr. Pettipas sufficient to motivate her to make up a story of sexual abuse. I find that N.G. would have very little if any motive to fabricate an account of sexual abuse, compared to the accused's motive to deny it. This is a permissible comparison, as outlined by the Supreme Court of Canada in *R. v. Laboucan*.[23] I find that I may consider this as one of many factors pertinent to assessing N.G.'s credibility.

[58] With respect to the inconsistency in N.G.'s evidence identified by defence counsel regarding the precise sequence in which the various touchings, hand-

[22] [1998] N.J. No. 249 at paras. 32-34.
[23] 2010 SCC 12 at para. 22, *rev'g*. 2009 ABCA 7.

holding, and penis-exposure circumstances took place, I regard this as nothing more than normal human imprecision over chronological order.

[59] I find that Mr. Pettipas touched N.G. precisely as she described it: on her thigh and progressing to her genital area over her clothing; he then gripped her left wrist and moved her hand toward his exposed penis, coaxing her to touch it.

[60] N.G. did not want any of this to happen. I believe her completely. She wanted a drive home, not a mauling. She was unshaken in her testimony on this point.

[61] In reviewing Mr. Pettipas recorded evidence, I found its contents highly dubious.

[62] First of all, Mr. Pettipas tried to normalize what he had done. N.G. had flirted with him in the pastor so he said—and so he thought this time was okay.

[63] I keep in mind that females do not exist in a state of continuously consenting to sexual activity; if the proposition is that everyone is entitled to a first feel, I would reject that as Camp mythology which carries no legal weight.

[64] The evidence of N.G. satisfies me beyond a reasonable doubt N.G. neither said nor did anything to express consent to being groped and manhandled by

Mr. Pettipas. Instead, N.G. told Mr. Pettipas "no" three times, and tried to pull her hand away from his grasp. Not even Mr. Pettipas suggested that he had sought consent of N.G. He assumed it when he had no basis for doing so.

[65] Mr. Pettipas' offered little in the way of an explanation when he was asked about how his penis had become exposed, other than to suggest that it was accidental. When the investigator confronted Mr. Pettipas with the proposition that he must have known he had been exposed, he tried to normalize this, too: his response was that he had "seen other people walk by, and when they sat down . . . ." The inference I draw from this is that Mr. Pettipas does not regard penis exposure as a particularly unusual occurrence, as he has seen other people walking by unfurled similarly. This narrative beggar' d all description.

[66] Mr. Pettipas also pleaded ignorance. He recalled N.G. saying "no" once as he held N.G.'s hand, but was unable to recall if she had said so more than once as "I didn't really pay attention."

[67] I find that there is no air of reality to the proposition that Mr. Pettipas thought N.G. had consented to being touched. Even if I were wrong on this point, the evidence satisfies me that the prosecution has negatived beyond a reasonable doubt any such defence. I am satisfied beyond a reasonable doubt

that Mr. Pettipas took no steps—reasonable or otherwise—to ascertain whether N.G. consented to being touched. The fact is that Mr. Pettipas simply did not care.

[68] Having considered the totality of the evidence, I find the prosecution to have proven beyond a reasonable doubt that

- Mr. Pettipas touched N.G. on her thigh and around her genital area, over her clothing, and pulled her hand toward his exposed penis;
- N.G. did not consent to this application of force;
- this application of force was sexual in nature;
- Mr. Pettipas knew that N.G. did not consent to being treated in this way; even if I were wrong on this point, I am satisfied beyond a reasonable doubt that Mr. Pettipas did not take any steps at all to ascertain whether N.G. was consenting to being groped.

[69] I find Mr. Pettipas guilty as charged.

JPC