# PROVINCIAL COURT OF NOVA SCOTIA

**Citation:** *R. v. Coady*, 2021 NSPC 13

**Date:** 20210113
**Docket:** 8396250, 8396251, 8396252, 8396253
**Registry:** Truro

**Between:**

Her Majesty the Queen

v.

Francis Coady

**Restriction on Publication: Section 486.4 of the Criminal Code**

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| **Judge:** | The Honourable Judge Alain Bégin, |
| **Heard:** | November 10, 2020, in Truro, Nova Scotia |
| **Decision** | January 13, 2021 |
| **Charge:** | CC 271 x4 |
| **Counsel:** | Alison Brown, for the Crown Attorney<br>Brian Casey, for the Defendant |

**Issue:** (1) Was the accused who was a long-haul truck driver in a "position of authority" over the sixteen or seventeen year-old girl who accompanied him on some of his trips?

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

**By the Court:**

**All emphasis in this decision is added by myself.**

[1] If the parents of a child place their trust in another adult to look after their child while accompanying them on their long haul truck on trips, does that legally put that person is a position of trust or authority in relation to that child? That is one of the questions this Court must address as it relates to the charges against Francis Coady regarding his sexual interactions with M.S. between March 1, 1998 and August 31, 1999. The other allegations are of sexual assaults.

[2] **There is an acknowledgement by Francis Coady that there was sexual contact between himself and M.S. What is in dispute is whether Francis Coady was in a position of authority as it relates to the s. 153(a) charges, and the issue of consent relating to the s.271 charges.**

[3] M.S. was born on March 17, 1982 so she would have been just 16 days short of 16 years of age at the start of the timeframe in question, and a couple months over 17 years of age at the end of the relevant timeframe.

[4] This was a criminal trial. The Crown has the onus of establishing beyond a reasonable doubt that Francis Coady committed the four offenses contrary to s. 153(a) and the four counts contrary to s. 271 with which he is charged. The onus of proof never switches from the Crown to the accused.

[5] Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous doubt. In ***R. v. Starr*** (2000) 2SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[6] The Supreme Court of Canada in ***R. v. Lifchus*** [1997] 3 SCR 320 noted at paragraph 39:

> 39. Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:

> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based on the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[7] It is settled law that an accused person bears no burden to explain why their accuser made the allegations against them. Reasonable doubt is based on reason and common sense. It is logically derived from the evidence or the absence of evidence.

[8] In ***R. v. W.D.*** the Supreme Court of Canada indicated the manner in which a trial court should assess the evidence of an accused who testifies. The accused's evidence is treated in a way different from other evidence. I must consider whether I believe the accused's evidence, and if so, then he is entitled to be acquitted on a charge where I believe his denial. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence.

[9] Even where I do not believe the accused, and his evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has

proved the essential elements of each offense beyond a reasonable doubt. I may only convict the accused of offenses proven beyond a reasonable doubt. Proof beyond a reasonable doubt also applies to issues of credibility.

[10] Finally, if I am left in doubt where I don't know who or what to believe, then I am by definition in doubt and the accused is entitled to the benefit of the doubt. Having said that, however, the accused's evidence is not considered in isolation. It is part of the whole of the evidence that I have heard and must consider.

[11] A criminal trial is **not** a credibility contest.

[12] On the issue of credibility I am guided by the case of ***Faryna v. Chorny*** [1952] 2 DLR 34 where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. **In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.**

[13] Or as stated by our Court of Appeal in ***R. v. D.D.S.*** [2006] NSJ No 103 (NSCA), **"Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a …criminal trial?"**

[14] With respect to the demeanor of witnesses, I am mindful of the cautious approach that I must take in considering the demeanor of witnesses as they testify. There are a multitude of variables that could explain or contribute to a witness' demeanor while testifying. As noted in ***D.D.S.***, demeanor can be taken into account by a trier of fact when testing the evidence, but standing alone it is hardly determinative.

[15] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[16] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[17] The Ontario Court of Appeal in ***R. v. G(M)*** [1994] 73 OAC 356 stated at paragraph 27:

> Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness…**But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely on the testimony of a witness who has demonstrated carelessness with the truth.**

And at paragraph 28,

> …it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented…….**While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence.** There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue…

[18] A trier of fact is entitled to believe all, some, or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts. Similarly, I can afford different weight to different parts of the evidence that I have accepted.

[19] In the case of ***R. v. Reid*** (2003) 167 (OAC) the Ontario Court of Appeal stated that although the trial judge is at liberty to accept none, some, or all, of a

witness' evidence, this must not be done arbitrarily. When a witness is found to have deliberately fabricated criminal allegations against the accused, the trial judge must have a clear and logical basis for choosing to accept one part of that witness' testimony while rejecting the rest of it.

[20] It is important to remind myself of my role, and duty, as the trial judge. The Nova Scotia Court of Appeal in ***R. v. Brown*** [1994] NSJ 269 (NSCA) confirmed at paragraph 17 that:

> …There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt.

[21] And at paragraph 18 of that same ***Brown*** case the Nova Scotia Court of Appeal referred to paragraph 35 of the BC Court of Appeal case ***R. v. K.(V.)*** which stated:

> I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a Complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgement I noted the gender-related stereotypical thinking that led to assumptions about the credibility of Complainants in sexual assault cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of Complainants which would have the effect of shifting the burden of proof to those accused of such crimes.

[22] In the case of ***R. v. Mah*** 2002 NSCA 99, the Court stated:

> The W.D. principle is not a magic incantation which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility related to the issue of reasonable doubt. **What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt**…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[23] The ***Mah*** case makes it clear that my function as a judge at a criminal trial is **not** to attempt to resolve the broad question of what happened. My function is

more limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offenses beyond a reasonable doubt. The onus is not on the Defence to disprove anything.

## My Analysis of the Evidence

[24] I have reviewed the evidence that was presented at the trial, along with the Exhibits. I had a transcript prepared to assist myself in reviewing the evidence presented. It is not my function as a trial judge when rendering a decision to act as a court reporter and recite all of the evidence that I have heard and considered. It suffices for me to highlight the pertinent parts. Further, any quotes that I attribute to a witness may not be an exact quote, but paraphrases and captures the essence of their testimony.

## Mrs. S.

[25] Mrs. S. is the mother of M.S. and she testified that:

- M.S.'s date of birth is March 17, 1982
- The family moved to Truro from Newfoundland in 1992
- They met Francis Coady shortly afterwards, and knew him as "Coady" and she believes that he was 38 years old when they met
- Coady was a truck driver and they would see him every 3 or 4 weeks
- Coady became a family friend, and he would stay at their house on occasion
- M.S. wanted to see different States and Coady indicated to M.S. "Why don't you come?" so M.S. went on some trips with Coady
- With regards to the trips, Coady told Mrs. S. and her husband, "Don't worry, I will look after her" as well as "I'll take care of her"
- M.S.'s parents had to sign a note to permit Coady to take M.S. into the U.S.
- M.S. had contact every day with her parents while on the trips with Coady
- On one occasion, after the timeframe in question for the allegations, Coady took M.S. and her boyfriend on a trip.

[26] On cross-examination Mrs. S. testified that it would have been a couple of years after they had met Coady before M.S. went on the trips with Coady

**M.S.**

[27] M.S. testified that:

- she first met Coady when she was in grade 10, and that her first trip with Coady would have been a year or two after she met him
- she would have been 16 or 17 years old during the road trips
- for her first road trip "I would have been 16" and she would have been in grade 10, it was during March Break, during her birthday
- she described Coady as her "best friend" and as a "father figure"

Trips to the U.S.

- during the first trip Coady tells her that she is "pretty" and that she has a "great personality" and that Coady "always told me that I was pretty, always told me I had a great personality."
- Coady kisses her and performs oral sex on her. There is no intercourse the first time.
- M.S. does not recall if she consented the first time but she did state "We had talked about it." She further stated that she could not fully remember that part of the conversation but that "I just remember how vulnerable I felt."
- M.S. "never had two seconds by myself except for when I was in the bathroom."
- M.S. also stated, "I remember how vulnerable I felt." Indicating that she had "no family" "no phone" and "no friends" while on the trip with Coady
- M.S. also stated that "I was by myself, I didn't have my family, I didn't have a cell phone at the time. I was frightened, didn't…didn't know what to do. I was…I wasn't at home at this point, so I didn't know exactly where I was. How would I know where the closest phone is or where to tell somebody something that happened."

- M.S. stated that the first time that it happened that she and Coady were in New Brunswick
- **after the first sexual contact between Coady and M.S., Coady tells M.S. "I shouldn't have done this. This was wrong." And he also tells M.S. "that if I ever told anybody he would deny it…deny it until the day he died." M.S. then stated "I will never forget that conversation."**
- the summer that followed that March involved a trip that took a couple of weeks and M.S. indicated that she had sex with Coady during that trip
- M.S. also testified that "…it was almost like a relationship kind of thing because he went and manipulated my…my vulnerability after he became my friend."
- M.S. would regularly call or text M.S. and he would tell her "Always remember who loves ya."
- the last sexual activity between M.S. and Coady was when M.S. was 17 as M.S. had started dating "Mark" at school
- M.S. and Coady remained friends and Coady would call her on her birthday and Valentine's Day
- She last saw Coady 5 years ago when she and her family went fishing with him in Newfoundland

<u>Port Hawkesbury and Kemptown</u>

- M.S. recounted incidents in both Port Hawkesbury and Kemptown indicating that the sexual activity occurred "Every night, almost like a relationship thing."
- M.S. was 16 ½ years old when the incident occurred at Port Hawkesbury, in the summertime, and it involved them having to return with a load from the States as it had been loaded upside down
- with regards to the Port Hawkesbury incident, M.S. stated "I was scared" and that "I didn't know what to do" and that she "remembered his words from before" when he had indicated to her that he would deny anything occurring between them until the day he died

- M.S. stated that Coady "manipulated our relationship." And further stated that "oral sex was his favourite" as he "loved it" and that "it would continue on into intercourse."
- when M.S. was asked what she said during the incidents of sexual intercourse, she responded, "Nothing, 'cause I was scared as to what he had said before that nobody would ever believe me and he would deny it. So, I was just scared, I didn't…I just didn't know what to do."

New Glasgow

- M.S. also testified to an incident that occurred when she was 17 at Trenton Works in New Glasgow after they had pizza at Sam's stating "there was intercourse"
- M.S. stated that there was no discussion prior "No, it just happened."

Old Barns

- M.S. testified about an incident near the watering hole when she was 17
- She and Coady were getting ready for another trip and they had intercourse before returning to her house

**On cross-examination M.S. testified that:**

- She stayed in contact with Coady after her sexual contact with him had ceased
- Coady let her drive his car and had placed her on his insurance
- She had invited Coady to her wedding
- Once M.S. had commenced a relationship with "Mark" there was no further sexual contact with Coady
- M.S. visited 39 different States with Coady, and she likely took 6 or 7 trips with Coady, but she does not recall the exact number. She was traveling with Coady to visit the States, and not to learn to be a truck driver
- She could not recall a sexual encounter at her parents' house, nor could she recall one in his car

[28] **There was no explanation by M.S. why she went on subsequent trips after she was first assaulted by Francis Coady, and it is not for this Court to decide how a victim of sexual assault should react after an assault. It has become quite clear in the jurisprudence from senior Courts, and from Parliament, that victims of sexual assault will react to a sexual assault, or multiple sexual assaults, in different ways, including remaining in an abusive relationship. Further, for the charges against Francis Coady regarding M.S. the Court must be mindful of the age of M.S. at the time of the alleged assaults, and how that may have impacted M.S.'s behaviour.**

**Francis Coady**

[29] Francis Coady testified that he was born on February 13, 1961 so he would have been either 37 or 38 years of age at the time of the alleged incidents. Mr. Coady also testified that:

- He moved to Truro with his girlfriend Gloria in 1996 and he would have met M.S.'s family in 1997
- **When asked about M.S. traveling with him he did not seem to know how this came about as he stated, "It was for whatever reason, I don't know how, but she ended up in the truck with me." As well as "I don't remember inviting her, but I'm not saying I didn't, you know."**
- He indicated that there was no sexual contact with M.S. during the first trip
- **When he was asked when he remembered the sexual activity taking place, he did not seem to recall as he stated, "I honestly don't know."**
- **And when asked how it started he responded "I don't know that either."**
- **When pressed by his lawyer as to how the sex first started he then stated, "I don't know. I know it happened, yes, I'm not denying that. How it came about I really don't know."**
- He denied any sexual contact occurring in Port Hawkesbury
- When asked about having sex with M.S. in Trenton he responded "Possibly."

- With regards to having sex in his truck in Kemptown he responded, "To the best of my knowledge that happened in the white truck."
- **With regards to having sex with M.S. in Truro he indicated that it did occur at the house of M.S.'s parents when he was laying on the couch. M.S. then comes to him on the couch and unzips his fly. He tries to push her hand away, but this does not stop M.S. as she pushes his hand away, and then M.S. kneels on the floor and performs oral sex on him. For this incident Francis Coady portrays M.S., who was either 16 or 17, as the sexual aggressor, and he being the 37 or 38 year old male, and the larger of the two, and the adult, as having no control in that situation, and being helpless to stop M.S.**
- He also described another incident when he helped M.S. with a school project, and it ends up with them in his car in a secluded location where M.S. performs oral sex on him
- **When he was asked about having sex with M.S. he stated "It was consensual, one hundred percent. That's just the type of person that I am."**
- **When Francis Coady was specifically asked by his lawyer if he asked M.S. before having sex with her, he stated, "I don't recall asking, but I am sure that I would have."**
- He maintained contact with M.S. after the sexual contact with her had ceased, maybe contacting her twice per year.
- **With regards to the incidents in Port Hawkesbury, or New Glasgow, or Kemptown, Francis Coady again appears to shift the blame on M.S. for the sexual activity occurring by stating "I don't remember any time passing Truro and not asking, 'Do you want to go home, are you coming with me.' That…that option was always there." It is as though Francis Coady is stating that M.S. knew that sexual contact would occur if she stayed in his truck, and that she chose to stay in his truck, knowing that there would be sexual contact.**
- On cross-examination Francis Coady testified that:
- **"I have a pretty good memory. I remember a lot of specific things" even though he could not recall how the sexual contact had commenced between him and M.S.**

- That he never told M.S.'s parents about his relationship with M.S., and when asked why he responded "No, why?"
- He acknowledged that M.S. would have been a student when he helped her with her school project
- **When asked if he had told M.S. that they could get married when she was of legal age he responded, "Maybe jokingly, or something, but I mean, probably not, for the simple fact that…" and then stated that it was "Certainly possible" that he had told M.S. that.**

**Summary/Decision**

[30] Defence counsel states that this is not a matter that revolves around arguments over dates, but then states that the trips likely occurred in 1999 or 2000. Defence also submits that it is not clear that the sexual contact occurred before M.S. was 18 years of age.

[31] The difficulty with the argument is that Francis Coady, despite claiming to have a good memory, seemed unsure as to when exactly the sexual contact occurred. He could not recall why M.S. started going in his truck with him, nor how the sexual contact with M.S. commenced. This is difficult for the Court to accept. Someone who claims to have a good memory would absolutely recall how sexual contact as either a 37- or 38-year-old male would have commenced with a 16 or 17-year-old girl in his truck. To claim otherwise is simply not believable and absolutely affects Mr. Coady's credibility.

[32] Where there is a dispute between dates in the evidence, I accept the evidence of M.S. and her mother over the evidence of Francis Coady as they were both certain as to when the trips had occurred, and M.S.'s age at the time they occurred.

**Was Francis Coady in a Position of Trust or Authority over M.S.?**

[33] If the parents of a child place their trust in another adult to look after their child while accompanying them in their truck on long haul trips, does that legally put that person is a position of trust or authority in relation to that child?

[34] I have reviewed the caselaw submitted by Defence counsel as it relates to determinations by various levels of Courts as to what is required for someone to be in a position of trust or authority. The highlights from the cases, in chronological order, are as follows (emphasis added):

[35] ***R. v. R. H. J.*, 1993 CanLII 6885 (BC CA)** was a case involving a stepfather and his 17-year-old stepdaughter. At paras 23 & 25:

> [23] …The reason is that in my opinion the question of whether the appellant was in a position of trust or authority towards the complainant within the meaning of s. 153, and the question of **whether the complainant was in a relationship of dependency with the appellant within the meaning of s. 153, are questions of fact** for the jury once the jury has been instructed on the law.
>
> [25] I do not think that where the relationship is between a 17-year-old young woman and the common law spouse of her mother, who shares the family home, a relationship of trust or authority on the part of the man or dependency on the part of the young woman should be conclusively presumed to exist as a matter of law.

[36] ***R. v. Caskenette,* 1993 CanLII 6879 (BC CA)** involved an employer/employee relationship, and the Court held that merely being in an employment relationship did not create a relationship of dependency. At para 17 when referring to ***Norberg v. Wynrib* (1992), 1992 CanLII 65 (SCC):**

> [17] La Forest J. went on to refer to one party dominating and influencing the other. He referred to "power dependency" relationships which create "a significant power imbalance between the parties". He referred to exploitation of such a relationship "when the 'powerful' person abuses the position of authority by inducing the 'dependent' person into a sexual relationship thereby causing harm".

[37] ***R. v. C.G.,* 1994 CanLII 215 (ON CA)** involved a 27-year-old adult and a 14-year-old runaway. The Court held that prima facie, a 27-year-old man is entitled to have sexual relations with a 14-year-old girl unless one of three conditions prevails: a position of trust, a position of authority or a relationship of dependency. The disentitling condition must exist independently of the sexual relationship. The alleged dependency in this case was solely economic. That alone is not what is proscribed by the *Criminal Code*. There was no allegation in this case of any quid pro quo between the economic support and the sexual relationship. The relationship was not exploitive. **There was no obvious power imbalance. The accused did not take the complainant away or keep her away from home, school, parents or friends. She could have returned home at any point during her stay with the accused.** She lived with him because she wanted to and because she preferred living with him to living with her mother.

[38] The Court held that Parliament, by using the word "dependency", must have added a category which is ejusdem generis to the categories of trust or authority, that is, something that was an extension of the first two categories which have become somewhat circumscribed by traditional legal definition. **What is contemplated by a relationship of dependency is a relationship in which there is a de facto reliance by a young person on a figure who has assumed a position of power, such as trust or authority, over the young person along non-traditional lines.** Because a relationship of dependency is a de facto one which can only be determined after due consideration of all the circumstances, **the jurisprudence will have to develop on a case-by-case basis to retain the flexibility that the phrase "relationship of dependency" was intended to provide.**

[39] ***R. v. Audet,* 1996 CanLII 198 (SCC), [1996] 2 SCR 171** which involved a teacher/student relationship. While much of the case refers specifically to teacher/student relationships, there are portions of the case that provide useful guidance for s. 153 charges. At paras 38 and 39:

> 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.**
>
> 39 In this context, it should, as I have mentioned, be noted that **Parliament did not elect to prohibit sexual contact with a young person by referring to the status of the accused in relation to the young person, so this factor cannot be decisive in itself.**

[40] ***R. v. W.J.M.* [2000] N.J. No. 278** involved a 37-year-old male and a 16-year-old girl, which is very similar to the ages in our case. The Court was clear that **one cannot simply look at the age difference between the accused and the complainant when making a determination as to the status of the relationship**. At paras 60, 62 and 63:

> 60 **We live in an age where, fortunately, the stigma of older people having relationships (sexual or otherwise) with younger people has to a large degree disappeared.** If these relationships, many of which start off "friendly" but later develop into consensual sexual relationships, are transformed in some way into a "trust" relationship, countless criminal charges can be laid and endless civil litigation could result.
>
> 62 In the instant case, the age difference between the complainant and the accused is considerable and some might consider such a relationship would be unnatural. However, it is not unheard of**. Here, the complainant was almost 17 and had known the accused for a considerable period of time. The accused was 36 or 37. Absent other factors, I am not persuaded that the age difference between the two persons here would bring their relationship into the ambit of s. 153.**
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> 63 **…There was no evidence, however, that prior to the summer of 1996 that he at any time had exercised any dominance or control over the complainant or that she was in any way "dependent" upon him. The relationship appears to have been no more than the normal relationship that would have evolved between two families which knew each other over a period of time and shared some common interests.**

[41] ***R. v. D., C.*, 2000 CanLII 5730 (ON CA)** involved a piano teacher and his student. There was a claim that the parents had entrusted the complainant with the accused to ensure that she was transported safely to and from the piano lessons. At paras 75 and 76:

> [75] The appellant submits that it was wrong for the trial judge to instruct the jury that the jury could find that there was a position of authority or trust if they found **that T.'s parents "entrusted the accused to see that she got safely to and from piano lessons with respect to those occurrences which she described" (initial charge to the jury) – or if they found "that T.' parents agreed to the accused driving her to piano lessons and being with her on the assumption that she was safe with him and that they could rely on him to act properly toward her"** (the re-charge).
>
> [76] I agree with the appellant's submission that **these passages do not accurately state the law on the meaning of "position of trust". Specifically, it is wrong to assess the position of trust issue simply from the perspective of the complainant's parents** (R. v. L. (D.B.) (1995), 1995 CanLII 2632 (ON CA), 101 C.C.C. (3d) 406 (Ont. C.A.) at pp. 409-410) although this is a relevant and, I think, an important factor to take into account.

[42] ***R. v. Poncelet,* 2008 BCSC 202 (CanLII)** which involved a 41-year-old horse trainer and his 15-year-old student. The Court looked at the meaning of the term "position of trust" and stated at paras 35, 39 and 58:

[35] The jurisprudence has in large part succeeded in defining the meaning of "a position of authority" and the meaning of "a relationship of dependency." However, a definition of the term "a position of trust" remains elusive. Although the seminal decision of **R. v. Audet,** 1996 CanLII 198 (SCC), [1996] 2 S.C.R. 171, purportedly addressed this issue, no workable definition can be extracted from the court's reasoning. Moreover, **in spite of attempts at a definition by earlier and subsequent decisions, to date there remain few definitive guidelines on what constitutes a position of trust for those relationships outside of the presumptive archetypal cases involving teacher, parent, religious/spiritual advisers, etc. These categories of relationships are said to be presumptive positions of trust because they include an inherent "power of dependency" based on the social role entrusted to them by society.** (**Audet** at ¶41).

[39] The most that can be said about the court's guidance on what is meant by the term "position of trust" is the summary in **Audet** at ¶36-38:

> ¶36 I would add that the definition of the words used by Parliament, **like the determination in each case of the nature of the relationship between the young person and the accused, must take into account the purpose and objective pursued by Parliament of protecting the interests of young persons who, due to the nature of their relationships with certain persons, are in a position of <u>vulnerability</u> and <u>weakness</u> in relation to those persons.**
>
> ¶37 Even in light of these definitions, the concept of a "position of trust" is difficult, perhaps even more than that of a "position of authority", to define in the abstract in the absence of a factual context. For this reason, it would be inappropriate for this Court to try to precisely delineate its limits in a factual vacuum, especially since very few judicial decisions have so far commented on this relatively recent provision of the Criminal Code. The fact that this appeal was brought as of right and that the issue was not fully argued in this Court makes this even more compelling.
>
> ¶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 … at the time of the alleged offence.**

[58] **Their age difference is significant. An instinctive reaction to such a wide disparity in age might be one of distaste. Many might find Mr. Poncelet's actions to be inappropriate if not morally reprehensible. The Court, however, must be careful not to impose mainstream or even personal views on its assessment about the nature of a sexual relationship that is not prohibited under the Criminal Code. A significant age difference existed in Caskenette and no position of trust was found.**

**Something more than an age difference must exist in order to find the inherent power imbalance and vulnerability that is associated with trust relationships.**

[43] ***R. v. Anderson*, 2009 PECA 4 (CanLII)** involved a 22-year-old soccer coach and her 15-year-old student.

> [53] The prohibited relationships provided for in s. 153(1) are those where the accused is in a position of trust or authority vis-a-vis the young person, a relationship where the young person is in a position of dependency vis-a-vis the accused and finally, where the relationship between the two is found to be exploitative of the young person. The existence of these relationships have been termed conditions which disentitle any person to sexual contact with a young person of the kind described in s.153(1)(a) and (b) of the **Code**. The disentitling conditions must be proven, independent of the sexual conduct. See: ***R. v. Galbraith*** (1994), 1994 CanLII 215 (ON CA), 30 C.R. (4th) 230; (1994), 90 C.C.C. (3d) 76 (Ont. C.A.); [1994] O.J. No. 808 at paras. 13 and 14.
>
> [56] A "relationship of dependency" was considered in ***R. v. Galbraith, supra***. At the time of that decision, the relationship of dependency had recently been added to s. 153(1). **The Ontario Court of Appeal concluded that a relationship of dependency was one where there was de facto reliance by the young person on the accused who had assumed a position in relation to the young person which created a power imbalance in favour of the accused.**
>
> [57] In ***R. v. Galbraith*** the accused was a 27-year-old male and the complainant was a fourteen-year-old female who had run away from home and taken up residence with the accused, a residence he was sharing with other individuals. The complainant made it clear in her evidence that if she had not been living with the accused, she would not have returned home because she did not get along with her mother and her stepfather. The accused provided the complainant with food and also gave her money and a ring. The two had consensual sexual relations on a daily basis over a two-month period of time. The complainant testified that she did not feel pressured into the sexual relationship. The court of appeal found there was no relationship of dependency.
>
> [58] …Finlayson J.A., writing for the court…was of the view that the scope of a relationship of dependency was set by the legal definition of trust and authority. **In other words, the dependency of the young person must be such that the accused had assumed a position of power or authority over the young person.** At para. 18 Finlayson J.A. stated as follows:
>
> > In my view, "relationship of dependency," the third prohibited relationship in s. 153 of the Code, must be looked at with reference to the other two prohibited relationships, namely positions of trust or authority. My first thought was that "dependency" was the inverse of the other two relationships and described the position of the person subject to feelings of trust or the object of the authority. On reflection, however, it seems to me

> that Parliament, by using the word "dependency," must have added a category which is ejusdem generis to the first two. That is to say, something that was an extension of the first two categories which have become somewhat circumscribed by traditional legal definition. **In my view, what is contemplated by a relationship of dependency is a relationship in which there is a de facto reliance by a young person on a figure who has assumed a position of power, such as trust or authority, over the young person along non traditional lines.** Sexual relations are prohibited in relationships of trust, authority and dependency because the nature of the relationship makes the young person particularly vulnerable to the influence of the other person. Under these circumstances it has been determined that any sexual activity, even where it is consensual, involves taking advantage of a person in need of protection and merits society's condemnation. Because a relationship of dependency is a de facto one which can only be determined after due consideration of all the circumstances, I believe that the jurisprudence will have to develop on a case by case basis to retain the flexibility that the phrase "relationship of dependency" was intended to provide.

> [67] The terms “authority”, “trust”, “dependency” or “exploitative” are not defined in the Criminal Code. Parliament has directed, however, by the provisions of s. 153(1.2) of the **Code** that **a judge may infer an accused is in a position which is exploitative of the young person from the nature and circumstances of the relationship including: (i) the age of the young person; (ii) the age difference between the young person and the accused; (iii) the evolution of the relationship; and (iv) the degree of control or influence by the accused over the young person. In considering the nature and circumstances of the relationship, including the four circumstances specifically mentioned, what is the judge or the court looking for? In the same way, for example, that Blair J. defined the meaning of a relationship of trust in R. v. S. (P.) a judge or the court must determine the meaning of an exploitative relationship before considering whether the nature and circumstances of a particular relationship is, in fact, one which is exploitative of the young person.**

[44] ***J.S.S. v. R.*, 2010 NBCA 51 (CanLII)** involved a 16-year-old student and a 33-year-old teacher’s assistant. At paras 12 and 13:

> [12] **The Criminal Code does not create a de jure relationship of trust or authority between two individuals for the purposes of applying s. 153(1). In fact, Parliament specifically rejected such an approach** in its response to the Committee on Sexual Offences Against Children and Youths’ 1984 report titled Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths [the Badgley Report]. The appropriate approach is to consider the characteristics of the relationship…

> [13] One finds such an inquiry into the characteristics of the relationship in R. v. R.R., [1999] N.B.R. (2d) (Supp.) No. 19 (Q.B.), [1999] A.N.-B. no 552 (QL), aff'd (2000), 2000 CanLII 27183 (NB CA), 227 N.B.R. (2d) 46 (C.A.), [2000] N.B.J. No. 204 (QL). In that case, a police officer befriended a person under 18 years of age while both were patients in a psychiatric hospital. There followed a sexual relationship between the two. At trial, Deschênes J., as he then was, scrutinized many aspects of the relationship between the police officer and his sexual partner, including their age difference, circumstances surrounding their initial meeting, positions in the community, maturity levels and letters exchanged between them. **He also considered whether the accused had the capacity to decide the future or the destiny of the alleged victim**, issue orders, force obedience and, generally, the power to influence behaviour. This Court refused to interfere with the acquittal given the findings of fact made by the trial judge about the character of the relationship.

[45] In reviewing the cases just noted, and in reviewing the facts of this specific case, I find that Francis Coady was **not** in a position of trust or authority with M.S. Simply looking at the difference in their ages is clearly not the test ***(W.J.M., Poncelet).*** I also considered the following factors in making my determination:

- Francis Coady did not have the capacity to decide the future or destiny of M.S. ***(J.S.S.)***
- M.S. was not obligated to take part in the trips, and she could have stopped at any time ***(C.G.)***
- Francis Coady and M.S. were not in an employer/employee relationship ***(Caskenette)***
- Francis Coady and M.S. were not in a relationship where Francis Coady was instructing or teaching M.S. ***(Audet, Poncelet)***
- the degree of control or influence by Francis Coady over M.S. was minimal, apart from his driving the truck to the various destinations ***(Anderson)***
- there was no de facto reliance by M.S. on Francis Coady who had assumed a position of power, such as trust or authority, over M.S. along non traditional lines ***(Anderson)***
- the trips in the truck were voluntary, and of fairly short duration (never longer than a couple of weeks) so there never was a relationship of dependency where there was de facto reliance by M.S. on Francis Coady

who had assumed a position in relation to M.S. which created a power imbalance in favour of the accused ***(C.G., Anderson)***

- There was no evidence, however, that prior to the relevant time period that Francis Coady at any time had exercised any dominance or control over M.S. or that she was in any way "dependent" upon him. The relationship appears to have been no more than the normal relationship that would have evolved between two families which knew each other over a period of time and shared some common interests ***(W.J.M, R.H.J.)***
- it would be wrong for this Court to assess the position of trust issue simply from the perspective of M.S.'s parents ***(D.C.)***

[46] Finding the there was no abuse of a position of trust or authority is not determinative of all the charges against Francis Coady. There is no denial by Francis Coady that he had sexual contact, including intercourse, with M.S., but Francis Coady insists that the sexual contact was all consensual.

**Did Francis Coady Sexually Assault M.S.?**
**The Crown's Burden for a s. 271 – Sexual Assault**

[47] To find Mr. Coady guilty of sexual assault, Crown counsel must prove each of these essential elements beyond a reasonable doubt:

i. that Mr. Coady *intentionally* applied force to M.S.;
ii. that M.S. did *not* consent to the force that Mr. Coady *intentionally* applied.

iii. that Mr. Coady *knew* that M.S. did *not* consent to the force that Mr. Coady *intentionally* applied; and

iv. that the force that Mr. Coady *intentionally* applied took place in circumstances of a sexual nature.

[48] If Crown counsel has not satisfied myself beyond a reasonable doubt of each of these essential elements, I must find Mr. Coady *not* guilty of sexual assault. If Crown counsel *has* satisfied myself beyond a reasonable doubt of *each* of these essential elements, I must find Mr. Coady *guilty* of sexual assault.

[49] As there is an acknowledgement by Francis Coady that there was sexual contact, including intercourse, with M.S., I only need to address the issue of consent by M.S.

[50] On the issue of consent, M.S. testified that:

- M.S. does not recall if she consented the first time but she did state "We had talked about it."
- M.S. also stated, "I remember how vulnerable I felt." Indicating that she had "no family" "no phone" and "no friends" while on the trip with Francis Coady
- after the sexual activity with Francis Coady, he tells M.S. "I shouldn't have done it." And he also tells M.S. "If you tell anyone, I will deny it until the day I die."
- that "…it was almost like a relationship kind of thing because he went and manipulated my…my vulnerability after he became my friend."
- M.S. would regularly call or text M.S. and he would tell her "Always remember who loves ya."
- with regards to the Port Hawkesbury incident, M.S. stated "I was scared" and that "I didn't know what to do" and that she "remembered his words from before" when he had indicated to her that he would deny anything occurring between them until the day he died
- M.S. stated that Francis Coady "manipulated our relationship." And further stated that "oral sex was his favourite" as he "loved it" and that "it would continue on into intercourse."
- M.S. stated that for the New Glasgow incident that there was no discussion prior "No, it just happened."
- Francis Coady let her drive his car and had placed her on his insurance

[51] On the issue of consent, Francis Coady testified that:

- When asked about M.S. traveling with him he did not seem to know how this came about as he stated, "For whatever reason she ended up in the truck with me."
- When he was asked how the sexual contact with M.S. started, he did not seem to recall as he stated, "I don't know." And also "How it came about I really don't know."
- With regards to having sex with M.S. in Truro he indicated that it did occur at the house of M.S.'s parents when he was sleeping on the couch.

M.S. then comes to him on the couch and unzips his fly. He tries to push her hand away, but this does not stop M.S. as she then goes on her knees and performs oral sex on him. For this incident Mr. Coady portrays M.S. who was either 16 or 17, as the sexual aggressor, and he being the 37 or 38 year old male, and the larger of the two, and the adult, as having no control in the situation and being helpless to stop M.S. Francis Coady portrays M.S. as the sexual aggressor in this situation, and he is apparently unable to stop her.

- With regards to the incidents in Port Hawkesbury, or New Glasgow, or Kemptown, Francis Coady again appears to shift the blame on M.S. for the sexual activity occurring by stating "I don't remember any time passing Truro and not asking, 'Do you want to go home, are you coming with me.' That…that option was always there." It is as though Francis Coady is stating that M.S. knew that sexual contact would occur if she stayed in his truck, and she chose to stay in his truck. Francis Coady places the responsibility onto M.S. for those incidents as she never asked to be dropped off in Truro instead of staying in the truck with him.
- When he was asked about having sex with M.S. he stated "It was consensual. That's just the type of person that I am."
- When he was asked if he had asked M.S. before having sex with her, he stated, **"I don't recall asking, but I am sure that I would have."**
- "I have a pretty good memory" even though he could not recall how sexual contact commenced between him and M.S.
- That he never told M.S.'s parents about his relationship with M.S. and when asked why he responded "No, why?"
- When asked if he had told M.S. that they could get married when she was of legal age her responded that it was "Possible" that he had told her this.

[52] As previously noted, it is simply not believable for Francis Coady to testify that despite claiming to have a good memory, he seemed unsure as to when exactly the sexual contact occurred. He also could not recall why M.S. started going in his truck with him, nor how the sexual contact with M.S. commenced. Also, while certain that he would have asked M.S. for her consent because that is his nature, he cannot actually recall doing so.

[53] This is difficult for the Court to accept. Someone who claims to have a good memory would absolutely recall how sexual contact as either a 37- or 38-year-old

male would have commenced with a 16 or 17-year-old girl in his truck. To claim otherwise is simply not believable and absolutely affects Mr. Coady's credibility. This is buttressed by the fact that Francis Coady never discussed the relationship with M.S.'s parents.

[54] I accept the evidence of M.S. that she was "scared" and I find that she was an unwilling participant in the sexual activity with Francis Coady.

[55] I find that Francis Coady is guilty of sexual assault on M.S. There was no consent by M.S. as Francis Coady manipulated M.S. by taking advantage of her desire to see many States in exchange for sex. Francis Coady also manipulated M.S. by providing her with the use of his car and having her insured on it. Francis Coady "always told M.S. that [she] was pretty, always told [M.S.] that she had a great personality."

[56] I accept that M.S. felt "vulnerable" and I find that Francis Coady was wilfully blind to this if he claims that M.S. was consenting. I also accept that Francis Coady carefully controlled M.S. and that she "never had two seconds by herself except for when she was in the bathroom."

[57] I accept that M.S. was "…was scared as to what he had said before that nobody would ever believe [her] and he would deny it. So, [she] was just scared, [she] didn't…[she] just didn't know what to do."

[58] Francis Coady also controlled M.S. by telling her that perhaps they would get married when she became of legal age, by telling her that he would deny their relationship for the rest of his life, and by repeatedly telling her "Always remember who loves ya."

[59] I noted at the start that I was guided by the case of ***R. v. W.D.*** I must consider whether I believe Francis Coady's evidence, and if so, then he is entitled to be acquitted on the charges where I believe his denial. I do not believe the evidence of Francis Coady so I must turn to the second stage of ***R. v. W.D***.

[60] Even where I do not believe Francis Coady's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence. The evidence by Francis Coady did not raise a reasonable doubt so I must turn to the third stage of ***R. v. W.D***.

[61] Even where I do not believe Francis Coady, and Francis Coady's evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offense beyond a reasonable doubt. I may only convict Francis Coady of the offenses proven beyond a reasonable doubt.

[62] It has been proven beyond a reasonable doubt that M.S. did not consent.

[63] Francis Coady is guilty of the sexual assaults in Port Hawkesbury (Count 8), Trenton (Count 7), Kemptown (Count 6) and at Lower Truro (Count 5).

Judge Alain Bégin, JPC