

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. M.M.*, 2022 NSPC 33

Date: 20221027

Docket: 8509773, 850774, 850775, 850776

Registry: Kentville

Between:

His Majesty the King

v.

M.M.

Restriction on Publication: s.486.4
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Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	May 9, 2022, May 10, 2022, June 3, 2022, in Windsor, Nova Scotia.
Decision	August 26, 2022,
Charge:	s. 151 x 2 of the <i>Criminal Code of Canada</i> s. 271 x 2 of the <i>Criminal Code of Canada</i>
Counsel:	William Fergusson, for the Crown Derek Sonnichsen, for the Defendant

By the Court:

Introduction

[1] During the busy docket day, the Court was required to abbreviate its reasons in this case with the written decision to follow. This is the written decision.

[2] M.M. stood charged with two counts of sexual interference and two counts of sexual assault contrary to sections 151 and 271 of the *Criminal Code*. The Crown proceeded by indictment. At the close of its case the Court granted the Crown's application to amend counts three and four to broaden the timeframe to 'between January 2009 and September 12, 2020', and also extend the jurisdiction to 'at or near Hants County'. The Crown offered no evidence on counts one and two.

[3] It is fair to say the alleged factual foundation for the sexual assault and sexual interference offences are the same.

[4] The allegations are that M.M. touched the vaginal area of the complainant when she was between the ages of four and eight years old. Years later when she was a teenager, it is alleged he put his hands in her pants and up her top when she

was cornered in his kitchen, and on a different day, while outside a shed with her parents inside, he slapped her buttocks. M.M. denies all the allegations.

[5] The Court heard evidence from the complainant, her mother, and her younger sister. M.M. called evidence from his wife, stepdaughter, and stepson's girlfriend. Counsel entered two exhibits, a series of text messages between the complainant and her sister on September 12, 2020, and a photograph of M.M.'s stepdaughter's bedroom.

Issue:

[6] The sole issue is whether the Crown discharged its burden to establish the elements of the offences beyond a reasonable doubt.

Decision:

[7] After considering all of the evidence the Court finds the complainant a credible and reliable witness. Her evidence with respect to the assaults when she was a small child did not establish touching for a sexual purpose; however, the Crown did prove the other two incidents that occurred when she was a teenager to the criminal standard of proof beyond a reasonable doubt.

The Law:

General Criminal Trial Principles:

[8] M.M. benefits from the presumption of innocence and the Crown bears the heavy burden of proving his guilt beyond a reasonable doubt. That onus never shifts to M.M., asking him to prove that he did not commit the offences.

[9] 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” (*R. v. Lifchus*, [1997] 3 S.C.R. 320) Instead, the burden of proof lies “much closer to absolute certainty than to a balance of probabilities” (*R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144).

[10] Finally, a “reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt”. (*R. v. J.M.H.*, 2011 SCC 45)

[11] Evidence is not assessed in a piecemeal fashion, rather the Court considers the whole of the evidence recognizing a trial is not a credibility contest with the Court simply preferring one side to that of the other. Instead, some, none, or all of what any witness says can be accepted after assessing the reliability and credibility of their testimony.

[12] Credibility assessments involve the Court considering the veracity or truth of a witness' testimony, while reliability assessments consider the accuracy of the testimony. More particularly, accuracy requires scrutiny of such things as the ability to observe, recall and recount a situation. If witness testimony on an issue is not credible, he cannot provide reliable evidence on the points in issue. However, a credible witness may give evidence that is unreliable, as in the case of mistaken eye-witness identification observation, where circumstances such as having only a brief opportunity to observe render an honest belief unreliable.

The Elements of the Offences:

Sexual Interference:

[13] Section 151 of the *Criminal Code* states as follows:

Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years...is guilty of an offence.

[14] Sexual interference "is a specific intent offence, meaning that the offender must specifically intend that the touching is for a sexual purpose" (*R. v. B.J.T.*, [2019] O.J. No. 4503 (C.A.) at para. 37).

[15] Section 271 of the *Criminal Code* states:

Everyone who commits a sexual assault is guilty of...an offence.

[16] The offence of sexual assault "is comprised of an assault within any one of the definitions in s. 265(1) of the *Code*, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated" (*R. v. Ewanchuk* (1999), 131 C.C.C. (3d) 481 (S.C.C.), at para. 24).

Assault:

[17] Section 265(1)(a) of the *Criminal Code* states:

A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

[18] The strength of the touching is immaterial and the slightest touching of another person without their consent can constitute an assault (*R. v. Palombi*, 2007 ONCA 486). The force required to prove the offence of sexual assault may be minimal. (*R. v. LBC*, 2019 ABCA 505 at para. 33)

[19] Sexual assault and sexual interference “use different terms to describe similar acts” and “although the words ‘touch’ or ‘touching’ and ‘force’ are

distinct, in some circumstances...they mean the same thing in law”. (*R. v. R.V.*, 2021 SCC 10 at para. 51 and 52).

[20] In *R. v. Barton*, 2019 SCC 33, the Supreme Court specified that a “person commits the *actus reus* of sexual assault ‘if he touches another person in a sexual way without her consent’” (para. 87).

[21] In *R. v. G.F.*, 2021 SCC 20, the Supreme Court of Canada held that the *actus reus* of the offence of sexual assault “requires the Crown to establish three things: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent...The first two elements are determined objectively, while the third element is subjective and determined by reference to the complainant’s internal state of mind towards the touching” (at para. 25).

The Mens Rea:

[22] In *Barton*, *supra*, the Supreme Court also described the mental element of the offence of sexual assault as “intention to touch” (at para. 87).

[23] Based on the foregoing, sexual interference is established if the Crown proves M.M. touched a person under sixteen years of age for a sexual purpose. Sexual assault is established if the Crown proves M.M. intentionally

touched the complainant in an objectively sexual manner, without her consent, and that he knew or was willfully blind or reckless as regards the lack of consent.

The Evidence and Findings of Fact:

[24] I do not intend to set out the testimony of each witness in minute detail, instead I will aver to the evidence as it relates to the submissions of counsel. While it may appear, I made findings of fact as the decision unfolds, I did so only after assessing all of the testimony of each witness, reviewing my trial notes, listening to a few short portions of the recorded evidence, and hearing and considering the submissions of counsel. Only then did the Court make findings of fact and assess witness credibility and reliability.

[25] The complainant was a baby or toddler when she and her two-year younger sister P started sleeping over at the M family residence. The girls' mother testified that the sleepovers were of assistance to her when the girls' father was working away and when she also had to work. According to C.M.'s testimony the girls started sleeping at her house when they were babies, she enjoyed having them over, and would ask for them. The M's daughter A.C. also recalled regular sleepovers. Of course, the complainant's memory cannot be expected to

contemplate such visits when she was a baby, but the Court accepts the witness evidence that the sleepovers occurred starting at a young age and continued onward for some time, ceasing when the complainant was approximately eight years of age. All agree there was a break when the family moved away for a year, but sleepovers resumed, albeit less frequently, when the family returned to Nova Scotia.

[26] The families were close and spent time together over the years until the complainant reported the alleged incidents to police in 2021.

The testimony of the complainant:

[27] The Complainant was sixteen years old when she testified. She presented as age appropriate, clear, and pleasant. She was not emotional and gave clear cogent answers.

[28] Asked about her first memory of anything “untoward”, she testified that while she was unsure of her exact age, something untoward occurred when she was between the ages of four and five years. She recalled being at the M family house with her grandfather who proposed to leave her there with M.M. while he ran an errand. She recalled fear at the prospect of being left alone with M.M. Her testimony was cut off by Crown questioning just as she was explaining that

she went upstairs to a bedroom, and so she did not take up the rest of the story.

Ultimately, she said she did not stay at the house, instead she left with her grandfather. She explained that she was of an age where she did not know what was going on but recalled being “super, super scared” at the prospect of being left alone with M.M.

[29] Being scared coloured her testimony about events when she was a young child, but not so when she was teenager. Rather, as a teenager she explained that she did not want to be alone with M.M. but was not avoiding her family, loved his wife, and enjoyed their dogs.

[30] The complainant testified that the M family household consisted of M.M., his wife, C.M., and their children A.C. and J.C. who are “always quite a bit older than me”. She recalled “hanging with” C.M and A.C., and both women testified agreeing they did so.

[31] The complainant generally recalled C.M. putting the girls to bed in their own room where they shared a bed. The sleeping arrangements were also described as “different arrangements every time because they moved a few times”. Asked where the family lived when she was four or five years old, she said simply said “down the shore”.

[32] Not surprisingly, exact ages were not pinned down and the Court is aware of the Supreme Court of Canada's direction that a child's inability to firmly establish dates, times and ages should be carefully considered but not detract from her testimony about what she says happened to her. Children simply do not recall detail to the level expected of adults. (*R. v. B. (G.)*, 1990 CanLii 7308 (SCC))

[33] So, being guided by her very young age range, the Court concludes the sleepovers occurred at the same general time of the complainant's earlier account of fearing M.M.

[34] The complainant testified that after putting her two-year younger sister to sleep on the inside of the bed, M.M. entered the bedroom to see if the girls were sleeping. On cross examination she added that she thought M.M. was trying not to wake P.

[35] On cross examination she also explained that she recalls only she and her sister in the bed that she believed was a cot. She did not recall sharing the bed with A.M., and says if A.M. was not there in the room, she is unaware of where A.M. was sleeping.

[36] The complainant says M.M. “would sit on the side of the bed or lay on it” and she would try to fall asleep or turn over. While lying next to her, M.M. would, “kind of like lie half on top of me in a way”, “he would tell me to try to get some sleep, stay quiet”.

[37] Asked a rather leading question, whether there was any physical contact, she testified that he would “sometimes put his hand on my waist or in the side of my pants or down on the insides of my legs”. Asked if he said anything, she testified that he would say “I was a good little girl and the things you would tell a child to stay quiet and go to bed. Like don't tell anyone we are lying in here.” Much later in her direct testimony she provided that he “would put hands by my thigh or down by my vagina or on my breasts, over and under clothing”. There was none of the exacting detail one might expect for such a charge.

[38] She was unsure how often this occurred because she was so young. She says she has “the idea of him coming in lying next to us”, adding “he would never bother my sister because she was always sleeping on the far side” of the bed.

[39] These situations ended with M.M. walking out of the room.

[40] Asked if this started between ages four and five, she agreed with Crown counsel adding it continued until her family moved away for a year when she

was possibly six. Upon their return to Nova Scotia the sleepovers were less frequent but “the activity” continued. She stopped going to the M family house for sleepovers at approximately eight or nine years of age.

[41] Under cross examination, the complainant testified that she first started thinking something was wrong about the situation when she was in grade five and a police officer educated the children at her school about right touches and wrong touches. She added, “nobody else was doing this to me and I thought maybe that was how M.M. showed love”, but she maintained “something felt not right”.

[42] Asked on cross examination if learning about right and wrong touches changed how she felt about M.M., she said “not really but it gave me a better understanding, and I always thought that was how he showed affection but started thinking it was weird and creeping me out”.

[43] Asked if she changed how she behaved around M.M. after learning about good and bad touches, she said “not really, but I would not wear revealing clothes, I was never super comfortable wearing them anyway.”

[44] She agreed that she told police she felt uncomfortable around M.M. and as her understanding became better, she “felt more uncomfortable with him and

tried to avoid being alone with him”. But she would not avoid the entire family because she was uncomfortable with him, adding, we bred dogs, I loved [C.M.], and made money dog sitting.

[45] Each subsequent years’ ‘right touch wrong touch’ session increased her understanding, and despite the general direction to report wrong touches, she did not do so.

[46] With respect to the sleepovers, the complainant agreed with defence counsel that C.M. put the girls to bed, but sometimes A.M. did so and would stay in the room. On those latter occasions M.M. did not come into the bedroom.

[47] While she recalled A.M.’s bedroom being pink, she did not recall a trundle bed. A.M. would testify that there was one in her room and the girls slept on it, noting it was creaky and moved easily. The complainant also agreed the girls slept in the dark with a night light and after looking at Exhibit #2, a photograph of A.M. standing in a bedroom, maintained no recollection of the trundle bed pictured there.

[48] Defence counsel made unfruitful attempts to suggest perhaps the touching involved a different man and not M.M. While agreeing she slept away at her grandparents’ house, with her aunt and husband, and other close family friends,

she offered very clear reasons why she slept at those other places and who lived there. She was not prepared to accept defence counsel's suggestion a different man touched her.

Decision:

[49] As previously stated, the offence of sexual interference is established if the Crown proves M.M. touched the complainant, who was at the time, a person under sixteen years of age for a sexual purpose. The Crown proves the offence of sexual assault if it proves M.M. intentionally touched the complainant in an objectively sexual manner, without her consent, and that he knew or was willfully blind or reckless as regards the lack of consent.

[50] Clearly the complainant was under the age of sixteen and too young to consent to sexual touching. This charge comes down to whether the Crown proved M.M. intentionally touched the complainant in circumstances of a sexual nature. The evidence that supports such a conclusion is his purported words "don't tell anyone we are lying here", but the evidence of where he touched her does not necessarily support a conclusion the touching was for a sexual purpose. This is one of those cases where a few more carefully posed questions might have elicited sufficient evidence to support touching for a

sexual purpose, but in this case the evidence does not support such a conclusion.

[51] The complainant's evidence was clear he "would put hands by my thigh or down by my vagina or on my breasts, over and under clothing". Clearly a child under eight years old does not have breasts and placing a hand "down near" a vagina, is not placing a hand on or in a vagina. The context of an adult man lying next to a child to put her to sleep, renders the alleged actions of M.M. entirely consistent with cuddling a small child. There is simply no proof beyond a reasonable doubt that such cuddling crossed the line into touching of a sexual nature or for a sexual purpose. It is equally consistent with simply touching a child for a non-sexual purpose. 'Down by my vagina' is simply much too vague to reach a conclusion the touching was for a sexual purpose. As such, the Crown has not proven the allegations with regard to this incident. Of course, there are more allegations than simply those at the sleepovers when the complainant was a young child.

Touching generally:

[52] The complainant testified that when sleepovers ceased, "the activity" continued after she was nine years old with M.M. putting his hand on the inner

thigh of her leg when people were not looking, holding her waist, putting his hand in the band of her pants, or reaching around her back over/onto her breasts. She says he would make inappropriate comments about her clothes and looking good. These things happened in his home or when he came to her house for [redacted]. She says he would stand next to her and ask where she was. Once again, quick general touching is alleged.

Installation of a light fixture:

[53] The complainant recalled two specific incidents that occurred when she was a teenager. At her house, near the end of the summer of 2020, M.M. had installed a light fixture in the family shed. She explained that her father had been engaged in general renovation of the shed over the summer, and possibly into the fall, when she went to see her parents and M.M. at the shed. She explained “I was not going to avoid him, I never did”.

[54] Her parents went into the shed leaving her and M.M. alone outside. She testified that “he put his arm around my waist and slapped my ass. I walked away”. On cross examination she explained that her parents were fifteen feet away in the shed when she was assaulted.

[55] The complainant was unable to recall if this was the last incident, or the second to last incident before she went to police. The other potential 'last incident' involved dog sitting.

Dog sitting:

[56] On what may have been the last incident, the complainant testified that M.M. collected the sisters from Smiley's campground where they were camping with her family. The plan saw the girls dog sitting while the M family went out, she thought to a museum.

[57] When the M family returned to the house, the sisters were dancing around and "I was making a sandwich" in the kitchen. She says M.M. came up behind her, asked to see the dance video, put his arm around her and put his hand in the side of her spandex shorts "and felt around my butt and then his hand went up my shirt to my breasts". She had her phone in her hand, so she messaged her sister, who was in the living room, asked her to come in. Her sister did so, and M.M. walked away.

[58] The Crown showed the complainant a chain of text messages, marked as Exhibit #1. She reviewed them and confirmed she sent those particular texts after she and her sister got out of M.M.'s car when they arrived at his house to

dog sit. She explained that Exhibit #1 was not the message she sent to her sister asking her to come into the kitchen. She believed that message was likely done by snapchat, noting snaps disappear.

[59] On cross examination she explained that the dog sitting was arranged a week prior through her mother and C. M., the girls would be paid for the job. She also recollected C.M. had been sick, was now feeling better, and believes, while not exactly sure, that the family was “going to the city, perhaps not the city, and maybe to a museum”. The Court does not recall C.M. being asked during her direct testimony whether she had been sick and was feeling better. The complainant agreed with defence counsel’s suggestion that A.M. and J.M. also went on the day trip, but was not really sure.

[60] She also agreed that at the end of the dog sit, the M family walked into the house, and she assumes J.M. and his partner Ms. B went to the other side of the duplex unseen by her. She believes this because she recalled C.M. talking about Ms. B before the [M]’s left for their day trip and so assumes Ms. B went with them.

[61] She reconfirmed that she was in the kitchen when the M family came home, not at the door, and only M.M. came into the kitchen where she was making the

sandwich. She believes C.M. might have been in her bedroom, but P was in the living room.

[62] Shown Crown Exhibit #1, the complainant says the messages “were from the car because he was creeping me out and he punched my bum getting out of the car”, they were sent before the incident in the kitchen. She also reconfirmed that the message sent to her sister from the kitchen was likely a snap.

[63] Asked about her police statement, she agreed she told police she was tired from a long day when M.M. asked about a TikTok video. She also agreed she told police she said to M.M., “I know what you are doing, just stop, when he put his hand in my pants band. I told him stop it and asked my sister to come in because he was not stopping. It worked because my sister came in and he stopped”.

[64] She also agreed she told the police he was making effort to coach her, agreeing she said, “Him saying ‘I am not doing anything’, was to make me think what he was doing was not wrong. I knew it was wrong”

[65] She agreed she was not yelling at him to stop but instead was talking in a regular tone of voice, one she did not expect her sister heard through the wall. She was saying, “Stop it, I’ve had a long day, I don’t want this right now.”

[66] The complainant denied Ms. B was in the kitchen and does not recall seeing her when the M family arrived home- adding “as a fact, it was only me and M.M. when I was making a sandwich and he came up to me”.

At the campground:

[67] She agreed with defence counsel that M.M. and C.M. later brought the girls back to the campground and stayed to visit with their dogs for 45 minutes to an hour or so before leaving. Asked if she walked dogs during that time, she said she recalls lots of walks but not alone with M.M. and denied asking him to accompany her on a walk.

Summer party:

[68] Asked by defence counsel to recall a summer birthday party at the M family home for A.M.’s son, she recalled it and denied looking for M.M. She did recall borrowing a two-piece swimsuit from A.M. but could not recall the clothes she wore to the party. She explained that she wore only the borrowed bikini top because the bottoms were too revealing for a family event.

[69] Asked if she recalled acting uncomfortable around M.M. at the party, she said “Yes, I recall the child, and I took him in the water. I recall being told I

could change in [C.M.]’s room, and I recall asking where M.M was, and [A.M.] said ‘why?’ and I said, ‘I did not want anyone coming in’. She stood outside the door while I changed into the swimsuit because someone was in the bathroom”. A.M. was not asked about this evidence from the complainant.

The testimony of P:

[70] P testified when she was fourteen years old about events that occurred between the ages of one and twelve. She took the witness stand and was quickly given Exhibit #1, text messages between she and her sister dated September 12, 2020. She was emotionally overwhelmed and started to cry. In the Court’s assessment her emotion did not appear connected to the exhibit, but instead being unprepared for Court rendered her speechless. I allowed her to sit on the witness stand until she composed herself and could continue to provide evidence.

[71] P testified identifying Exhibit #1 as text messages she believed came from her sister on their drive back from the M house to Smiley’s campground after dog sitting. She recalled M.M. driving the car and she and her sister sitting next to each other. Of all this she was “pretty sure”.

[72] She became aware of the allegations, in her estimation, “over a year ago, sometime last year”.

[73] Pointedly asked if she recalled anything about “the kitchen incident”, she testified that the girls had been dog sitting and while in the living room her sister sent a “snap” asking her to come into the kitchen because she did not want to be alone with M.M. She went into the kitchen and saw M.M. take two steps and leave. She maintained that only she, her sister, and M.M. were in the kitchen at the time.

[74] On cross examination defence counsel sought to determine if P had, over the lunch hour, discussed her sister’s evidence before giving her own. P testified that while her sister said defence counsel was nice, they did not talk about the testimony.

[75] P agreed with counsel that she was really shocked when her sister told her about the matters involving M.M. and agreed that, at first, she did not believe it. She explained that after hearing more detail she came to believe her sister. That conversation she estimated occurred “over a year ago, sometime last year”.

[76] Asked about dog sitting for the M family in 2020, P says she believed there were two or three times that she and her sister did so, but only one time when they were returned to Smiley's campground afterward.

[77] Asked to recall the M family return to the house that day, she testified that she was "pretty sure it was just them" who came back to the house. When it was proposed that a person would be coming to court to say she was in the kitchen at the relevant time, P inexplicably answered "Char was not there". Defence counsel once again challenged whether she had been talking to her sister before testifying and had learned he was going to suggest the yet unnamed female was Char. She denied it and said, "neither Char nor [C.M.] were in the kitchen".

Assessing the testimony of P:

[78] P was a very young witness and not very sophisticated in her language or mannerisms. Her evidence about the kitchen was direct and to the point and not undermined on cross examination. Her memory with respect to matters of little consequence was not overly reliable and quite general- the car rides and when she received the text messages. But overall, I found her to credible and reliable with respect to being summoned to the kitchen and seeing M.M. take two steps. I perceived her meaning to be two steps away, but little turns on that inference.

Disclosing the allegations:

[79] The complainant testified explaining the two families remained close until last year when she told her best friend, A, what happened with M.M. She could not recall if she told A before September when those two girls went to the M family house to dog sit or after the kitchen incident.

[80] She did recall her sister asking about the text messages and after “brushing her off” and later telling A, the complainant told her sister what had occurred. She agreed her sister did not initially believe her and sometime later she told both siblings, and it was suggested she speak to her parents. She talked to police after her parents decided to call them following their family discussion.

Assessing the evidence of the complainant:

[81] The complainant was a youthful sixteen-year-old grade ten student when she testified. She was comfortable on the witness stand and energetically spoke about her interests and activities. She was never emotional when relaying the allegations and, of course none of these things really factor into credibility or reliability assessments but are simply mentioned as an indicator of how she presented. Her testimony was consistent on direct and cross examination. Her evidence was fair and balanced. It was also plausible, and the Court did not

detect in content or manner an effort to mislead. She was a credible and reliable witness.

Defence case:

[82] Char B testified. She is the girlfriend of M.M. stepson who lives next door in the adjoining duplex. She recalled “last year, or the year before, we went to the museum and the ovens...I believe maybe September the museum, and the ovens I recall in the summer”. Clearly Ms. B was unsure of when the two outings occurred but says she, “definitely remembers coming back from the Ovens, and a birthday party”.

[83] She did not testify about leaving for the Ovens in as much detail as she testified about coming back to the house with J.M. and his parents that evening. She provided a surprising level of detail regarding the order in which people entered the house. She testified C.M. entered the house first, followed by her, and then M.M. When the door was opened there were dogs and she recalled M.M saying, “might as well take them for a run” and leaving the house.

[84] She says the girls were there at the door when they arrived, but later in her testimony appeared to suggest P was standing in the kitchen upon their arrival.

[85] Ms. B says she sat at the kitchen table and C.M. stood to the side of her near the door. P she placed near the door and the complainant by the sink. She says they chatted with the girls about the dogs and asked them about J.M.'s dogs. They were told things went well. She recalls C.M. went to the bathroom and M came into the house and went to the fridge making a comment about how the complainant was texting and asking her if she was writing a movie. Ms. B says she laughed, and C.M. came out. After approximately 15 minutes, M went out to the car first, taking the dogs, the complainant and P followed, then C.M. Ms. B says she then went next door to J.M.'s house. After relaying all this information, she testified that she believes it occurred in the summer of 2020, but with Covid she is not sure of timelines.

[86] Ms. B also offered that she has known the complainant for seven years, seeing her approximately twice a year. Not surprisingly she has also seen M.M. and the complainant together. She testified that she had the impression the complainant was infatuated with M.M. and was actively seeking him out, asking where he was. She recalled a party where the complainant arrived, and M.M. was off to the side with her father, and the complainant was asking "where is M.M.?" before running to give him a hug. She says M.M. acts the

same with the complainant as any female not his wife-age-appropriate actions and treating people the same.

[87] Ms. B says she has not observed signs of discomfort in the complainant adding she “dressed typical for a female her age seeking attention- more revealing clothing”.

[88] On cross examination Ms. B was pressed about when she became aware of the charges- a few days after M.M.’s arrest on April 9, 2021. She agreed that was seven to eight months after the kitchen allegation. She says she found out about them from C.M. and, on her own initiative, turned her mind to what she testified about today.

[89] Ms. B also maintained that she is recollecting the correct day because on the other day trip the complainant brought a friend, not her sister, and Ms. B stayed away on the other side of the duplex. She went to the M family house after the museum trip day because P was there.

[90] In assessing her evidence, I am aware I can accept some none or all of what any witness says in her testimony. I assess her evidence as simply too convenient. The level of detail provided about the exact order people entered the house and left it was simply implausible. There was no reason for her to

recall such a level of mundane detail from so long ago and her testimony came across as scripted and contrived.

[91] The testimony about staying in the house because P was there appeared odd, and I did not believe it.

[92] The objective of her testimony appeared to be constructing a detailed scenario that would rule out any opportunity for M.M. to be alone with the complainant. It struck the Court as fabricated and disingenuous testimony. It may well be the case that Ms. B believes her testimony is true, but it is much too convenient that it almost exactly matched that of C.M.

[93] In that regard, C.M. testified that she came into the house first, followed by Ms. B, and told M to take the dogs out because they were going to Smiley's. She says he did so, they all spoke, and Ms. B sat at the table "where she always sits". J.M. came over from his side, thereby suggesting he went to his own side of the house when the family returned home. She says he put his arm on the door "like he always does", and they all chatted for a few minutes. She recalls going to the washroom, coming out to find M.M. at the fridge with a bottle of water. She recalls him asking if the girls were "writing a movie". She says at

that time P was by the microwave and the complainant was near the sink. She told the girls to get their stuff “and we will take you home”.

[94] She says M.M. went to put the dogs in the car, Ms. B “went out, then the girls, or maybe the girls first, no wait Char went home, and I was still in the kitchen, and I closed the door. I told the girls they would have to sit together due to the dogs.”

[95] Asked how she remembers with so much specificity, she explained “it was a good day, and we don’t usually go out and I did not have to worry because the dogs were taken care of”.

[96] Once again, while it appears C.M. believes her testimony is truthful, the Court is skeptical. Her testimony, not unlike that of Ms. B, appears carefully constructed and implausible. Retaining this level of recall about such mundane things as a trip to the washroom and who was left in a room some eight months ago simply defies logic. My sense is both C.M. and Ms. B were trying extremely hard to construct a scenario that could not allow for M.M. and the complainant to be alone for a few minutes in the kitchen. I reject the evidence of both of these interested witnesses on these points.

[97] C.M. also joined in with the testimony of A.M. and Ms. B to support a description of the complainant as a teenager who dressed inappropriately and, vaguely explained, also acted inappropriately around men.

[98] C.M. in particular testified that at the campground the complainant asked M.M. if he wanted to go for walk with the dog, to which he said no. She says this stood out because she wanted her husband with her because they were visiting the complainant's parents and helping with the dogs. She says, "whenever there is a bunch of people", he always stays with her because she has anxiety. She also recalled the complainant asking her husband to take the dogs down near the river to get a drink, and him going with her. She testified that she could see them. On cross examination C.M. says she watched because she had a bad feeling about the complainant based on a day when she "came out from a shower in a towel" while the M family were visiting to view a puppy. She added, appearing to minimize her concern, that she had no problem with the trip to the river "I saw no problem with this, [complainant] is [complainant] and the dog was thirsty".

[99] She also testified that generally the complainant was always happy to see M.M. and "the first thing she does is run up and hug both of us", adding that her husband used a side hug "as everybody knows".

[100] She testified that at birthday parties the complainant went looking for him and when she found him, she hugged him. She always wanted to make sure he knew she was there. Not just him, the complainant would also bend over in front of men, and other adults told C.M. the complainant was not dressed appropriately. Surprisingly, there was no objection to this hearsay.

[101] C.M. says the complainant dressed in short jean shorts at their pool party and A.M.'s bikini top, "that people were complaining about". She explained that the complainant dresses "a lot like this" adding she does not know "if that's a thing or not".

[102] She conceded her husband would punch the complainant's arm and say, "see you brat", but that was just carrying on. Sometimes he would take her by the head, but C.M. saw nothing wrong with that, adding "I'd do the same". She never saw evidence that the complainant was uncomfortable around her husband and would instead brag to people that "we raised her".

[103] On cross examination C.M. was shown the text messages between the girls on September 12, 2021 (Exhibit #1). She had never seen them. Asked about the date and time of the messages, she agreed that was the day they went to the Ovens. C.M. says she has no explanation for the messages adding she was there

except when in the washroom. Asked if she realized this message related to her husband driving the girls to their house from Smiley's alone, she says, "wouldn't [P] have seen him do something, because he does punch in the arm and say see you brat?"

[104] With respect to the earlier incidents that I have disposed of, she was asked about her testimony that M.M. was never left alone with the girls at sleepovers, she did concede maybe he was when she went to the bathroom. She also agreed that sometimes she went to bed first adding she did not go first very often.

[105] Asked why she testified that she could see the complainant and her husband at the river with the dogs, she reiterated that she "got a bad vibe off" the complainant because of the towel incident, and she knew other men who had a problem with the complainant, adding she was more so watching the dog not them.

[106] Assessing her testimony, it is clear she is an interested witness. She is the wife of M.M. and is very invested in the outcome of this case. Her evidence appeared scripted and aimed at undermining the complainant. I simply do not accept it. Her evidence was coloured by animus and self interest. I expect she believes her testimony, but it is not reliable because it was aimed at an effort to

look back in time to piece things together in support of her husband. I should not be taken to reach this conclusion without foundation. Her evidence was simply too rehearsed and very vague. For example, suggesting the complainant was flirting with her husband did not make sense on her own vague evidence. Her testimony was not balanced but was quite harsh without real support. She was careful to paint her husband as a careful side hugger but at the same time as punching the complainant playfully and engaging with her head.

[107] A.M. also testified and was a fair bit more balanced than the other defence witnesses. She described a close loving extended family. The girls were a big part of her life. She was 11 years older than the complainant and not surprisingly has no unusual memories of their sleepovers. Her observations of the complainant and M.M. over the past few years was of the complainant “always running and giving mom” and M.M. “a hug”, noting “he would side hug her; he hugs me that way”. I must note the complainant was never asked about side hugs with M.M., but she did say she loved his wife.

[108] Asked about the complainant’s manner of dress, she testified that she did not dress like a 14 or 15-year-old should. She dressed in bikini tops, tight leggings, short shorts, and bikini bottoms, adding she ran up excited to see M.M. and all of us. The Court notes, this appears to be the dress of all teenaged girls these

days and the bikini was lent to the complainant by A.M. She did concede on cross examination that it is not unusual for young girls to wear bikinis, but took the opportunity to add that she would not do so if she was uncomfortable around someone.

[109] On cross examination A.M. confirmed she was twenty-six while testifying, is 11 years older than the complainant and agreed she was 12 years old when the complainant was 1 year old. While she testified, “I don’t remember because I don’t remember dates”, she agreed the complainant was 3 or 4 years old when she was 14 or 15 years old, so if the complainant was at her house until she was 7 years old, A.M. would have been 17 or 18 years old. I point this out simply because it renders any suggestions A.M. was always with the small children when they went to bed at her house completely implausible.

[110] She was not questioned about the complainant’s testimony about asking where M.M. was when she changed in the couples’ bedroom and posting A.M. as guard at the door. So, there was no evidence on that point from A.M.

[111] A.M.’s evidence suffered from the same concern as the other defence witnesses. It was not balanced, and it was unsettling when she judged the

complainant wearing a bikini, which was lent by her, as something one would not do if uncomfortable around someone. Overall, her evidence added little.

Position of the defence:

[112] It is always necessary to consider the submissions of counsel when reaching a decision. Having disposed of the earlier incidents, I will focus on the later incidents. Defence counsel argues the complainant's evidence is not reliable because she testified that she told her sister before telling her parents, but her sister says she heard about the allegations only a year ago. A look at the Information discloses M.M. was charged well over a year ago, suggesting P's memory is weak.

[113] After considering P's testimony, I note she testified that she heard about the allegations "over a year ago, last year". She was not asked the exact date she heard, and the evidence of her mother and the complainant support P hearing before the mother and father were told and the police called. Assessing the memory of the teenaged P, I conclude nothing turns on her general statement about when she heard about the allegations. Her testimony in that regard did not demonstrate a carelessness with truth that was concerning to the Court.

[114] Defence counsel says P's evidence is also concerning because she testified that only M.M. drove the girls back to Smiley's when the other witnesses say both M.M. and C.M. did so. This is the very sort of detail that can hardly be expected to remain in the mind of a child. She was not asked about C.M. being present at Smileys after drop-off and provided little exacting detail about the drive. I am unconcerned that her recall of surrounding details diminishes her recall of being called into the kitchen and seeing M.M. take two steps and leave. As I recall she did not think there was anything going on, she just responded to her sister's request and learned some short time later that this had been an incident of concern to her sister.

[115] Defence counsel argues the complainant's evidence of being "super, super scared" must lead one to ask why she was scared. M.M. was said to have uttered comforting words as he tried to put her to sleep. With respect, the complainant's evidence included M.M. advising her not to tell anyone he was there lying on the bed. In the context of being touched down by the vagina over and under clothes it makes some sense that she would be "super, super scared" as she could not process why she believed this was wrong until she was taught about touches in grade five.

[116] In addition, according to the evidence of A.M. and C.M., the trundle bed was too loud and could flip if M.M. sat on it. This proposition is troubling for any number of reasons. First, the evidence of A.M., which I carefully reviewed, was not that she was always with these young children who were possibly 1 and 3 years or 2 and 5 years, every minute they were in the bedroom. The Court simply cannot ignore that A.M. was 11 years older than these toddlers and cannot imagine a 14- to 17-year-old staying with toddlers when they went to bed. Likewise, it does not accord with common sense that trundle beds flip if adults sit on them. Even if the bed was extremely loud when an adult sits on it, how can the Court conclude that would wake a sleeping child. I am simply not prepared to accept that these propositions are anything other than wild speculation, but they did undermine the credibility of A.M.'s testimony.

[117] Defence argues that the complainant learned of right and wrong touches in grade 5 and did not report these allegations. The law is clear, people report at different times and the Court should not be persuaded complainants are untruthful based on when they report, without something more. Nothing causes this Court concern about the timing of the complainant's reports of these incidents.

[118] Defence argues the complainant's evidence that she was uncomfortable around M.M. and wore baggy clothes is neither credible nor reliable. Instead, the defence witnesses say she sought out M.M. and dressed provocatively, not in baggy clothes. They thought it laughable the suggestion she was uncomfortable around M.M. The Court finds, the defence evidence of how this teenaged girl dressed appeared to accord with other girls her age. I accept her testimony that she wore A.M.'s swim top but not the bottoms because they were too revealing. In any event, it did not appear from my review of her evidence that she carefully considered what she wore whenever she might see M.M.

[119] Defence counsel asked the Court to place some weight on what others believed about the complainant's disclosure. I decline to do so.

[120] I also did not accept the testimony of defence witnesses that she ran up hugging M.M. when she saw him because it was never put to her and, if I am incorrect on that point, I do not recall any evidence of such. As I have said, I found her a reliable and credible witness and do not accept that she was enthusiastic and physical with M.M. She simply testified "I did not avoid him".

[121] With respect to the physical evidence, it would have been nice to have copies of the snap chat between sisters, but it is not the complainant's job to

investigate, that rests with the police. The absence of a snap does not render it false; the Court is aware snap chats disappear once read, and they are commonly used by young people.

Conclusion:

[122] After assessing the evidence of all the witnesses, I find the complainant a credible and reliable historian of what she says occurred. Her testimony did not appear exaggerated, rather it was straightforward and clear. She was also balanced and fair. She painted a picture of serial harassment at the hands of M.M. that lasted her entire life. While it was also evident that she loved the others and enjoyed time with the family and the dogs, what was equally clear, she was done with being touched.

[123] Her evidence of what occurred when she was young child was also fair and balanced. She did not say he touched her vagina but instead put his hand near it. She did not ascribe more to his actions than what she could process as a child.

[124] She was likewise clear and compelling in her description of what occurred on September 12, 2020. Her evidence is supported by her text messages even if a snap was not available. She relayed a fairly quick incident that occurred when

the two were alone and did not firmly place C.M. in any specific location other to guess, but the complainant was certain she was not in the kitchen.

[125] Finally, the complainant's description of the touching leaves no doubt that placing hands on a teenage girl under her pants and under her top in the breast area is sexual in nature. There is simply no other reason for an adult man to do such a thing. Her description of a quick grab around her waist and buttock slap while her parents were in the shed, and the inappropriateness of such an action, are also accepted by the Court as sexual in nature.

[126] The Crown will have a conviction on both counts but may wish to stay one count.

[127] Judgment accordingly.

van der Hoek PCJ