

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R v. Lynch*, 2022 NSPC 44

**Date:** 20221130

**Docket:** 8385728, 8385730

**Registry:** Kentville

**Between:**

His Majesty the King

v.

Shawn Lynch

**Restriction on Publication: s. 486.4**

<b>Judge:</b>	The Honourable Judge Ronda van der Hoek,
<b>Heard:</b>	August 26, 2022, August 30, 2022, November 9, 2022, in Kentville, Nova Scotia
<b>Decision</b>	November 30, 2022
<b>Charge:</b>	151 of the <i>Criminal Code of Canada</i> 271 of the <i>Criminal Code of Canada</i>
<b>Counsel:</b>	Nathan McLean, for the Crown Ian Hutchison, for the Defendant

**By the Court:**

**Introduction:**

[1] It is alleged that Mr. Lynch offered fourteen-year-old SB hand me down clothing when she arrived at his house to babysit his children. He suggested she go to the basement where she tried on a sports bra that he offered to check for fit. In doing so he placed his hand inside the side band of the bra. SB returned to the bedroom to change back into her own bra and tank top, and Mr. Lynch walked into the bedroom before she could do so. She quickly put on her clothes while protesting that she was still changing. He then walked toward her and pulled out her tank and bra near the top, looked down her top and asked where she bought her clothes. He also asked if a birthmark located under her breast, was a hickey.

[2] Mr. Lynch was charged with sexual assault, sexual interference and, being a person in authority, touch a person under the age of sixteen years for a sexual purpose contrary to sections 271, 151, and 153(a) of the *Criminal Code*. The Crown proceeded summarily and called three witnesses, the complainant, SB, her mother, NA, and father, KA, whom SB telephoned after Mr. Lynch left the house. The defence elected not to call evidence.

[3] The Crown conceded the s. 153 offence had not been made out as the evidence did not support a finding Mr. Lynch was in a position of authority with respect to SB.

[4] The only issue was whether the Crown proved the case. I find it did not, instead a reasonable doubt existed on the evidence. Before considering that evidence, I will set out the parameters that guided my analysis and findings of fact.

*Burdens and principles applicable on a criminal trial:*

[5] In a criminal trial it is the Crown who bears the burden to prove the elements of the offences beyond a reasonable doubt. Mr. Lynch is not required to prove he did not commit the offences, he need not testify, and that is because he benefits from the presumption of innocence. Nor does he bear a burden to prove the complainant had a motive to lie, and I should guard against reversing the burden by asking him to do so. (*R. v. Gerrard*, 2022 SCC 13) Finally, the presumption of innocence remains firmly in place until such time as the Crown discharges its heavy burden.

[6] I remind myself that the beyond reasonable doubt standard is heavy one and does not equate with probable or likely guilty. Instead, it lies much closer to absolute certainty than to the civil standard of proof on a balance of probabilities.

Only after considering all of the evidence as a whole can the Court determine whether the Crown has met its onus.

[7] Assessing the testimony of each witness required the Court to consider its reliability and truth. I brought my focus to such things as intrinsic and extrinsic consistency in the evidence, things said differently at different times, plausibility, balance, possible interest, the ability to recall and communicate what was observed and how that ability might be impacted by such things as the passage of time, emotion, age, or other factors. I also considered whether a witness was being sincere, candid, biased, reticent and/or evasive during testimony. Finally, I can accept some, none, or all of a witness' evidence.

[8] I do not propose to recreate a transcript of the trial, same were prepared for use of counsel given the matter was spread out over time. Instead, I will set out my findings of fact referencing the testimony that supported those findings. Only after considering all of the evidence, listening to the closing submissions, and reflecting on the applicable law, did I make those findings or reach conclusions.

*Elements of the offences:*

[9] Sexual interference is a specific intent offence and requires the Crown prove Mr. Lynch touched, directly or indirectly, and for a sexual purpose, the body of

SB, who is under 16 years old. (*R. v. B.J.T.*, [2019] O.J. No. 4503 (C.A.), at paragraph 37).

[10] Sexual assault is an assault, intentional application of force, which is objectively sexual in nature. It requires the Crown prove Mr. Lynch applied such force, directly or indirectly, to SB who did not consent, and who he knew was not consenting. SB's lack of consent is determined subjectively. (*R. v. Barton*, 2019 SCC 33; *R. v. G.F.*, 2021 SCC 20; *R. v. Ewanchuk*, 1999 CanLII 711 (SCC) at paragraph 24). Due to her age, SB could not legally consent to touching of a sexual nature.

[11] For the purpose of this case, it is important to note that the strength of the touching is immaterial and the slightest touch, however light, of SB without her consent can constitute an assault (*R. v. Dawydiuk*, 2010 BCCA 162 (CanLII); *R. v. Palombi*, 2007 ONCA 486 (CanLII); *R. v. LBC*, 2019 ABCA 505 at paragraph 33).

[12] In *R. v. J.A.*, 2011 SCC 28 (CanLII) at para. 24, it was held that a "person has the required mental state, or *mens rea* of the offence, when he or she knew that the complainant was not consenting to the sexual act in question, or was reckless or wilfully blind to the absence of consent".

*The Evidence:*

[13] SB testified when she was seventeen years old about events that occurred when she just turned fourteen years old. As a result, the Court must be cognizant of her age in accordance with the Supreme Court of Canada's direction *W.(R.)*, and while the reasonable doubt standard is not lowered in cases involving child complainants, a careful assessment of a child's credibility should account for experiencing the world differently than adults. For example, a child may not find details such as time and date as important as an adult witness, and a flaw or contradiction in a child's testimony should not be treated as similar to the same flaw or inconsistency in the testimony of an adult. That said, I must also consider the age of the witness at the time she is actually testifying. (*R. v. W.(R.)*, 1992 CanLII 56 (SCC), [1992] S.C.J. No. 56 at para. 24 and 26 and *R. v. B.(G.)*, 1990 CanLII 7308 (SCC), [1990] 2 S.C.R. 30 at para. 48)

*The drive to the house:*

[14] SB says Mr. Lynch arrived at her home at 8:30 am and drove her to his house to babysit his young children. She babysat "quite regularly", three or four times before, and Mr. Lynch was her father's best friend whom she had known since she was three years old.

[15] The short drive included small talk about school, but SB says overall it was “pretty quiet, but pretty different” because Mr. Lynch told her “all the conversations between me and him were private”, and “he had never told me anything like that before”. That comment came toward the end of the drive.

[16] Pressed for more detail about the conversation, SB explained that they had taken pictures at the beach a week or so before. She wanted a picture for her social media account, but her mother said no because SB was wearing a bikini. She testified that Mr. Lynch said, “if I ever wanted pictures taken, that he would take them for me, but all the conversations between us were private, and that’s how that came about”.

[17] In her police statement SB described the conversation as “really weird” and “a little weird”. It was also apparent the officer introduced the idea that the conversation was concerning, and SB agreed that he did so.

[18] Defence counsel described SB’s evidence on this point as ‘evolving disclosure about what was said in the car’, with police injecting into it some nefarious purpose despite SB not initially seeing it that way. On a more important note, this type of police questioning should cause a court concern, however I find SB’s evidence that the words were “weird” or “different”, suffice to sum up her

thoughts on the topic. Ultimately the conversation itself means little to the larger picture.

*Offer of clothing:*

[19] Upon arriving at the house, Mr. Lynch's wife was in the kitchen, his older daughter was in her bedroom, and the two young children were sitting at the coffee table watching television. SB believed Mr. Lynch was sitting at the kitchen table and she sat with the young girls.

[20] She explained that Mrs. Lynch left for school for 8:55 am, but agreed she told police 9:55 am. She testified that she realized later that she was off by an hour. After Mrs. Lynch left the house, and 5 to 10 minutes after arriving at there, SB says Mr. Lynch told her that he “was cleaning out his dresser, and that there were a few things that I could take home, and if I wanted them and they fit, and to try them on, and that I would try them on downstairs so that his daughter wouldn’t come in and bugged me”. She testified that he said he also had some clothes belonging to his wife that she needed to try on. SB agreed with defence counsel that she did not tell police about the comment regarding the daughter and does not recall when it was said.



[21] SB testified that the Lynch's had given her clothes before, but at her home, not theirs. Mrs. Lynch would testify that SB had tried on cast off clothing once in their bathroom.

[22] SB agreed that she told police in her statement the offer of clothing was made as they were leaving the car. This was of course not her evidence on direct examination.

[23] Defence counsel SB statement creates an underlying inference Mr. Lynch was baiting her with the clothing, but points out that her testimony of offering the clothes as they left the car defies that position because doing so would create an opportunity for his wife to become involved. This means the offer of clothes prior to entering the house has a ring of truth and supports an innocent objective, as opposed to an offer being made after the wife left. As the Crown points out, that evidence also suggests a spontaneous crime of opportunity.

[24] SB says she was offered a few shirts, a strapless bra, and a sports bra, and she went downstairs three times.

[25] SB was asked if Mr. Lynch had the clothes with him or, alternatively, where the clothes were located. She testified that "the clothes were downstairs on his bed". Earlier she testified that she went into the bedroom "with the shirts". This

serves as a reminder that less than precise language can lead to confusion. Did she go to the room with the shirts, or did she go the bedroom where the shirts were located?

*A few shirts:*

[26] SB testified that she followed Mr. Lynch downstairs and into the bedroom where she did not try on the clothes because she felt uncomfortable. While in the bedroom with a few dark shirts, SB says Mr. Lynch barged in and she “would not have even had time to try them on”. He asked if she tried them on and she said yes, because she did not really know what else to say.

[27] My sense, these were Mr. Lynch’s shirts, and there was no evidence, or suggestion, a fourteen-year-old would need to undress to try on such a shirt. She testified that she was wearing sweatpants, a pink bra, and a light purple tank top.

[28] SB says she went back upstairs.

*Strapless bra:*

[29] Not long afterward, Mr. Lynch asked SB to come downstairs and try on the strapless bra. While she went downstairs to the bedroom, she says she did not try that item on either, instead she shut the bedroom door and “still felt a little

uncomfortable”. Mr. Lynch once again “barged” back into the room, but she “was still covered”. An odd choice of word given she did not try the bra and remained fully clothed.

[30] On cross examination SB says she tried to the lock the door this time, but also appeared to deny it. Her evidence was quite confusing on this point. She also agreed she told police Mr. Lynch said he would lock the door, but that issue was not fully explored.

[31] SB agreed that she wrote about the incident in her diary- Mr. Lynch asked if she had tried on the strapless bra and told her “if it was too small, my boobs would overflow over the top of the bra”. SB agreed she left that out of her direct testimony and did not tell police in her statement. She testified that after processing her feelings and thinking about what happened, over the next few days she diarized the additional information. She agreed that the children would have been within ear shot of the words spoken by Mr. Lynch, so they were spoken upstairs.

[32] She then agreed that she did *not* try to the lock the door when she went downstairs to try that bra.

[33] She went back upstairs.

*Sports bra:*

[34] SB says she went back downstairs a third and final time. Mr. Lynch told her to try on the sports bra, come out and show him, to make sure it fit. She explained that because he is someone with daughters, she “didn’t really think anything of it, because he was so close to the family”.

[35] On cross examination she agreed that Mr. Lynch told her he would go back upstairs, and also wrote that in her diary. She agreed she did not say that in direct examination, nor did she tell this to police in her statement. She explained that this was information she recollected after collecting her feelings and having time to think.

[36] She says she tried on the sports bra and came out of the bedroom to find Mr. Lynch standing outside the door.

[37] SB testified that, “he just put his hand under the left side of my sports bra and pulled out on it, and he told me that I’m smaller than his wife”. SB could not recall which hand Mr. Lynch used, but described his action as “he just kind of slid his hand up the side of it, up and around, then pulled it out like, the sports bra. He didn’t move around his hand or anything, he just slid it up and kind of pulled it out”. His hand was placed palm side outward under the band and the back of his

hand made contact with the left side of her ribs. She estimated that touching lasted a couple of seconds.

[38] Asked how she felt in the situation, she testified that she was uncomfortable and overwhelmed because she had never had anything like that happen. She explained that she was young, and Mr. Lynch was old and someone who is close to the family. She knew this was “not a right thing to do”.

[39] SB testified that before she turned to go back into the bedroom “he went to go touch the front of the bra. I don’t know what he was trying to do, to pull it out or something, but he pulled his hand away and told me he didn’t want to touch my breasts”.

[40] SB says she turned around and went back into the bedroom to change. She shut the bedroom door and “tried to lock it this time” ... “because there was a lock, and it was one-way”. She tried to open the door to see if the lock engaged, and “I turned it the other way cause it wasn’t. I went in, I had just enough time to take my bra off, the sports bra, and then I was completely topless when he barged right in the door”. Later in her testimony she said she took the sports bra off and went to put her bra back on, but didn’t have enough time before he barged into the door.

[41] She says she put her bra on and put her shirt back on and then she told him twice that she was not done changing. SB also testified that she tried to cover herself up, turned, and told him twice that she was not done changing. She did so to be sure he “got the memo, and he did not leave”. So, she put her bra back on, and her shirt, and turned around very flustered. It was not clear to the Court if she told Mr. Lynch she was not finished changing before or after she changed.

[42] SB agreed she did not tell police that she told Mr. Lynch twice that she was changing. She says she is unsure why she would have left that out.

[43] After she dressed, Mr. Lynch said he wanted to go shopping with his wife and wondered where SB bought her clothes. He “pulled out all my shirt and asked me where I got it from, and I said George”. SB testified “and then for the second time after that, he got a hold of my bra and my shirt and pulled it out, and he asked me where I got my bra. I told him and he looked down my top and asked if that was a hickey on my right breast. I said no”.

[44] SB testified that she has a birth mark on her breast which is why she knows he saw her breast.

[45] Later upstairs SB called her mother after Mr. Lynch left the house and reported the assault. Her mother and father came to the house with the police.

*Mirror:*

[46] Asked on cross examination why she told police she was looking for a mirror in the bedroom, SB explained she did so because she wanted to look at herself in it and “it is a lot easier to look in a mirror to see what’s behind you than when you are looking around”. She was asked why she needed to do that and replied, “to remember where I was and so that I could see what was on the walls or the windows, and how everything was placed”. Asked why she needed to do that, she replied, “because I was going to come to tell the police what happened. I knew at that point, when he had walked in, that I was... After when I was looking for a mirror, that I would have to know those details to report.” SB agreed with defence counsel that she did not explain this to the police in her statement. She added in cross-examination that she started looking in the mirror for that purpose “after everything happened”. She was asked why not just look around the bedroom as opposed to looking at it through mirror. SB explained “I don’t know, that’s how I’d normally do it, when I go into a new surrounding, I look for a mirror so that I could see behind myself.”

[47] Defence counsel proposed an alternate theory to SB. He suggested that perhaps she had gone downstairs to try on T-shirts and looked for a mirror to see herself and determine fit. SB replied, “No. I don’t remember looking to see how

they would fit... because I didn't really care." The Court found this answer quite confusing as it suggested perhaps, she did try on the T-shirts after all.

[48] Defence counsel described this testimony as "farcical" and notes it arose under pressure of cross examination because she was caught in a lie and was attempting to recover. The Court is asked to use common sense, and find this evidence simply does not make sense. Instead, SB noted that mirror simply as a function of voluntarily trying on clothes with no contact from Mr. Lynch. The Court is not sure she spoke initially of the mirror for any reason other than it was mentioned in passing in her police statement, however, her additional evidence on crosse examination was, I agree, unusual.

[49] On cross-examination defence counsel also pointed out that SB did not testify in direct examination that Mr. Lynch told her not to mention that she had tried on the strapless bra, she agreed and also conceded she recorded that in her diary but did not say so to police. SB explained that when she spoke to the police, she was just trying to pass along the core details because she was traumatized by the situation. Only after she was at home thinking, processing her feelings, and writing in her diary did she find more detail. She explained that she omitted it from her testimony because she did not think about it. I note this evidence may have



related to the sports bra but, in any case the evidence about not telling is concerning.

*Assessing the testimony of SB:*

[50] SB was a fairly thorough witness, and why not, she reviewed her diary entries and her statement to police before testifying about an event alleged to have occurred years ago when she was fourteen years old. Initially she appeared to provide abundant detail in an uninterrupted fashion as she outlined the event from pick up to arrival at the Lynch house through to the alleged assault. In point of fact, the Crown asked SB to explain what happened and she provided a detailed and lengthy answer that covered the entire scenario.

[51] Defence counsel, however, points to a number of concerns in her evidence that differed as between direct examination and cross examination, and as between those and her police statement. It goes without saying that a witness is not expected to testify perfectly or maintain complete recollection of an event, however that does not mean concerns about reliability or credibility cannot arise and cause the Court concern. SB was seventeen when she testified and could be expected to be more precise.

[52] Counsel pointed to a number of difficulties in SB's evidence including a perceived overstatement of a close uncle/niece type relationship followed by a later suggestion they were not close. Counsel says these two positions are incompatible. I find that her evidence on that point is capable of belief simply because it was rather vague and undefined. Uncles can be close or not so close, but remain uncles, if that makes some sense.

[53] I am however more concerned about the other inconsistencies that affected reliability and by extension credibility. SB left out a fair bit of information in her statement to police and yet, after reviewing her detailed diary entry and that statement, did not incorporate the details on direct examination. That I found rather curious, and it affected her reliability and credibility. Other concerns, in no particular order of priority, include the attempt(s) to lock the door and when, when the offer of clothing arose, the curious evidence about the mirror, whether shirts were on the bed or carried to the room by SB, her evidence about Mr. Lynch asking her not to tell anyone she tried on a bra, and the other concerns addressed above.

[54] Mrs. Lynch testified as did the parents of SB. Mrs. Lynch testified that SB had tried clothes at her house before and there was really nothing that served to undermine her testimony on that point. SB's parents I expect were terribly upset

when SB called. It is understandable in the circumstances that her father may have inferred a report of breast touching, even if it made better sense to report looking down ones' top, the actual complaint.

[55] I remind myself that the Crown's burden to prove the case beyond a reasonable doubt is a heavy one. While it is possible this offence occurred, I cannot say that I am convinced to the high criminal standard necessarily required to register a conviction. SB's evidence suffered from insurmountable reliability and credibility concerns. On all of the evidence, I am left with a reasonable doubt.

[56] While I might be suspicious something may have happened, and also leaving aside whether that something could in law constitute a sexual assault, I find neither offence has been proven to the criminal standard. I am reminded of Blackstone's ratio, "It is better that ten guilty persons escape than that one innocent suffers".

Judgment accordingly.

van der Hoek PCJ