

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Arsenault*, 2026 NSPC 11

Date: 20260224

Docket: 8853615

8853616

Registry: Dartmouth

Between:

His Majesty the King

v.

Justin Arsenault

Restriction on Publication: [s. 486.4 *Criminal Code*](#) – Any information that could identify the complainant shall not be published in any document or transmitted in any way.

Judge: The Honourable Judge Timothy G. Daley

Heard: October 28 and November 13, 2025, in Dartmouth, Nova Scotia

Decision: February 24, 2026

Charge: Sections 271 and 151 of the *Criminal Code*, RSC 1985, c C-46

Counsel: Michael Blanchard, for the Crown
Colin Coady, for the Accused

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 162.1, 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).

Mandatory Order on Application

486.4(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim Under 18 — Other Offences

486.4 (2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory Order on Application

486.4 (2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order;

(b) on application of the victim or the prosecutor, make the order.

Child Sexual Abuse and Exploitation Material

486.4(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes "child sexual abuse and exploitation material" within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

486.4(5) Limitation — victim or witness

An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

By the Court:

Introduction

[1] This is the trial decision respecting Justin Joseph Arseneault. He is charged that, on or about the 15th day of August 2024, in Lower Sackville Nova Scotia, he committed the following offences against AA under the *Criminal Code*, RSC 1985, c C-46 [the *Criminal Code*]:

1. Sexual assault contrary to section 271.
2. For a sexual purpose touched AA, a person under the age of sixteen, with a part of his body to wit, hands contrary to section 151.

The Evidence

[2] At the commencement of the hearing, an Agreed Statement of Facts pursuant to s. 727 of the *Criminal Code* was entered into the record as follows:

1. Mr. Arseneault (the "Accused") admits the following elements of the alleged offences:
 - a. Date and time of the allegation.
 - b. Jurisdiction.
2. The Accused also admits that:
 - a. The sworn statement he gave to Cst. Janelle on the evening of August 15, 2024, was voluntary and Charter compliant.
 - b. That photos taken of him by Constable Janelle at the Lower Sackville RCMP detachment at the time of his arrest are true and accurate representations of how he appeared on August 15, 2024.

c. That for the purposes of the voir dire pursuant to 715.1 of the Criminal Code, the video recording of MM's statement is a true and accurate representation of her interview, which took place on August 26, 2024.

3. The Accused also admits the following facts:

- a. The call was made to 911 on August 15, 2024 by BB, regarding an incident involving her sister, AA.
- b. That call was made at 6:36 PM on August 15, 2024.
- c. That AA was under the age of 16 on August 15, 2024.

AA

[3] AA provided her *viva voce* testimony by remote video and her video statement to the police was admitted into evidence.

[4] In that video statement, AA said that on the day in question she was at the Sackville bus terminal to board a bus. She explained that, due to bullying, she was changing schools and this was a way of her practising travel by bus from her home to the school. Her mother had dropped her at the bus terminal and was waiting to watch over her from up the road. The plan was to meet her sister when she got off the bus.

[5] She described that the terminal included a building on one side with a parking lot and on the other side there are several bus stops. An aerial photograph of the bus terminal was entered in evidence and confirms this. The bus terminal is off Walker Avenue and on the right side as one enters the bus terminal area is a long concrete walkway beside which are multiple bus parking areas. Towards the

end of that concrete walkway is the bus terminal building on the right. At the end of the bus terminal area is a widening paved area which is used by the buses, presumably, to turn around and exit the bus terminal area.

[6] While she couldn't remember which bus stop she was at, AA did confirm that she was there for bus number 87 and that she was standing at the very end of the bus terminal building. It was around 4:50 PM and recalled this time based on her expectation that her bus would arrive at approximately 5 PM.

[7] In her video statement she explained that, at one point, she was looking in her bag for a pen to draw on herself because she was bored. Nearby was "the kid" playing with a cat toy. This kid was later identified as the stepson of the Accused who was 16 years old at the time, autistic and non-verbal.

[8] She described that the Accused commented to her that his son has autism, and she replied that she had seen the boy before with the Accused a couple of times at the pool at the Sackville sports stadium and was aware of his condition.

[9] The Accused replied that that was cool and that most people didn't know that. He then asked her for her phone number which she refused, explaining that her phone was at home. She said that after that interaction, she "kept doing my thing".

[10] When asked what the boy was doing with the cat toy, she described that he had a phone up to his ear and was listening to something on a loop or repeat and was playing with the cat toy in the air. She described the cat toy as a colourful string on a grey pole, a kind of plastic toy. The boy was waving it in the air, walking back-and-forth.

[11] She continued to draw on herself. She said that at that point the Accused stood up and she kept drawing on her leg as he came towards her. As he got close to her, she said he squeezed both of her breasts with his hands. She says that she didn't say anything in response and her bus arrived "like, two seconds afterward."

[12] She got on her bus and travelled to the bus stop where her sister was waiting. At that time, she told her sister what happened. She also testified that she saw her mother who was waiting in her car as she left the terminal and waved at her from the bus. She was able to describe the Accused, including the colourful shirt he was wearing at the time.

[13] When asked for a further description of what happened to her as he approached her, AA said in the video statement that "he just, like, grabbed one, and then grabbed the other, and then, like, I said I have to go, my bus is coming." She confirmed he had used both hands. When asked how long the groping lasted, she

replied, "just, like, for a minute maybe." She described the Accused as simply looking at her when he was groping her and that he said nothing. There was no conversation between them.

[14] As described earlier, she then got on the bus. Immediately after, saw the Accused through the window and that he was making motions with his hands for her to lift her top.

[15] In her video statement AA said that when she got off the bus at the MacDonald Bridge terminal, she found her sister BB and described to her what had happened at the terminal. BB then called their mother and AA described to her what it occurred. Their mother replied that she would call the police.

[16] AA and her two sisters who were present with her then had some disagreement about whether to call the police, attempts to call the non-emergency line unsuccessful, and discussed whether AA wanted to speak to a friend first. Ultimately, the police were contacted.

[17] AA confirmed there were other people outside waiting for the bus at the terminal when the incident occurred. She said there were two girls present when the Accused asked for her phone number, but they left on a bus. She said they were likely too far away to hear about the conversation between her Accused.

[18] She was able to describe the girls to a limited extent and estimated their ages to be around 15 years old.

[19] She confirmed that there was a security guard for the terminal who came out to walk around. She also said that she could see a couple of people inside the terminal building.

[20] In her *viva voce* evidence on direct examination, she again confirmed that the Accused had grabbed her breasts, causing bruising which lasted approximately one week. One breast was bruised and the other was slightly bruised. Her mother took photographs of her breasts which were entered into evidence, and which show the bruising described.

[21] AA confirm there was no bruising on her breasts prior to this incident and that the cause of bruising was the Accused squeezing and pinching her breasts, with that action lasting between 20 and 60 seconds.

[22] She again confirmed that there were two girls nearby, but not close, and she didn't believe they could hear the conversation between her and the Accused.

[23] She confirmed her mother was in her vehicle and had taken her to the bus terminal to prepare her for her attendance at school by using public transit.

[24] She testified that there was no bus present prior to the groping incident and at the end of that incident the bus arrived within 1 to 2 minutes.

[25] In cross-examination, AA denied that she told the Accused that she had an autistic family member. She also denied that she and the Accused had discussed it was difficult for his son to find friends.

[26] On cross-examination, several inconsistencies in her evidence were identified as follows:

- She agreed that in her video statement to police she described that she wrote to her sister about the incident but in her *viva voce* evidence denies this and said she told her sister.
- In her *viva voce* evidence, she testified that she was at the bus terminal to practice travel for school and her mother was up the road. She testified that her mother could see both her and the Accused but did not state this in her video statement to the police.
- She also confirmed that in her video statement she said that the Accused grabbed one breast and then the other but in her *viva voce* evidence said that he had grabbed both at the same time.

- In her video statement AA described the groping as lasting a minute and in her *viva voce* evidence she testified that it lasted between 20 and 60 seconds.
- AA agreed that in her *viva voce* evidence she testified that the Accused had squeezed, twisted and pinched her breasts, but had not described this action in her video statement.
- AA agreed that in her video statement she said that the bus arrived within two seconds of the end of the groping but in her *viva voce* evidence said that the bus arrived between one and two minutes after the groping ended.
- She also agreed that in her *viva voce* evidence she described herself as being up against a wall by a window, but she did not say this in her of video statement.

CC

[27] AA's mother, CC, provided evidence in the matter. She confirmed that the plan on August 15, 2024, was to drop AA off at the Sackville bus terminal to allow her to practice taking the bus to her new school. She said there were a few people in the parking lot at the time, and that, after dropping off AA, she parked in a spot

by the U-Haul and Wheaton's stores nearby. The plan was to ensure that AA got on the bus safely.

[28] In evidence is an aerial photograph of the bus terminal and the area around it, including where CC identified herself as parking and AA standing. Based on this photograph, CC was parked a considerable distance away. Based on the number of cars parked along side of the bus terminal, that distance may be measured as at least 13 car lengths or more.

[29] CC said that after she parked, she rolled her window down and watch her daughter the entire time. She testified there was no obstruction of her view, and she waited approximate 10 minutes for the buses to come and go.

[30] She testified that she saw a man walk up to her daughter before AA was able to get on the bus. She did not know the man, but she could see him and described him as older. She also saw a younger man, identified elsewhere in the evidence as the Accused's stepson, and was able to provide a description of him.

[31] She says that during approximately one minute, the Accused walked up to and was face-to-face with AA. The Accused's back was to CC, and she saw no body movement. She testified she couldn't see where his arms were.

[32] She said that she observed her daughter get on the bus thereafter, and that the bus was already approaching when her daughter and the Accused were close to one another.

[33] She said the bus left the terminal onto Walker Avenue and she was close to where it was exiting, allowing her to observe her daughter on the right side of the bus.

[34] She returned home and approximate 40 minutes later BB called her and she was told what occurred. She said that she met with her daughters AA and BB and the police were called.

[35] She testified as to the injuries suffered by AA and that she had taken photos of same.

[36] When asked specifically how close AA and the Accused were, she said they were a few inches apart.

[37] In cross-examination she agreed that in her *viva voce* testimony on direct examination she described that the Accused walked up to AA for that at encounter, was face-to-face with AA for approximately 60 seconds, only inches away, that his back was to CC.

[38] She then agreed that none of this was included in her statement to the police. She also confirmed that in her statement to police she said, "I couldn't make out anything that happened." Excerpts of that statement were played which confirmed she said that she "saw someone next to her".

Constable Janelle

[39] RCMP Constable Janelle give evidence in the matter. He confirmed that she is a general duty police officer and has been with the RCMP since 2009 and working in Halifax since 2021.

[40] He was the lead investigator in this matter and after being contacted at approximately 6:50 PM on the day in question, he travelled to the Sackville bus terminal off Walker Ave. in Sackville.

[41] He confirmed that he entered the lot behind the bus terminal and observed the Accused leaning on the corner of the building. He was wearing the clothes described by AA and was later photographed in those clothes. Identification is not an issue in this matter.

[42] He said she spoke to the Accused and explained the purpose of his investigation. During the conversation he detained the Accused, at which time he confirmed that he was not alone, that his son was running around with his toy.

[43] They returned to the police vehicle, and he called and spoke to AA for more specific information on these clothes the Accused was wearing as he was concerned whether he had the right person. The Accused was released at around 7 PM.

[44] The officer went back to the detachment to review some information and returned to the terminal at which time the Accused had left. He called the Accused, explained of the purpose of her investigation, and the Accused agreed to meet with him that same day at approximately 8 PM. When he arrived, he was wearing the same clothing as described by AA.

[45] At the detachment he provided a voluntary video statement which was entered in evidence, and a transcript provided.

[46] The following day he informed AA that she would arrange an interview with her.

[47] When asked about the possibility of obtaining video recordings from cameras at the bus terminal, the officer indicated that it took a long time to do so

and that two downloads of the videos had failed. As a result, when they obtained video, the recordings from that day had been overwritten. As a result, there was no video available.

[48] On cross-examination, Constable Janelle confirmed that the Accused had repeatedly asked him to watch the video that would be available at the bus terminal to confirm that he had done nothing wrong. He also confirmed that, based on the information he had of where AA and the Accused were at the time of the alleged incident, there would have been video available based on the camera's field of view.

[49] Constable Janelle confirmed that no statement was taken from the security guard on the basis that the guard had no idea of what had occurred.

[50] Finally, he also confirmed that the video that would have been available from the bus that pulled up to pick up AA had been requested but was not available due to delay and it being overwritten.

Justin Arsenault

[51] Justin Arsenault, the Accused, provided evidence of the matter. He testified that his son, who was 16 years old at the time, is severely artistic and nonverbal.

His son does not live with the Accused, but he has been caring for him since he was two years old. He confirmed that his son does run up to people playing with his toy but means no harm and never intends to hurt anyone. He explains his son's condition and behavior to people his son approaches.

[52] On the day in question he said he was out with his son after going to a park and purchasing groceries. He was awaiting the arrival of his girlfriend to provide him the keys to his house which he forgot that day.

[53] He testified that he was sitting on a bench at the bus terminal and AA was standing. His son ran up to AA and the Accused explained to her that his son has autism. She replied, "I know, I've seen him before." and that AA disclosed having an autistic sibling. The Accused admits to asking AA for her phone number, but it was on the hope of possibly connecting his son with her relative and that they might be able to form a friendship. He understood that his son and her relative were around the same age.

[54] He confirmed that she told him she did not have her phone on her and that was the end of the conversation.

[55] He said that they were 5 to 6 feet apart with him sitting on the bench the entire time and that he never stood up at any time. He denies any physical contact between them and denies any assault of any type.

[56] He said that the discussion between them occurred around 5 PM that day and there were some people around outside and perhaps 10 or so inside, and a security guard was coming in and out of the building. He described the terminal as "real busy" with buses coming and going.

[57] In his video statement to police, the Accused denied the allegation made against him. It is also noteworthy that on numerous occasions throughout his statement he asked whether the police had viewed the video that would be available at that bus terminal, or whether they would be obtaining and viewing the video, as he believed it would exonerate him.

[58] On cross-examination, the Accused confirmed that his son is his stepson, that his autism is obvious to anyone and that he is not attending school due to him being violent.

[59] He confirmed on cross-examination that on the date in question, he was waiting at the bus terminal for a couple of hours for his girlfriend to arrive with the keys to his home. He and his son arrived at between 4:20PM and 4:30PM. When

shown the photographs of the bus terminal, he disagreed with AA's markings of where they were located. He placed her as being significantly further away than she did from him.

[60] Consistent with AA's testimony, the Accused described his son running around with his toy and with his phone to his ear. He testified that when he told AA his son is autistic, she identified that she has a sibling with autism.

[61] When asked about his observations of AA, he thought she was an older girl and was "100% surprised" to learn that she was 12 years old. He confirmed he was in his early 40s at the time and agreed that if had known her age, he would have concluded that it would be strange and inappropriate to speak to her as he did to obtain her phone number. His evidence was that he was only thinking of a friend for his son when he asked for her phone number.

[62] He confirmed that in his video statement to police he estimated that they were 3 to 5 feet away from each other and in his *viva voce* evidence was saying they were 5 to 6 feet away from each other.

[63] He agreed that in his video statement he did not mention that he was sitting, but he likewise confirmed that he was never asked that question.

Summary of the Law

[64] In this criminal trial the Crown bears the burden of establishing proof of every element of the offence beyond a reasonable doubt. The Supreme Court of Canada decision of *R. v. Lifchis* [1997] 3 SCR 320 provides direction on this issue as follows:

- 36 Perhaps a brief summary of what the definition should and should not contain may be helpful. It should be explained that:
- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
 - the burden of proof rests on the prosecution throughout the trial and never shifts to the Accused;
 - a reasonable doubt is not a doubt based upon sympathy or prejudice;
 - rather, it is based upon reason and common sense;
 - it is logically connected to the evidence or absence of evidence;
 - it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
 - more is required than proof that the Accused is probably guilty; a jury which concludes only that the Accused is probably guilty must acquit.

[65] In *R. v. Starr* (2000) 2 SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities. Mere probability of guilt is never enough in a criminal matter.

[66] As credibility of the Accused is at issue in this trial, I note that in *R. v. W.(D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742 the Supreme Court of Canada indicated the way a trial court should assess the evidence of an Accused who testifies as follows:

First, if you believe the evidence of the Accused, obviously you must acquit.

Second, if you do not believe the testimony of the Accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the Accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the Accused.

[67] I further adopt the restatement of these principles by the Nova Scotia Court of Appeal in *R. v. N.M.*, 2019 NSCA 4 where the Court adopted a reframed statement of the *WD* factors as expanded by the Supreme Court of Canada in the case of *R. v. JHS*, 2008 SCC 30. The restatement was as follows:

First, if you believe the evidence of the Accused, obviously you must acquit.

Secondly, if you do not know whether to believe the Accused or a competing witness, you must acquit.

Thirdly, if you do not believe the testimony of the Accused but you are left in a reasonable doubt by it, you must acquit.

Fourthly, even if you are not left in doubt by the evidence of the Accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the Accused.

[68] A criminal trial is not a credibility contest.

[69] On the issue of credibility, I am guided by the case of *Faryna v. Chorny* 1951 CanLII 252 (BCCA) 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.

[70] 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?

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

[72] 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.

[73] 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.

[74] As the Supreme Court of Canada stated in *R. v. Kruk*, 2024 SCC 7 at paragraph 81:

Assessments of credibility and reliability can be the most important judicial determinations in a criminal trial. They are certainly among the most difficult. This is especially so in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-specific and multifactorial: they do not operate along fixed lines and are “more of an ‘art than a science’” (*S. (R.D.)*, at para. 128; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621). With respect to credibility in particular, while coherent reasons are crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to “the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events” (*Gagnon*, at para. 20; see also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 28; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81). The task is further complicated by the trial judge’s ability to accept some, all, or none of a witness’s testimony.

[75] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence.

[76] 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.

[77] 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.

[78] The *Mah* decision 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.

[79] In this matter, there is contradictory evidence between the Accused and the complainant and in assessing the Accused's credibility, the court in *R. v. Jaura*, 2014 ONCJ 338 helpfully comments at paragraph 13 and 15 as follows:

[13] In assessing the credibility of any witness, including the Accused, the existence of evidence that contradicts the witness is obviously highly relevant. For my part I regard it as the single most important factor in most cases, though the relative weight given to this versus other factors - such as demeanour, contradictions within the witness's evidence itself, potential bias, criminal record or other factors - varies from case to case. No witness is entitled to an assessment of his credibility in isolation from the rest of the evidence. Rather, his evidence must be considered in the context of the evidence as a whole. In a "she said/he said" case, that necessarily means that the defendant's evidence must be assessed in the context of and be weighed against the evidence of the complainant (and vice versa...

[15] It is beyond dispute that, in any other criminal case, rejection of the defendant's evidence can be based solely on the contradicting Crown evidence, particularly where the latter is scientific in nature or otherwise practically exempt from the usual credibility assessments to which witness testimony must be subjected. For example, an Accused's denial of being present at the crime scene could surely be rejected if there is DNA evidence or a videotape putting him there. (emphasis added)

Analysis and Decision

[80] In this matter, an assessment of credibility and reliability is central to arriving at a just and proper decision. In conducting such an assessment, I must apply the test provided in *WD* and as restated in *R. v. N.M. supra*.

[81] First, I must determine whether I believe the evidence of the Accused, in which case I must acquit. I am not satisfied to enter an acquittal on this ground as there are some elements of the Accused's testimony that give me pause.

[82] When I turned to the second test I must determine whether I do not know whether to believe the Accused or a competing witness, in which case a must acquit. In addressing this step of the analysis, I must assess the evidence of the Accused, AA and CC.

[83] With respect to the Accused, I found his evidence in direct and cross-examination to be straightforward and clear. While there were some minor inconsistencies identified by the Crown on cross-examination, including the distance between the Accused and AA, his evidence was generally unshaken on cross-examination and his denial of the allegation clear.

[84] I also give significant weight towards his credibility when I assess his statement to the police in which he repeatedly asked the police whether they had yet or would obtain and review the video from the bus terminal.

[85] Respecting the issue of the failure of police to obtain the CCTV recordings both at the terminal and on the bus that picked up AA, this is of significant concern to the court. Had the CCTV recordings been obtained in a timely fashion, they would likely have disposed of this matter one way or the other. This was the hope of the Accused when he repeatedly asked the police if they had reviewed or would

obtain and review the video in his statement to them. Their absence leaves him without the most important evidence that may have quickly led to his exoneration.

[86] On this issue, I referred to the decision of Judge Atwood of the Nova Scotia Provincial Court in *R. v. McNeil* 2024 NSPC 40. In that matter, CCTV surveillance capability was available respecting the sexual assault alleged, but police did not collect any video recording segments of the events in dispute. The court noted as follows:

[69] What is of greater concern to the Court is that there likely existed relevant CCTV evidence that was not captured by the investigation.

...

[77] If a location where a crime is supposed to have occurred is under video surveillance, and there is no video recording capturing the alleged offence, that is a circumstance that demands attention. This is because video cameras may operate as “unbiased witnesses with instant and total recall of all that it observed.” *R v Nikolovski*, 1996 CanLII 158 (SCC), [1996] 3 SCR 1197. The fact that a video recording of a scene of a purported crime shows no crime being committed is material, relevant and informative.

[87] In this matter, while the officer provided an explanation as to why there was a delay in obtaining the CCTV video and it therefore being overwritten and unavailable, I find that explanation to be inadequate given the seriousness of the offence alleged.

[88] As well, it is troubling that no other potential witnesses were interviewed or statements obtained. Had the video been obtained by the police in a timely fashion

it is possible they may have been able to identify some witnesses to the events that may have been quite significant to the Defence or the Crown. The failure of the police to obtain the CCTV video in a timely fashion severely prejudiced the defences available to the Accused.

[89] When assessing the credibility and reliability of the evidence of AA, I must first note that, as a young person giving evidence in a court, I have allowed for the fact that she may not be as clear and concise as one might expect of an adult. I do, however, find that there are several inconsistencies in her evidence as identified on cross-examination which give pause to the court in assessing her credibility.

[90] First, in her video statement she described the Accused grabbing one breast and then the other. In contrast, in her *viva voce* evidence she said that he grabbed both at the same time. This is a troubling inconsistency.

[91] Second, in her video statement she described the groping as lasting a minute and in her *viva voce* evidence that it lasted between 20 and 60 seconds. This is a significant inconsistency.

[92] Third, in her *viva voce* evidence she described the Accused squeezing, twisting and pinching her breasts, but did not describe this action in her video statement.

[93] Forth, she said in her video statement that the bus arrived within two seconds of the end of the groping but in her *viva voce* evidence she stated the bus arrived 1 to 2 minutes after the groping ended.

[94] Finally, she described in her *viva voce* evidence that she was up against a wall by a window but did not describe this in her video statement.

[95] In reviewing these issues of credibility and reliability, I accept that a witness's testimony may be inconsistent on certain issues of over time. No one's memory is perfect.

[96] That said, in a criminal trial, it is critical to thoroughly assess the credibility and reliability of each witness in determining whether an Accused is guilty of an offence. In this matter, I have concerns respecting the reliability of the evidence of AA. Individually, each inconsistency discussed may have little weight. But taken together they give rise to concern.

[97] That is not to say that I disbelieve her, particularly given the bruising to her breasts. But in assessing this issue in the criminal trial context, the test to be applied is that set out under *WD* and the overall test that the Crown must meet of proof beyond a reasonable doubt of every element of the offence. Thus, while I find that AA has attempted to be clear and truthful in her evidence, and is therefore

credible, I find that the inconsistencies in her evidence raise concerns that she is not a reliable witness.

[98] When assessing the credibility and reliability of CC, I find that her evidence was likewise credible but not reliable. In giving her *viva voce* evidence, she appeared to be sincere and wished to give the best account of what she recalled, but when compared to both her statement to the police and the circumstances of her location in relation to AA and the Accused, I do not find that evidence to be reliable.

[99] Specifically, in her statement to the police she described that she could not make out anything that happened and only saw someone next to her daughter. Yet in her *viva voce* evidence she testified that she could see the Accused walk up to her daughter and could even describe the distance apart, face-to-face, even though she also said his back was facing her.

[100] When I then assess this evidence in the context of the distance between her and AA and the Accused, I find that it is unlikely that she could see much, if anything, of the interaction between the two. She was sitting in a car with the window down a significant distance away and I find it unlikely that she could have observed the interaction between her daughter and the Accused.

[101] I therefore find that while she is a credible witness, she is not reliable.

[102] In this matter, for reasons set out above, I do not know whether to believe the Accused or competing witnesses. In applying the WD analysis, this leaves me with a reasonable doubt as to his guilt in the matter. I therefore find the Accused not guilty.

Timothy G. Daley, JPC