PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. E.C.M.,* 2013 NSPC 86

Date: 20130924
Docket: 2469457, 2469458, 2469459
Registry: Pictou

Between:

Her Majesty the Queen

v.

E.C.M.

VERDICT

Restriction on publication: It is ordered that any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

Judge: The Honourable Judge Del W. Atwood

Heard: 20, 22 August 2013, in Pictou, Nova Scotia

Charge: Sections 151, 152 and 271 of the *Criminal Code of Canada*

Counsel: Patrick Young for the Nova Scotia Public Prosecution Service
Rob Sutherland for E.C.M.

By the Court:

Synopsis

[1] E.C.M. is alleged to have sexually abused A.B., a young girl who is the daughter of E.C.M.'s former common-law partner. As a result of this allegation, E.C.M. was charged with offences under sections 151, 152 and 271 of the *Criminal Code*. The prosecution proceeded indictably and E.C.M. elected to have his trial held in this court. I heard evidence on 20 and 22 August 2013. E.C.M. represented himself on the first day of trial; Mr. Sutherland conducted the cross-examination of the complainant pursuant to an order appointing counsel made by me under sub-s. 486.3(1) of the *Criminal Code*. By the second day of trial, E.C.M. had retained Mr. Sutherland as his trial counsel. I reserved my verdict until today. It is clear that, should I be satisfied beyond a reasonable doubt that E.C.M. did what was described by A.B., the court ought to convict on all counts, as all elements of the offences might then be said to have been proven beyond a reasonable doubt. The defence of consent has not been raised in this trial–indeed, would not available here given the provisions of s. 150.1 of the *Code*–and E.C.M. asserts no mistaken-belief defences. For the reasons that follow, I do believe A.B.,

the evidence marshalled by the prosecution proves all elements of each offence beyond a reasonable doubt, and I find E.C.M. guilty of the charges against him.

Evidence

[2] I have reviewed my trial notes and the Court Log audio record in great detail. The testimony presented to the court was relatively uncomplicated. C.D. is the biological mother of A.B. A.B. was born on ... November 1997. At some point in time during the spring of 2013, C.D. came across the private diary of A.B. C.D. read what A.B. had written and was alarmed to discover a narrative of ongoing sexual liaisons between her daughter and E.C.M. C.D. knew E.C.M. very well, as they had been in a relationship between 2001 and 2009. C.D. and E.C.M. continued to have contact after they had broken up, and A.B. often visited E.C.M. at his various places of residence.

[3] C.D. contacted police after she had made this shocking discovery. A.B. was interviewed by an investigator and a child-welfare worker on 17 May 2012. A.B. was fourteen years old at the time. Police made an audio and video recording of that interview; it was tendered with E.C.M.'s consent as Exhibit No. 1 pursuant to the provisions of section 715.1 of the *Criminal Code*.

[4] The recording of the interview is an important piece of evidence in this case; this is because it is the main piece of evidence implicating the accused. All

too often, these interviews are conducted in an unsatisfactory manner, so as to make clear that the investigator has already formed the conclusion that an offence has been committed–based typically on things said by parents or other family members who have no first-hand information to offer–and the recorded interview is conducted merely as a checklist item carried out perfunctorily as what seems more often than not to be a routine step in the course of laying a charge. In one case heard recently in this court, the questions posed by an investigator (who was not the investigator in this case) to a child witness were focussed on confirming what the child had told his mother, rather than seeking to find out what had happened. This sort of questioning does not produce much in the way of admissible or useful evidence. A proper criminal inquiry is not encumbered with preconceived notions or premature conclusions. This is because the purpose of an investigation is not to verify that *it* happened, but, instead, to ascertain *what* happened. This is done by gathering evidence with an open mind and testing the accuracy of that evidence vigorously. An investigation starts out with a hypothesis. A credible investigation will seek to test, question and challenge the hypothesis rigorously; on the other hand, an investigation that assumes the truth of an allegation–and cherry-picks only that evidence that will support it–will be

afflicted by confirmation bias and is the sort of thing that leads to miscarriages of justice.

[5] In this case, the investigator's questioning of A.B. was remarkable, in the sense that it was done the right way. The investigator approached her task with, indeed, an open mind, seeking pertinent details without asking leading questions. The investigator sought background information from A.B. that might be used to determine the circumstantial reliability of A.B.'s account. The investigator took her time, and this is one of the best indicia of a proper witness interview; checklist-style sessions are typically rushed, galloping along with a let's-get-this-over-with lack of sensitivity, with scant attention paid to the need to gather detailed information from the witness, and with little attention directed to the needs of the child. This one wasn't one of those kinds of interviews. This investigator proceeded carefully and thoughtfully. It is clear that much preparation went into her work.

[6] During the interview, A.B. described her family history; she told the investigator about her mother's relationship with E.C.M. and where they had lived together over the years. A.B. described E.C.M. as "nice." The investigator turned A.B.'s attention to the diary that was found by her mother. A.B. affirmed that

what she had written in her diary was true.[1] A.B. told the investigator about a time when, while sleeping on a couch at E.C.M.'s home with E.C.M.'s daughter, E.C.M. woke A.B. and kissed her on the lips. A.B. described the kiss as similar to the way E.C.M. kissed C.D. E.C.M. kissed her the same way the next day after a trip to Truro. A.B. thought this happened in the summer when she was thirteen years old. It was evident to me that A.B. was very uncertain about the dates of specific events.

[7] A.B. then told the investigator that the kissing escalated to full sexual intercourse in E.C.M.'s bedroom, E.C.M. having removed her clothing. This happened on a number of occasions, and ended only when C.D. discovered A.B.'s diary and alerted the police. A.B. told the investigator that the first time E.C.M. had removed her clothing so they could have sex, she had expressed fears of becoming pregnant. E.C.M. told her not to worry as he had been "fixed".

[8] Following the admission of the video recording into evidence, A.B. was called to testify. She described the nickname she had given E.C.M.–"O.C." or Orange Cat–and described the gifts, presents and outings E.C.M. had favoured her

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[1] As I shall discuss later on, I treat this as narrative evidence only; the diary–or any testimonial adoption of it–is most certainly not admissible as proof of the truth of its contents.

with over a substantial period of time. The prosecutor showed A.B. two letters that had been seized by police–tendered as Exhibit No. 2; A.B. identified them as having come from E.C.M. A.B. said that the longer of the two caused her to believe that she and E.C.M. were "in a relationship." I regard A.B.'s belief as being more in the nature of a conclusion or evidence of A.B.'s state of mind.

[9] The cross-examination of A.B. was focussed on her exact posture on the couch at the time of the first kiss. In my view, there was nothing improbable in A.B.'s description of that event: I recognize that her recall of that detail might not be precise, and the fact is that the human body is not restricted to a mannequin-like rigidity.

[10] A.B. was cross-examined at length about going into E.C.M.'s bed, uninvited and of her own initiative. A.B. acknowledged going into bed, but did not acknowledge doing so on her own. At the end of the trial, I was left uncertain what to make of this line of inquiry, as E.C.M.'s testimony was clear–particularly when he was cross-examined–that A.B. had never been in his bed under any circumstances.

[11] A.B. was cross-examined about the gifts she had received from E.C.M., particularly a ring. Mr. Sutherland suggested A.B. had asked E.C.M. to get her

one. A.B. replied that E.C.M. had asked her what she would like for Christmas, and she requested a ring. Nothing much turns on that point.

[12] A.B. admitted to being confronted by one M.M. and denying having sex with E.C.M.

[13] A.B.'s mother, C.D., was called by the prosecution; she testified about her relationship with E.C.M. and how he had fulfilled the role of stepfather to A.B. during the time they had lived together as a family. C.D. described the sorts of activities shared by E.C.M. and A.B., which continued even after C.D. and E.C.M. had broken up. C.D. recounted finding A.B.'s diary, and told the court–for narrative purposes only, and not in proof of the truth of the contents–some of what she had read. C.D. recalled speaking with A.B. soon after the discovery of the diary. "I asked her if there was anything going on, anything she'd like to tell me. She let out a gut-wrenching cry and then told me what had happened." C.D. found letters along with the diary; she recognized the handwriting as E.C.M.'s. C.D. was cross-examined at some length about her knowledge of E.C.M.'s vasectomy. It is clear the C.D. had found out about E.C.M's surgery while they were a couple, but she could not pinpoint the exact date she had learned of it. C.D. was asked about what E.C.M. wore to bed; she acknowledged he often slept in the nude, but remembered him wearing underwear and pyjama pants, as well.

[14] E.C.M. testified in his own defence. He described where he had lived, both while he and C.D. were together and after their separation. He testified that he had had his vasectomy surgery between 2007 and 2008 and that A.B. was present when he had discussed it with C.D.

[15] E.C.M. agreed that he had bought A.B. a ring for Christmas 2011, and had given C.D. the receipt. E.C.M. acknowledged offering to take A.B. on a vacation to Cuba where they would be accompanied by other family members; he denied ever offering to take her to Bermuda.

[16] E.C.M. admitted readily that A.B. continued visiting him after he and C.D. had separated, particularly after C.D. had moved to a home right across the street from E.C.M's.

[17] E.C.M. denied having any sort of sexual encounter with A.B. He disputed unequivocally even the kiss, and noted that his daughter was a very light sleeper: "If I walked into a room, she would wake up." Recall A.B.'s testimony that E.C.M.'s daughter was asleep next to her on the couch when she was kissed. E.C.M. explained the letters by recalling that, every time they parted, he would kiss A.B. and she had told him she liked it. The letter was intended merely to remind A.B. of something she liked. E.C.M. informed the court that A.B. liked getting letters in the mail and that it upset her that her mother didn't hug or kiss

her. E.C.M. stated he used to joke with A.B. about her baby teeth, and would jocularly refer to her “little teethies” [sic].

[18] The accused’s daughter, E.F., testified. She recalled a time when she and her father were living with A.B. and C.D. and the topic came up of her father having been “fixed.” She testified that she was a light sleeper. She recounted having a diamond ring on her Christmas list; when A.B. found out, she wanted E.C.M. to get her one, too.

[19] M.M. testified for the defence. She informed the court that she was dating E.C.M.’s nephew. She acknowledged texting A.B. on two occasions and asking her whether she was “in a relationship” with E.C.M. M.M. said that A.B. had denied that there was a relationship.

[20] G.H. was called by defence. She stated that she started dating E.C.M. in March 2013 and he always sleeps in the nude. She testified on cross-examination that she had observed this three to four times each week since March.

Analysis

[21] A.B. was 15 years old when she gave her evidence under oath. Although there were no questions raised under s. 16 of the *Canada Evidence Act* regarding A.B.’s testimonial capacity, I observed her to be very youthful in appearance, noticeably subdued and withdrawn, certainly childlike in her manner. In assessing

the evidence of A.B., I apply the principles set out by the Supreme Court of Canada in *R. v. R.W.*:

> 24 The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in *R. v. B. (G.),* [1990] 2 S.C.R. 30, at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that
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> > ... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of

> course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children. [page134]

25 As Wilson J. emphasized in *B. (G.),* these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.

26 It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in

> the context of the age of the witness at the time of the events to which she is testifying.[2]

[22] Nevertheless, I caution myself that the burden of proof in this case rests entirely with the prosecution; further, the standard of proof remains proof beyond a reasonable doubt. There is no lesser or relaxed standard for cases involving child complainants.

[23] I must consider the evidence as a whole in determining whether the prosecution has discharged its burden of proof.[3]

[24] Furthermore, a court must remain open-minded and impartial at all times in its reception and analysis of the evidence. The only presumption that will guide the court in the conduct of a criminal trial–absent statutory presumptions or deeming provisions, and there is none of that applicable here–is the presumption of innocence of the accused. This was re-affirmed recently by the Court of Appeal in *R. v. Downey*.[4] The opinion of Farrar J.A.–writing for a unanimous three-

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[2][1992] S.C.J. No. 56 at paras. 24-26.

[3]*Cote v. The King* (1941), 77 C.C.C. 75 at p. 76.

[4]2013 NSCA 101 at paras. 11-20.

member panel–refers to the well known and highly pertinent decision of the Ontario Court of Appeal in *R. v. Thain*:

> [16] In *R. v. Thain*, 2009 ONCA 223 the Ontario Court of Appeal reviewed a similar passage. The court stated at ¶18-19:
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> > 18 For ease of reference, I repeat here the impugned passage from the trial judge's reasons:
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> > > The accused's credibility must be assessed bearing in mind that his explanation comes long after disclosure was available to him and having regard to the totality of the evidence. In the accused case [sic] I am not convinced that his evidence has not been influenced by his desire to extricate himself the situation [sic]. While any witness *is presumed to tell the truth such a presumption can be displaced by inconsistencies, contradictions and the evidence as a whole.*
> >
> > 19 In my respectful view, *each of the three sentences in this passage contains a significant legal error.*
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> (Emphasis in original)
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> [17] The Ontario Court of Appeal continued at ¶32:
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> > 32 *Witnesses are not "presumed to tell the truth". The evidence of each witness is to be assessed in the light of the totality of*

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

[25] So it is that I must assess the evidence of A.B. in light of all the evidence, mindful always of the presumption of innocence.

[26] Given that defence called evidence at this trial, I apply the law as set out in *R. v. W. (D.)*[5]: if I believe the evidence called by E.C.M., I must find him not guilty; even if I do not believe the evidence of E.C.M., but that evidence should leave me in a state of reasonable doubt, I must find him not guilty; even if I were not to believe E.C.M., and his evidence not leave me in a state of reasonable doubt, I must still ask myself whether, based on the evidence I do accept, I am

[5] [1991] 1 S.C.R. 742 at para. 28.

satisfied that the prosecution has proven each and every element of the offenses beyond a reasonable doubt, and, if not, I must find E.C.M. not guilty.

[27] The *W. (D.)* algorithm is not intended as a form of automated reasoning; the Supreme Court of Canada, itself, made this clear in *R. v. S. (J.H.)*[6] and *R. v. Avetysan*.[7] Even in cases when an accused has called evidence, a trier of fact might conclude that the prosecution's case has failed to prove beyond a reasonable doubt one or more essential elements of a charged offence, so that an acquittal might logically and legally flow from an analysis of the evidence without the need to analyse extensively any exculpatory evidence offered by an accused. Similarly, a trier of fact might find reasonable doubt to have arisen from a combination of defence and prosecution evidence. Reasonable doubt will arise if a Court cannot decide whom to believe.[8] There are an array of possible analytical permutations which might not fit nicely in the *W. (D)*. framework.[9] What is essential is that the

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[6]2008 SCC 30 at para. 13.

[7]2000 SCC 56 at para. 1.

[8]*R. v. H.(C.W.)* , (1991), 68 C.C.C. (3d) 146 at p. 155 (B.C.C.A.).

[9]*Supra* note 2 at para. 10.

Court keep the following core and constitutional principles of criminal justice in mind:

> • the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
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> • the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
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> • a reasonable doubt is not a doubt based upon sympathy or prejudice; rather, it is based upon reason and common sense;
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> • it is logically connected to the evidence or absence of evidence;
>
> • it does not involve proof to an absolute certainty;
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> • it is not proof beyond any doubt nor is it an imaginary or frivolous doubt;
>
> • finally, more is required than proof that the accused is probably guilty -- a court which concludes only that the accused is probably guilty must acquit.[10]

[27] In *R. v. J.C.H.*, the Newfoundland and Labrador Court of Appeal prescribed what I consider to be the highly appropriate sequence of judicial analysis in a

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[10]See *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36.

criminal case, requiring an initial focus on evidence presented by the prosecution.[11] Rowe J.A. provided an entirely insightful explanation for this approach:

> [13] A trial judge should generally first consider the evidence offered by the Crown in support of the charges especially that of the complainant. That sets out the case that the accused has to meet. Only if there is sufficient strength in that evidence is it necessary to consider the evidence (if any) led by the accused. That sequence accords with the burden of proof resting with the Crown. The danger in considering the evidence of the accused first and determining whether it is worthy of belief before considering the Crown evidence is that it may induce the judge to place too great an emphasis on the remaining evidence, i.e. the Crown evidence, without carefully scrutinizing that evidence in the context of the evidence as a whole to determine whether it can support the charges to the standard of proof required. In effect, it creates a tendency for the judge to consider the evidence in an "either/or" way, thereby departing from the required burden of proof. [12]

[28] This is an appropriate model of analysis for use in this case, particularly as the case for the prosecution rests almost entirely on the evidence of A.B.

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[11] 2011 NLCA 8 at paras. 12-14.

[12] *Ibid*.

[29] I would continue my analysis by noting that the court must remain alive to the distinction between witness credibility and accuracy.[13] A witness might be trying to tell the truth, yet be factually incorrect. This, in my view, is not a substantial concern here. This is not a case where a theory might be argued that an innocent hug was mistaken for a demeaning sexual violation. The allegation is that E.C.M. had sexual intercourse with A.B. and that it happened many times. Not much room for inaccuracy in that. Accordingly, the assessment of credibility, and the circumstantial guarantees of it, are at the core of the court's analysis. I recognize, of course, the typical frailties that beset the testimony of lay witnesses; people who are compelled in court to relive the experience of life's events–the good, the bad and the traumatic–do so almost always without the benefit of memory aids that can enhance the accuracy of recall. When called upon to give up exact times of day, precise postures, detailed descriptions of furniture arrangement or clothing and the like, many witnesses will, unfortunately, render guesses in an effort to come up with an answer to a question. I say unfortunate, as guesses can be inaccurate, and I am certainly alert to that potential here, as A.B. was cross-examined quite extensively on small details. In my view, not a great deal turns on the small details in this case.

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[13] *See R. v. Gittens*, [1994] O.J. No. 2140 (C.A.).

[30] In considering A.B.'s evidence, I would observe that her anxious and melancholic affect and demeanour–both in the s. 715.1 video recording and in court– were consistent with what a reasonable person would expect of a victim of serial sexual violation by an older, trusted adult. I am cautious, however, not to place undue emphasis on demeanour evidence, as directed by the Court of Appeal in *R. v. S.H.P.*[14]

[31] Still, it was clear to me that A.B. was not an enthusiastic participant in the trial process. Here it is important to underscore the fact that it was not A.B. who made the complaint to the police; rather, it was her mother, C.D., who alerted the authorities after discovering the entries in A.B.'s diary. I recall particularly well C.D.'s description of her daughter's "gut-wrenching cry" when confronted with the diary; A.B. was clearly in anguish upon its discovery.

[32] I would underscore the fact that the diary was not tendered in evidence. Nor ought it to have been. Prior consistent statements of a complainant are generally inadmissible as constituting oath-helping evidence, and may be received at trial only in narrowly circumscribed situations. The following extract from the opinion of Beveridge J.A. in *R. v. Farler* is highly instructive:

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[14]2003 NSCA 53 at paras. 28-30.

97 The appellant says that the trial judge misapplied the "rule of *R. v. Dinardo*". This is a reference to the decision of the Supreme Court of Canada in *R. v. Dinardo*, 2008 SCC 24 where the Court acknowledged the well established law as to the limited role for prior consistent statements. Charron J., for the Court, confirmed it was legal error for the trial judge to consider the contents of the complainant's prior consistent statements to corroborate trial testimony. Since the error was not harmless a new trial was necessary. She said this:

> [36] As a general rule, prior consistent statements are inadmissible (*R. v. Stirling*, [2008] 1 S.C.R. 272, 2008 SCC 10). There are two primary justifications for the exclusion of such statements: first, they lack probative value (Stirling, at para. 5), and second, they constitute hearsay when adduced for the truth of their contents.
> [37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility" McWilliams' *Canadian Criminal Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see also *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).

98 The trial judge in the course of delivering his reasons made the following comment:

> The statement of the complainant to their mother, or in the case of RGT to Constable Lafontaine, are not

> evidence of the truth of the allegations. I may consider the narrative of events in statements in assessing the complainants' likely truthfulness, however. And I refer to Dinardo again at paragraph 37 to 39.
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> 99 While on its face, this comment is not an accurate statement of the law, I am unable to accept that this comment, or any other reference to what a witness had said in a prior statement, reflects reversible error. I say this for three reasons. First, the trial judge earlier correctly directed himself when he, just moments before, said:
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> > The evidence of Ms. T. as to what she was told by RGT or BKT and what she told Constable Lafontaine cannot be used to establish the truth of the contents, but only to relate the unfolding of events. It cannot be used for any other purpose and I refer to *R. v. Dinardo*.
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> 100 Second, trial judges are presumed to know the law, and here the trial judge referred to the correct paragraphs in *R. v. Dinardo* where the law is explained. Furthermore, *how the disclosure occurred and its timing can assist a trier of fact in assessing credibility*. Third, and most importantly, there are no instances where evidence was led as to any details of the complainant BKT having made prior consistent statements. There was some evidence of RT having done so, but the appellant was acquitted of any allegations involving RT. I see no error by the trial judge in this respect.
> (Emphasis mine)

[33] The manner in which the allegation came to light in this case assists my assessment of A.B.'s credibility. A.B. was not the one who revealed it; she kept her alleged relationship with E.C.M. a secret, recorded only in her memory and in her diary. Her desire for secrecy explains as well A.B.'s denial of a sexual relationship when confronted by M.M. Why the need for secrecy? Consider this:

when asked by the police interviewer at the beginning of the s. 715.1 audio-video recording, "What kind of guy is E.C.M. . . . what's the first word you think of?", A.B.'s response was, "Nice . . . he takes me to movies and bowling." In giving her testimony, A.B. was very reticent and withdrawn. She did not display any form of animation, nor was she prone to theatrics or extravagant statements. Again, I ask the question, "why the need for secrecy?" The answer may be inferred reasonably from A.B.'s evidence and demeanour: I believe that she still harbours a level of affection for E.C.M.,–recall her description of him as "nice"– and she knows that he is now in jeopardy–indeed, knew from the beginning that he could get into trouble; that is why it was important that no one should know. And so it is not surprising that, when confronted by M.M., A.B. denied she was in a relationship with E.C.M. Nor is it surprising that she was not always a fully responsive witness on direct and cross-examination: this is a part of her life that she does not want to talk about because someone she cares for could get into trouble because of their secret intimacy. And then there is the fact that many of the questions posed to A.B. on cross were, in my view, put to her in such a manner as to be unrecognizable as questions in the mind of a 15-year-old witness labouring obviously under a great deal emotional stress. Defence counsel seemed content with A.B.'s intermittent lack of response, and, but for one occasion, did not seek

intervention of the court. This satisfies me that there was no real impediment to the accused's right to a fair trial, as it all fed into a defence theory that A.B.'s unresponsiveness diminished her credibility.[15] That sort of an argument is well within the bounds of permissible advocacy. I just happen to disagree with it.

[34] To be sure, A.B. was uncertain about details such as exact dates and discrete sequences of postures. These are the sorts of peripheral details that would be unmemorable to the adolescent mind, as noted in *R. v. R.W., supra*. However, I certainly caution myself that I ought not engage in a fill-in-the-blanks exercise by speculating what A.B.'s answers might have been when she was unable to verbalize answers to questions on cross; that would involve engaging in speculation rather than the drawing of permissible inferences.[16]

[35] What remains clear and concrete is that A.B. was entirely certain and consistent about what E.C.M. did to her.

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[15] *See R. v. Hart*, [1999] N.S.J. No. 60 at para. 100 (C.A.).

[16] *See Kern v. Steele*, 2003 NSCA 147 at paras 98-99.

[36] It is suggested that the kiss on the couch was improbable, as E.C.M.'s daughter was close by and was a light sleeper. This, in my view, is almost to propose that there is a canon–or a right way–of committing sexual assault. The fact is that sexual violation may occur in myriad manners: by stealth and disguise as in the well known case of R. v. Owens, [1984] N.S.J. No. 339 (A.D.); or in the middle of a crowded aircraft, as in *R. v. A.J.S.*[17] There is no single template for this type of crime. Furthermore, with respect to the allegations of intercourse, E.C.M. had undoubtedly many opportunities to commit those crimes, as A.B.'s evidence that she often spent time with him alone in his home on * Avenue was uncontested.

[37] As in any trial when the credibility of a complainant is at the core of the case for the prosecution, it is proper for the court to consider the motivation of the complainant in implicating the accused in the commission of a crime. In doing so, I direct myself firmly that the court must never place a burden of proof upon an accused to offer up evidence of a complainant's motive to lie. To do otherwise

[17][1998] N.J. No. 249.

would be contrary to the presumption of innocence.[18] Nonetheless, it is appropriate to note that, in assessing A.B.'s credibility, there is no evidence before me that would allow me to infer in any way a motive to fabricate a complaint of sexual abuse against E.C.M. In *R. v. A.J.S.*, Steele J.A. of the Newfoundland and Labrador Court of Appeal dealt with this very issue:

> 32 Counsel for the appellant concedes that an irrelevant cross-examination or one that oversteps the limits of a proper cross-examination does not automatically result in a successful appeal, and that an adequate jury instruction on the point may negate or minimize the harm, if any. Counsel objects to the language and tone of Crown counsel's closing address to the jury. He argues that the "focus of the Crown's argument", lack of motive for the complainant to lie, was objectionable and that the trial judge ought to have called the jury back and recharged them as defence counsel had requested. The following is that portion of Crown counsel's address that appellant's counsel contends is objectionable:
>
> > Now one of the questions that arises from this situation that's presented to you is why would someone deliberately fabricate? Now, keep in mind, this would have to be a very deliberate and calculated fabrication, in my submission to you, by N.W. Why would someone deliberately fabricate a sexual assault in these circumstances? Why would they place themselves in that particular spot and fabricate an allegation that has no basis in reality, potentially any number of witnesses to contradict what she's saying; and there's only one answer to that. No one - no one with the ability to come up with a fabricated story like this, follow it through and show

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[18] *R. v. Riche* (1996), 146 Nfld. & P.E.I.R. 27 at para. 15.

> the kind of emotion that she does when she explains it would choose to do that, certainly no one as bright as N.W. It just doesn't make any sense whatsoever. The only explanation as to why she describes an assault in that particular circumstance occurring is that it's true. That's the reasonable explanation for it. ...
>
> Why would this young lady, who has, it appears, a lot going for her, school activities, public speaking, excels at bowling, friends with her next-door neighbours who she participates in those activities with, why would she put herself - and her family - through such an obviously traumatic experience based on nothing? I want you to keep in mind there's absolutely no evidence of any motive to fabricate in this case. Now I want to make it clear as well that Mr. S. doesn't have to prove one, in fairness to him. However, the complete absence of any apparent reason why she would do this is definitely a factor that you have to consider in assessing her credibility; and there simply isn't anything in the evidence, I submit to you, that even remotely hints at a motive to fabricate. ... She was motivated by the truth; ...

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

> that the complainant told the truth, having no motivation to do otherwise.
>
> 34 Finally on this point, I do not interpret the cross-examination by Crown counsel objected to by the appellant as having the effect of placing a burden on the appellant to refute the Crown's argument, that is, the credibility of the complainant. The trial judge's instructions to the jury on the questions of credibility of witnesses, the burden of proof and reasonable doubt were quite explicit. The trial judge was not in error in refusing to call the jury back and re-charge them on this issue, especially in light of Crown counsel's unambiguous statement to the jury in his closing address that there was no obligation on the appellant to prove a motive to lie.[19]

[38] I affirm that there is no burden on E.C.M. to present evidence suggesting A.B. might have a motive to lie; however, I find, as the evidence leads me, that there is no evidence before the court to suggest that A.B. would have an animus–any animus at all–against E.C.M. sufficient to motivate her to make up a story of sexual abuse. I find that A.B. would have very little if any motive to fabricate an account of sexual abuse, compared to the accused's motive to deny it. This is a permissible comparison, as outlined by the Supreme Court of Canada in

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[19] *Supra*, note 16, at paras. 32-34; *see also R. v. G.K.B.*, 2001 NFCA 6 at paras. 30-33.

R. v. Laboucan.[20] I find that I may consider this as one of many factors pertinent to assessing A.B.'s credibility.

[39] If anything, A.B. would be well disposed toward E.C.M. He presented her with gifts, offered her a trip south with members of his family–essentially went above and beyond to endear himself to her. And he wrote the letters.

[40] Yes, the letters. Written by E.C.M.–by his own admission– to A.B., one begins as follows: "I am sitting here (alone) wishing you were here. I wish you could be with me all the time. I love the way you touch me, I love the way you kiss me; I just plainly love and adore you." E.C.M. provided an explanation for this content, suggesting that the letter was platonic and paternal, intended as a substitute for maternal affection which he said was absent in A.B.'s life. I find this explanation highly unbelievable. The letter is neither platonic nor paternal. Rather, it speaks of romance and infatuation; it seeks to entice and endear; it is calculatingly self-effacing, using that ploy to invite further contact.

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[20]2010 SCC 12 at para. 22, *rev'g*. 2009 ABCA 7.

[41] The second letter–beginning with the observation, “It’s been a weird couple months”–expresses romantic longing and a desire to reestablish close contact; it closes out with the sort of flattery intended to ensnare a vulnerable adolescent who is likely happy with the attention, given her rather unsettled home situation.

[42] This, in my view, is circumstantial evidence of grooming, with the prospect of bigger things coming from small beginnings.

[43] I do not accept E.C.M.’s evidence that A.B. found out about his vasectomy years earlier, when he and C.D. were still a couple and began contemplating adoption because of his sterilization. In my view, it is highly doubtful that E.C.M. would have mentioned this very private elective surgery to A.B. at that time. Even if he had, given that A.B. would have been twelve years of age or under at that point, it is highly unlikely it would have been memorable to her. No. What inscribed in A.B.’s mind the fact that E.C.M. had been “fixed” were his assurances that she needn’t get worried about pregnancy as he got ready to have sex with her for the first time.

[44] I am mindful that my rejection of E.C.M.'s evidence does not lead axiomatically to his guilt. A trial is not a truth-telling contest; it is not a matter of the court preferring the testimony of A.B. over the testimony of E.C.M. A trial imposes a burden of proof upon the prosecution, and the prosecution alone; and it imposes a very high standard, proof beyond a reasonable doubt as to each and every element of each offence. For the preceding reasons, I find that the evidence of A.B. amply fulfils that standard.

[45] Cognizant that reasonable doubt may arise from lack of evidence, I acknowledge that the investigation and prosecution did not achieve a level of perfection that would be required if the standard were proof beyond all doubt. For example, with the evidence police had obtained from A.B.–which indicated, among other things, that her alleged relationship with E.C.M. continued up to the time of the discovery of the diary–a full, warranted, tear-down search of E.C.M.'s bedroom would have been a reasonable operation to have pursued in order to look for, say, discarded articles of A.B.'s clothing or A.B.'s DNA on bedding; police could have sought to seize from A.B. any unlaundered apparel on which E.C.M. might have deposited his D.N.A., as ejaculate is still produced following vasectomy. There was no evidence of a SANE examination. Finally, I remain

puzzled why, if the prosecution had in its possession telephone records of text messages between E.C.M. and A.B., it waited until after the close of its case to try to confront E.C.M. on cross-examination? I found that tactic to have been case-splitting and did not allow it.

[46] No one asked A.B. about whether she noticed any distinctive physical features on E.C.M.'s body–particularly those visible only when unclothed; this would have been of greater import than the trivial point of whether he had the habit of wearing underwear to bed. Having said that, I recognize that evidence of this sort is not as important when identity is not in issue, as when a complainant and an accused have lived together in a family setting for a number of years and would know each other's physical appearance well, which is the case here.

[47] These questions do not displace what I find to have been a compellingly strong proof of an older male in a position of trust abusing that trust and sexually violating a child and I find all of the elements of the offences to have been proven beyond a reasonable doubt. I find E.C.M. guilty of invitation to sexual touching, cases no. 2469457, touching for a sexual purpose, case no. 2469458, and sexual assault, case no. 2469459, as having sexual intercourse with A.B. at his home in New Glasgow constitutes all of the elements of each offence. In intend to stay

judicially the s. 152 invitation and s. 271 sexual-assault charges pursuant to *R. v. Kienapple*, and deal with sentencing on the s. 151 count only, subject to comments from counsel.

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J.P.C.