

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. J.T.C., 2015 NSSC 203

Date: 2015-07-14

Docket: CRP No. 429440

Registry: Halifax

Between:

Her Majesty the Queen

v.

J.T.C.

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice James L. Chipman

Heard: May 25 and 26, 2015, in Pictou, Nova Scotia

Final Written Submissions: June 19, 2015

Counsel: T.W. Gorman, for the Crown
Joel E. Pink, Q.C. and Paul Sheppard, articled clerk for J.T.C.

Restriction on Publication: s. 486 C.C.
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Orally by the Court:

Introduction

[1] This is an historic sexual assault case with allegations dating back to the late 1970s and early 1980s. The now 40 year old Complainant, B.A.S., alleges she was sexually assaulted over a number of years when she was between the ages of perhaps two and ten. I say “perhaps”, because the Complainant is unsure of the precise dates and there are no eye witnesses.

[2] The Accused, J.T.C., is now in his early seventies. Married to B.A.S.’s mother’s sister, J.T.C. is B.A.S.’s uncle, through marriage. J.T.C. denies that he sexually assaulted B.A.S..

[3] The testimony in this two day judge alone trial consisted of evidence led by the Crown from B.A.S., M.M.F. (B.A.S.’s mother), T.A.C. (B.A.S.’s childhood best friend), I.B.M. (M.M.F.’s younger sister and aunt to B.A.S.), M.R.D. (I.B.M.’s daughter and cousin of B.A.S.), E.J.C. (wife of J.T.C.) and Det. Sgt. Stephen Chisholm (police investigator). Further, several exhibits were tendered, inclusive of Exhibit 11, the transcript of J.T.C.’s July 10, 2013 warned statement.

The Charges

[4] J.T.C. stands charged:

THAT between the 1st day of January A.D., 1977 and the 31st day of December, A.D., 1982, at or near [...], Pictou County, Nova Scotia, did indecently assault B.A.S., a female person contrary to section 149(1) of the *Criminal Code of Canada*;

AND FURTHERMORE

Between the 1st day of January A.D., 1977 and the 31st day of December, A.D., 1985, at or near [...], Pictou County, Nova Scotia, did commit an act of gross indeceny with B.A.S., to wit fellatio and cunnilingus, contrary to section 157 of the *Criminal Code of Canada*;

AND FURTHERMORE

Between the 1st day of January A.D., 1983 and the 31st day of December, A.D., 1985, at or near [...], Pictou County, Nova Scotia, did commit a sexual assault on B.A.S., contrary to section 246.1 of the *Criminal Code of Canada*;

s. 655 Admissions

[5] At the outset of trial, counsel tendered the following admissions as Exhibit 1:

1. At no time did the Accused verbally threaten B.A.S..
2. B.A.S. born March [...], 1975.
3. B.A.S. made a statement to T.A.C. when they were 12 years old, in 1987. This is 26 years prior to B.A.S.'s formal complaint to NGPD on or about May 1, 2013.
4. B.A.S. made a statement to her mother M.M.F, when she was approximately 15 years old, 23 years prior to the formal complaint to the police.
5. B.A.S. made a statement to I.B.M, when she was approximately 16 years old, in 1991, 22 years prior to the formal complaint to police.
6. B.A.S. made a statement to M.R.D, prior to B.A.S.'s move to Alberta in 1997, 16 years prior to the formal complaint to the police.

B.A.S.

Background

[6] The Complainant, B.A.S. (DOB March [...], 1975) is 40 years of age. She works as a registered nurse in Edmonton with Alberta Health Services. B.A.S. has specialized training and works in [...] nursing.

[7] B.A.S. was born and raised in Pictou County. She moved to Alberta in [...] and married J.S., originally from [...], Pictou County. The couple have three children: K. (age 11), T. (age 9) and C. (age 4). B.A.S. also has a son, A. (age 24), from a previous relationship with K.A.. B.A.S. was 15 years old and a student at [...] High School when A. was born. She took some time off in her Grade 11 year and graduated in [...].

[8] B.A.S. was raised by a single mother, M.M.F.. She and her mother lived with her mother's parents, M.F. and B.F., until B.A.S. was approximately two years of age. B.A.S. and M.M.F. then moved to a basement apartment on [...] in [...]. Across the street lived M.M.F.'s sister, E.J.C., and her husband, J.T.C.. In fact, the C. house fronted on [...] in [...]; however, the backdoor was on [...] and directly across from the home with the basement apartment where M.M.F. and B.A.S. lived.

[9] B.A.S. recalled the C. house (where J.T.C. and E.J.C. still reside) was painted [...]. She explained how the modest, two-story home was laid out and drew floorplans which were entered as Exhibits 2 (first floor) and 3 (second floor).

[10] B.A.S. testified her mother and aunt E.J.C. were "really close" and that it was a daily occurrence for her and M.M.F. to visit the C. residence. B.A.S. remembered M.M.F. and E.J.C. watched soap operas, played cards and drank tea. B.A.S. said she did not have much interaction with the C. children, sons T.C. and P.C., who were approximately ten and eight years older than her. By her recollection, it was usually herself along with her mother, E.J.C. and J.T.C. together at the C. residence. Having said this, she added J.T.C. worked shift work at [...] and his schedule varied.

[11] The Complainant recalled that her mother rarely worked outside of the home. E.J.C. had a job [...].

First Memory of Abuse

[12] B.A.S.'s first memory of something untoward occurring dates back to when she was two or three years old. She recalled it was a warm day and that the event must have occurred in the summer or spring. Although she testified that she did not know how old she was, B.A.S. feels she must have been age two or three on the basis of her outfit. In her words, she was wearing, "jean shorts like coveralls with buckles and a pocket with a sewn-on butterfly".

[13] B.A.S.. said the incident occurred during the day when her mother and aunt left her in the C. house with her uncle. She recalls J.T.C. saying he would teach her to tell time. She said they were upstairs in the bedroom of her aunt and uncle where there was a digital clock. At some point, "he started touching and having me touch him, his hand was touching my vaginal area." She said the touching was over clothes.

[14] B.A.S. said it was “hard to remember” how long the touching lasted. She went on to estimate about ten – fifteen minutes, “not really long”. She elaborated that her uncle unbuckled the top of her overalls and that she was wearing a shirt underneath the overalls. She was not sure which hand he used to unfasten the buckle. She recalled she had her “bottoms on”. B.A.S. had no recollection of what J.T.C. may have said and/or his facial expression. She believed the room curtains were open as the bedroom was not dark. She said the incident occurred while the two were sitting on the edge of the bed. Asked what was going on in her mind when this was happening, the Complainant responded, “confusion, I did not understand”. B.A.S. could not recall if she said anything. As to when it stopped, “... E.J.C. and my mother came back, we heard them coming through the door... the screen door slammed shut... mom yelled ‘where are you?’”. B.A.S. said that her uncle, “put the buckles back on and we went downstairs”. She added that nobody said anything about the episode.

[15] On cross examination, the Complainant thought the first alleged touching occurred when she was three years old but that it could have taken place when she was four or five. She said she can recall what she was wearing at ages two to five. She denied recalling her outfits on account of having seen photographs of herself taken in the clothing.

Oral Sex Performed on B.A.S.

[16] B.A.S. testified that her uncle sexually abused her, “every time we were alone.” She said the abuse would take place in the living room of the C. house, while she and J.T.C. were watching television. B.A.S. recalled that when she was a preschooler, her uncle would come home from the dayshift and she would be left alone with him. There was a table in front of the couch where J.T.C. rolled cigarettes. B.A.S. said, “he would get me to sit beside him on the couch... he made me feel uncomfortable just being in the room... I didn’t like going in the living room with him there.”

[17] The Complainant went on to explain that her uncle would, “reach out and take me by the wrist to the couch. He would place his hand on my vaginal area.” She said that if nobody was home, “sometimes he would take off my pants... one time he had put me on the couch with my pants down and he used his mouth to do oral sex, my vaginal area was touched by his mouth.” On this occasion, B.A.S. could not recall if the living room “heavy red blackout curtains” were drawn. She added, however, that the curtains were usually closed.

[18] B.A.S. did not know what she was wearing when this incident took place. She said her panties were pulled down and her shirt was pulled up a little. She could not recall how the oral sex event commenced. She says she laughed because J.T.C.'s facial hair tickled her belly. She could not say how long the episode lasted.

[19] B.A.S. described her uncle this time (he would have been around age 40) as having [...]. She recalled he had strong body odour involving the smell of cigarettes.

[20] Later in her testimony B.A.S. described J.T.C. as a quiet individual. She elaborated, "we didn't communicate, he had an intimidating demeanor, he would give you a glance, he made me feel frightened, scared."

[21] As B.A.S. closed out her testimony on this event, she stated, "this was one incident I remember. They happened so many times, I don't remember every incident. If I was alone, it would more be the oral sex. If someone was home, it would be touching over clothes. There was touching under clothes, when we were home alone."

[22] B.A.S. described the C. household as "busy". In addition to B.A.S. and her mother, her grandparents would often visit. She said her grandparents, M.M.F. and E.J.C. would typically talk, drink tea and play cards at the kitchen table. B.A.S. said that J.T.C. was not a card player so he would typically be in the living room watching television and she would be left with him. According to B.A.S., it was rare that they were walked in on; however, she recalled one occasion when her grandfather walked from the kitchen area. She says that the floors squeaked in the area outside of the bathroom (hallway between the kitchen and living room). On the occasion when her grandfather walked over this area, she says her uncle stopped touching her (above the clothing) in the vaginal area.

Oral sex performed on J.T.C.

[23] The Complainant was asked how many times there was "him to you oral sex"? She replied, "so many I can't put a number to it. I don't remember every single one." She went on to recall one episode that "stuck in her mind" dating back to when she was six or seven years of age. At this point, B.A.S. and her mother had moved from living directly across the street from the C.'s to an apartment on the [...]. B.A.S. recalled that they moved when she was around five years of age because her mother wanted her to go to the [...] School. With the

move, B.A.S. said that their daily visits reduced to perhaps three – four times a week at the C. residence. After the move (in around 1980), it would also be a fairly common event that she and her mother would sleep over at the C. house. When this occurred, she and her mother shared the single bed in the C.’s guest bedroom.

[24] B.A.S. recalled that on the occasion when she was six or seven she woke up around midnight because she had to use the bathroom. B.A.S. proceeded downstairs to the only bathroom in the home, located next to the living room where J.T.C. was watching television. After B.A.S. used the washroom, she recalled her uncle stopping her before she could go back upstairs. She testified, “his penis was exposed and he guided me to do oral sex. He guided my mouth onto his penis. His penis was erect.” B.A.S. recalled that it was dark with the only light coming from the television. She says her uncle had unzipped his pants.

[25] B.A.S. could not recall any words that may have been exchanged between herself and J.T.C.. She thought the episode lasted “maybe ten minutes”. She recalls her mother, “yelling down, ‘what are you doing?’”.

[26] At the time, the Complainant thought her uncle had peed in her mouth. She says she, “kind of gagged, he said ‘Do you want a glass of water?’” She does not think she took him up on the offer and after her mother yelled she went up the stairs and back to bed.

[27] Asked if there were other such events, B.A.S. said there were but, “I just recall that one.” She added that the oral sex occurred in daylight and thus provided a physical description of J.T.C.’s penis (“circumcised”). She added that J.T.C. had light pubic hair. B.A.S. has no recollection of seeing his scrotum/testicles. She added that she never saw J.T.C. fully naked.

[28] On cross examination, B.A.S. agreed she could have been anywhere from age five to ten when the alleged event occurred.

Avoiding J.T.C.

[29] B.A.S. estimates that the abuse lasted until she was age nine or ten. She said, “I just started to pull away and walk out (of the living room) to the kitchen and there was no response from J.T.C..” She added that she did not say anything to anyone but, “I just said I didn’t want to go” (referring to visiting the C. residence).

[30] The Complainant says she stopped going on a regular basis to the C. residence. She explained that on the occasions she “had to go” she would stay in the kitchen area.

[31] On cross examination, B.A.S. initially denied ever taking her son to the C. residence. She was then shown Exhibits 4 and 5 (photographs depicting B.A.S. and her son with his father in the C. kitchen). B.A.S. attempted to explain this by saying it had been her mother who took A. to the home of J.T.C. and E.J.C..

[32] Further, on cross examination, B.A.S. agreed that certainly by the year 2007 she wanted to have nothing to do with her uncle ever again. She was then shown Exhibit 6 (an envelope containing a wedding invitation, both made out in her handwriting) inviting E.J.C. and J.T.C. (among other family members) to her wedding which took place on May[...] , 2007.

[33] The Complainant was then shown Exhibits 7 and 8 (B.A.S.’s handwritten envelopes and Christmas cards) which she had sent from Alberta to Nova Scotia to her aunt and uncle. Furthermore, the Christmas cards enclosed pictures of her (then three) children for the recipients (E.J.C. and J.T.C.). In particular, the photographs depicted T. (age one and a half or two), K. (age 3) and A. (age 16).

[34] On cross examination the Complainant was asked about her son’s first birthday in 1991. She recalled celebrating A.’s birthday at their apartment on [...]. Having said this, she agreed it was possible that they could have had a birthday cake at the C. residence. B.A.S. was shown Exhibits 9 and 10 (photographs of M.M.F. and A. with a birthday cake taken in the C. kitchen). B.A.S. then acknowledged that she “could have been” present.

Spring 2013 Family Gathering

[35] B.A.S. testified that she made arrangements to fly from Alberta to Nova Scotia in late April 2013 for what was to be her grandmother B.F.’s [...] birthday. As it turned out, B.F. died at age [...] on April [...], 2013. In any case, B.A.S. says she told her husband before she left Alberta of her intentions, “that I was ready to do this” (referring to reporting to the police). B.A.S. explained that she had received counselling and that it is ongoing.

[36] B.A.S. said she met with New Glasgow police officer Smith a few days following her grandmother’s funeral. She then spoke with Det. Sgt. Stephen Chisholm.

M.M.F.

[37] M.M.F. (DOB September [...], 1937) is 77 years of age. Unfortunately, when asked, she thought her age was 83 and then corrected it to 87. Those answers were indicative of Ms. F's entire testimony which was confused and disjointed.

[38] M.M.F. was able to recall she was always single, having never married. She had one child, B.A.S.. She thought B.A.S. was born in 1935 (clearly confusing this date with the correct 1975). M.M.F. was asked about her siblings and she recalled being the oldest followed by A.F., E.J.C., I.B.M., J.F. and K.F..

[39] M.M.F. completed Grade 9 and worked previous to the birth of B.A.S.. Following her birth in 1975, M.M.F. stopped working and drew social assistance. M.M.F. did some babysitting when her daughter was in school.

[40] When B.A.S. was a young child, M.M.F. testified they spent a great deal of time with E.J.C.. She recalled that on various occasions when she and E.J.C. did errands, J.T.C. was asked to mind B.A.S.. M.M.F. thought this did not happen "many times but it did happen". M.M.F. recalled spending time at the C. residence one or two times a week when B.A.S. was growing up.

[41] M.M.F. gave evidence consistent with her daughter in respect of their living arrangements. She recalled that when the two visited the C. house, she would often play cards in the kitchen. She recalled J.T.C. would commonly be in the living room watching television and that B.A.S. would also watch television there. Asked how she felt about J.T.C. minding her daughter, M.M.F. responded, "it was all right".

[42] M.M.F. recalled occasionally staying overnight with her daughter at the C. residence. She described the sleeping arrangements as outlined by her daughter.

[43] Asked about B.A.S., M.M.F. described her as "a good child". She recalled she was of "normal size, I had no problem with her, she was good when you told her to come in – she'd be there".

[44] M.M.F. said B.A.S. first told her about the abuse when B.A.S. was six or seven years of age. M.M.F. thought the discussion took place in the kitchen when they lived on [,,].

[45] On cross examination, M.M.F. agreed B.A.S. would come to her if she had any problems. She thought they got along, “pretty well”. She then agreed that B.A.S. did not tell her anything was going on between B.A.S. and J.T.C.. Further, she agreed she had never seen anything going on during her time visiting with her daughter at the C. house.

[46] When shown Exhibits 4 and 5 on cross examination, M.M.F. thought it was not likely she was present at the C. house. She said B.A.S. and her boyfriend probably took A. there on their own.

[47] M.M.F. agreed on cross examination that she had never reported anything to the New Glasgow police.

[48] B.A.S. says she was 14 years old when she told her mother in their [...] apartment kitchen. At the time, she had just found out two months earlier she was pregnant with her son. B.A.S. was about five months pregnant when she found out of her pregnancy. She recalls her mother was “shocked” to learn of the abuse perpetrated by J.T.C.

[49] On cross examination, the Complainant agreed she was on “good terms” with her mother through the 1980s. She agreed she could discuss problems in school or difficulties with her menstrual cycle with her mother, anytime. B.A.S. said she did not tell her mother anything about J.T.C. abusing her until she was well into her teens.

T.A.C.

[50] T.A.C. (DOB October [...], 1974) is 40 years of age. For the past couple of years she has been a stay at home mother to her young daughter. T.A.C. testified she met B.A.S. for the first time in Grade 4 or 5 at age ten or eleven. Shortly thereafter they became best friends. Over the years and since B.A.S. moved out West, the two have kept in touch through telephone, texting and Facebook.

[51] T.A.C. thought she and B.A.S. were 12 years of age when B.A.S. told her about the matter in issue. She said the discussion took place on steps outside B.A.S.’s apartment building. T.A.C. said B.A.S., “told me about everything... a lot of detail.”

[52] Upon learning of this information, T.A.C. said she felt, “awful, sad, confused... so shocking at that age... it was scary for sure.” T.A.C. said she

thought the discussion took place in the summertime. She did not report it to anyone, “because it was B.A.S.’s story/secret.”

[53] On cross examination, T.A.C. agreed she did not tell her mother and/or the police.

[54] B.A.S. testified that she and her best friend T.A.C. were both around 11 or 12 years of age when B.A.S. told T.A.C. what her uncle had been doing to her. B.A.S. does not recall the whole conversation and, “I didn’t tell in great detail”.

[55] B.A.S. says the discussion took place in daylight, “probably in the summer”. She recalled the two were sitting on steps of a white office building next to where she lived at the time.

[56] On cross examination, B.A.S. agreed she never went to the police in proximity to her disclosure to T.A.C..

I.B.M.

[57] I.B.M. (DOB December [...], 1945) is 69 years of age. She is a younger sister of M.M.F., aunt to B.A.S.. I.B.M. has three children, aged 40, 47 and 50.

[58] I.B.M. recalled that M.M.F. had B.A.S. when M.M.F. was in her late thirties. M.M.F. had been living with I.B.M. for a couple of years when she became pregnant with B.A.S.. After B.A.S. was born, M.M.F. and her infant daughter moved to M.M.F.’s and I.B.M.’s parents’ home on the [...] Road. I.B.M. recalled that M.M.F. and B.A.S. moved to their own place when B.A.S. was about a year old. They had an apartment in [...] on [...]Street and J.T.C. and E.J.C. lived across the street.

[59] I.B.M. recalled visiting both M.M.F. at her basement apartment and J.T.C. and E.J.C. at their home. It was I.B.M.’s impression that M.M.F. and B.A.S. spent a lot of time at the C. residence.

[60] I.B.M. recalled her parents visiting the C. residence and playing cards with them and M.M.F.. Having said this, she allowed, “I didn’t go down a lot”, referring to the C. residence.

[61] I.B.M. stated that J.T.C. did not play cards and that he would be in the front room watching T.V.. She recalled B.A.S. spending time there too.

[62] I.B.M. said she first heard of J.T.C.'s abusing B.A.S. when she was on a walk with B.A.S.. They were doing the "loop around New Glasgow and Stellarton when she told me he had molested her." I.B.M. thought B.A.S. was 16 years of age when they had the discussion as B.A.S.'s son was perhaps a year old.

[63] I.B.M. stated, "it was hard for her to tell me, it was hard for me to hear, this was not an easy point in her life."

[64] On cross examination, I.B.M. agreed she had not spoken with her sister, E.J.C., since their mother's funeral. She added that M.M.F. also does not speak with E.J.C..

[65] I.B.M. agreed she would have been in her mid-forties when the 16 year old B.A.S. told her about J.T.C.. Although she agreed she knew the difference between right and wrong, I.B.M. acknowledged she did not go to M.M.F. or the police with this information. Further, she has not confronted J.T.C. about the matters in issue. I.B.M. said she talked to her sister, E.J.C., on one occasion about the matter.

[66] B.A.S. testified that when she told I.B.M., she was 16; "I already had A.." She recalls she told her mother's sister while the two were walking (on one of their usual walks) by the [...] park.

[67] On cross examination, B.A.S. agreed she never went to the police (until many years later) after her disclosure to I.B.M..

M.R.D.

[68] M.R.D. (DOB April [...], 1968) is 47 years of age. She has twin sons, aged 20. M.R.D. is the daughter of I.B.M. and cousin of B.A.S.. Although seven years her senior, M.R.D. had "quite a bit of contact" with B.A.S. while growing up. She recalled that when growing up, B.A.S. was "very thin and tall, kind of a skinny child." As for B.A.S.'s demeanor, "a quiet little girl". She said that her own personality was like B.A.S.'s and the two got along very well.

[69] To this day, the two stay in touch through texting, Facebook messaging, calling and periodic visits. B.A.S.'s son, A., is M.R.D.'s godson.

[70] M.R.D. testified that she first learned of the allegations from her mother. She does not know the exact year but thought that she (M.R.D.) was in her

twenties. M.R.D. discussed this with B.A.S. in 1997. She is sure of the date because B.A.S. was getting ready to move to Edmonton. M.R.D. recalled being told while standing by the door of the kitchen in the apartment B.A.S. was renting. M.R.D. went on to say B.A.S. told her she was wearing some of her hand-me-down clothes the first time it happened.

[71] M.R.D. said she believed B.A.S. and, “I was quite upset... she was calm about it.” M.R.D. said she was not shocked because she had already heard about it and she tried to be supportive.

[72] It was M.R.D.’s recollection that her aunt M.M.F. and B.A.S. attended at the C. residence, “a lot”.

[73] M.R.D. testified she stopped talking to her aunt E.J.C. and J.T.C., “about two years ago when my grandmother was ill”.

[74] On cross examination, M.R.D. agreed she sometimes visited the C. residence when M.M.F. and B.A.S. were there. She agreed that she usually did not go into the living room and watch television. She acknowledged having contact with J.T.C.. She said J.T.C. had never sexually touched her.

[75] M.R.D. agreed she was 29 years old when B.A.S. told her of the incidents. She agreed she knew the difference between right and wrong and that B.A.S. was a, “close cousin”. Impressed with this information, she did not go to the police or anyone else. In her words, “I believed it was B.A.S.’s job to do.”

[76] B.A.S. testified she is very close with M.R.D.. She remembered telling M.R.D. about J.T.C. at the time B.A.S. was getting ready to move to Alberta in 1997. This was also around the time E.J.C. and J.T.C.’s son, P.C., died.

[77] On cross examination, B.A.S. agreed she never went to the police around the time she told M.R.D..

E.J.C.

[78] E.J.C. (DOB April [...], 1943) is 72 years of age. She is married to J.T.C.. The couple had two sons, T.C. (born in 1963 or 64) and P.C. (born in 1969). Her sons predeceased her; however, she has twin 12 year old granddaughters who were five when their father, T.C., died.

[79] E.J.C. testified that J.T.C. is retired from [...], where he was employed for 44.5 years. He did shift work, 8:00 a.m. to 4:00 p.m., 4:00 p.m. to 12:00 a.m. or 12:00 a.m. to 8:00 a.m.. E.J.C. said that J.T.C. worked mostly the afternoon (4:00-12:00) and backshifts (12:00-8:00). When J.T.C. worked the afternoon shift, during the day he would fix things around the house and do work for his parents who lived nearby on [...] Street. On cross examination she confirmed J.T.C. generally worked these shifts as well as sometimes overtime on Saturdays and Sundays.

[80] During some of the time between 1975 and 1990, E.J.C. recalled working as an [...]. In later years, E.J.C. said she looked after children for various families.

[81] E.J.C. agreed that for a time M.M.F. and B.A.S. lived across the street from the residence she shared with J.T.C.. She said they lived in the basement apartment from the time B.A.S. was a couple of months old. She recalled her sister and niece coming over to her house every morning. She said she fed them and they usually left the house at about 8:00 p.m..

[82] E.J.C. recalled M.M.F. and B.A.S. moved to [...] when B.A.S. was five years old. After the move, M.M.F. and B.A.S. still regularly visited the C.s. In addition, E.J.C. would take M.M.F. out for errands as M.M.F. did not have a driver's license.

[83] E.J.C. could not remember whether J.T.C. ever looked after B.A.S.. She said M.M.F. and B.A.S. did not sleep over while they were living across the street; however, this changed when they moved. She agreed M.M.F. and B.A.S. shared a bed in the spare room where her son, P.C., used to sleep.

[84] Asked about B.A.S., E.J.C. said she was, "small compared to my children... I guess she was normal." Asked about her personality she answered, "she's Mrs. Know-It-All, she just got like that." She went on to explain that when younger, B.A.S. was quiet.

[85] E.J.C. was asked about card playing and agreed that she played in her kitchen with her parents and M.M.F. She testified that I.B.M. did not play cards. As for J.T.C., if he was not at work, E.J.C. said he, "liked to watch T.V. in the front (living) room." As for B.A.S., she would "probably be in the front room talking to P.C. and playing games." E.J.C. had, "no memory" of seeing B.A.S. and J.T.C. watching television together in the front room.

[86] On cross examination, she agreed that she would leave the kitchen to go to the front room at times when J.T.C. was watching television. She agreed that P.C. and T.C. would be home as well.

[87] E.J.C. said she first heard about the allegations concerning her husband in 2011. She was told by her sister-in-law, H.F.

[88] On cross examination E.J.C. said she never saw anything inappropriate going on between J.T.C. and B.A.S.. E.J.C. said, "normally when B.A.S. was at school and after school J.T.C. would be working."

[89] E.J.C. recalled B.A.S. visiting her house with her son. Shown Exhibits 4 and 5, she thought the photographs were likely taken by J.T.C..

[90] E.J.C. confirmed she used to send B.A.S. Christmas presents and cards and that B.A.S. sent cards to her and her husband. She agreed, when shown Exhibit 6, that B.A.S. had invited her and J.T.C. as well as their grandchildren to her wedding. With respect to Exhibits 7 and 8, E.J.C. said she received the envelopes and cards addressed to herself and her husband.

Detective Sergeant Stephen Joseph Chisholm

[91] Sgt. Chisholm has worked 31 years with the New Glasgow police force. For the past nine years, he has overseen the major crime unit which includes investigating crimes (including sexual assaults). Sgt. Chisholm confirmed that B.A.S. attended at the New Glasgow police station on April 25, 2013. He said that she reported that between the ages of three and ten, she was sexually assaulted by her uncle, J.T.C. at [...], [...]. B.A.S. provided a video statement on this date and on May 9, 2013 police conducted a follow up interview with her. They continued their investigation with numerous interviews (video and audio) of B.A.S.'s friends and family members.

[92] On July 10, 2013, J.T.C. was arrested without incident. He was transferred to the New Glasgow police department where he provided a warned statement.

[93] Sgt. Chisholm explained his routine for taking a warned statement. The 203 page statement of J.T.C. was then entered through Cst. Chisholm as Exhibit 11.

J.T.C. Warned Statement

[94] The Defence called no evidence; however, Defence evidence is contained in a statement (Exhibit 11) tendered by the Crown as being truthful.

[95] By agreement, counsel provided the Court with a complete copy of the transcript (less a small amount of redactions agreed upon between counsel). The recording commenced at close to 3:00 p.m. and ended at approximately 7:30 p.m., albeit there were a couple of breaks. In any event, from my reading it is clear (and although J.T.C. was offered opportunity to obtain counsel), J.T.C. sat alone in a room at the New Glasgow police station answering Sgt. Chisholm's questions for approximately four hours. There is considerable back and forth between Sgt. Chisholm and J.T.C.. The penultimate and most direct questions and answers appear about three quarters of the way through the interview (p. 149-152 of the transcript) wherein there is the following exchange:

- Q. Yeah. So now you're saying [B.A.S.] is a liar.
 A. Huh?
 Q. [B.A.S.] is a liar.
 A. Well...
 Q. She's lying about you. Is that what you're saying?
 A. Yes, then. How's that? Yeah. Yeah.
 Q. Oh, I'm just throwing it out there.
 A. Yeah, okay then.
 Q. So you never, ever touched her in your life, ever?
 A. No, I put my arm around her so.
 Q. But you never did anything else to her?
 A. No.
 Q. You never... You never touched her...
 A. No.
 Q. ... vagina?
 A. (That the?) (moves left arm out to side)
 Q. You never put your head on her vagina ever?
 A. I put my arm around her and that was it.
 Q. But you never touched her vagina?
 A. No. Never did nothing.
 Q. Never touched her vagina?
 A. No.
 Q. She never touched your penis?
 A. No.
 Q. You never performed oral sex on her or touched her genitals or...
 A. No
 Q. ... her vagina with your mouth?

- A. No. Just have to wait and see my lawyer.
- Q. She never... She never...
- A. You'll just have to wait and speak to the lawyer.
- Q. (Inaudible)
- A. Yeah. And that's about all I'm saying about it.
- Q. That's fine.
- A. Yeah.
- Q. But I'm talking.
- A. Yeah, go ahead.
- Q. She never... You never put your penis in her mouth?
- A. No.
- Q. Ever? You never ejaculated in her mouth?
- A. No.
- Q. Never, ever, ever happened? So [B.A.S.]... Everything [B.A.S.] said is a (bold faced) lie?
- A. No, it just goes back to one little... one little thing.
- Q. And everything her... everything she told her family is all a big lie.
- A. But you got to go back and go back to this one... this one incident with what happened.
- Q. Uh-hum. Well, you tell me about the incident...
- A. No, I'm not...
- Q. Because basically by you not telling me what's happening, if...
- A. If I tell you...
- Q. ... if you tell me.
- A. Then it's more like a confession, isn't it? I'm not giving no confessions.
- Q. Well, [J.T.C.]...
- A. Yeah.
- Q. ... if you... if you... there's a difference between a confession and being truthful.
- A. Yeah.
- Q. There's a difference.
- A. Yeah.
- Q. Confessing to something you didn't do...
- A. Huh?
- Q. ... I don't want to hear that.
- A. No.
- Q. But I want to hear the truth.
- A. Yeah.
- Q. The truth is what we want to hear.
- A. You'll hear it in court.
- Q. Yeah. So if you've got something...
- A. It's just...
- Q. ... that explains all this.
- A. It's just... Yeah, there is.
- Q. Well, then you...

- A. Just too bad.
- Q. If you got an excuse about it you should tell me, because then that might alleviate...
- A. Yeah.
- Q. ... might shed some light on some on this. But you're not doing that, so that... what does that tell me?
- A. But as far as that there is...
- Q. Um hmm. Well, what does that tell me, [J.T.C.]?
- A. As far as that is now...
- Q. Um hmm.
- A. ... I'm guilty.
- Q. Yeah, you're guilty.
- A. Of everything.
- Q. Yeah.
- A. Yeah.
- Q. As far as that is you're guilty.
- A. Yeah.
- Q. Why would you even say that if you... if you didn't do it.
- A. Because you said... you...
- Q. I'm not a judge, [J.T.C.].
- A. Yeah, but you said as far as you're concerned...
- Q. I said... I said I believe her. I didn't say...
- A. Yeah.
- Q. ... that you're guilty.
- A. It's the same thing.
- Q. Well, it's the judge who decides guilt.
- A. Yeah.
- Q. I don't decide guilt or innocence.
- A. You believe... You believe I'm guilty of everything, so...
- Q. I believe there's reason to believe you did it, yes.
- A. Yeah. Well, there you go.
- Q. But that's not my job to find you guilty.
- A. No, but...
- Q. Yeah, just so we're clear on that.
- A. But you're saying that it is, so...
- Q. Well, I think... I think something has happened, but, again, I don't have your side to tell me.
- A. That's right.
- Q. And that's what I'm looking for.
- A. Yeah.
- Q. And I'm worried about... And I'm worried about other children. That's part of my job.
- A. You don't have to worry about any... You don't have to worry about any other children.

Legal Framework for Analysis

Presumption of Innocence

[96] Section 11(d) of the *Canadian Charter of Rights and Freedoms* states:

11. Proceedings in criminal and penal matters – Any person charged with an offence has the right

....

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[97] B.A.S. describes a history of ongoing abuse perpetrated by J.T.C.. J.T.C. denies any abuse of B.A.S.. This case is not about choosing whom to believe. It is not about sympathy for a young child whom may have been vulnerable and may have had an abusive uncle. J.T.C. is presumed innocent. While B.A.S. says J.T.C. was essentially a sexual predator who abused her during her tender years, the Crown must prove this beyond a reasonable doubt.

Reasonable Doubt

[98] The Crown must prove each essential element of its case beyond a reasonable doubt. In *R. v. Litchis*, [1997] 3 SCR 320, Justice Cory summarized the reasonable doubt standard at para 36:

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.

[99] It is therefore not for the Court to simply choose which version of the events it believes. As trier of fact, I must consider all of the evidence. Accordingly, in this case, I must decide if I am satisfied beyond a reasonable doubt that J.T.C. committed any or all of the crimes against B.A.S. over the time period that she states the offences happened. In considering proof beyond a reasonable doubt, I am mindful of Justice Arnold's comments in *R. v. A.L.*, 2014 NSSC 402 at para 254:

In a case such as this, having heard the testimony of all witnesses, it is not necessarily difficult to achieve the civil standard of "a balance of probabilities"; however, probability in a criminal case is not the test. If a judge in deciding any criminal matter determines only, "I think he's probably guilty" and then registers a conviction, that decision will be wrong in law. Probability is never enough in a criminal matter. The standard in a criminal matter is that the Crown must prove the guilt of an accused person, in this case A.L., beyond a reasonable doubt - which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

Credibility

[100] In *R. v. W.(D.)*, [1991] 1. S.C.R. 742 at para 27-28, Justice Cory provides clear instructions for a trier of fact when assessing credibility:

27 In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.

28 Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

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.

If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[101] In *R. v. H.(C.W.)* (1991), 3 B.C.A.C. 205, Wood J.A., speaking for the Court, commented on the *R. v. W.D.*, *supra*, instructions and stated:

I would add one more instruction in such cases, which logically ought to be second in the order, namely:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[102] The Supreme Court of Canada again examined the issue of assessing credibility in the context of reasonable doubt in *R. v. Dinardo*, 2008 1 S.C.R. 788, where Justice Charron spoke for the unanimous Court:

23 The majority rightly stated that there is nothing sacrosanct about the formula set out in *W. (D.)*. Indeed, as Chamberland J.A. himself acknowledged in his dissenting reasons, the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W. (D.)*; it will depend on the context (para. 112). What matters is that the substance of the *W. (D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt. In my view, the substantive concerns with the trial judge's decision in this case can better be dealt with under the rubric of the sufficiency of his reasons for judgment.

The Test in *R. v. W.(D.)*, *supra*

[103] First, if I believe the evidence of the Accused, I must acquit. In this case, I was obviously not afforded the opportunity to observe J.T.C. testify. The evidence of the Accused was through the 203 page transcript. The Crown acknowledges that the Court ought to consider the *W.(D.)* test to establish whether or not the Crown has discharged its burden of proof on all the essential elements of the offences. I have carefully reviewed Exhibit 11, with particular scrutiny of the questions and answers set out above (pp. 149-152 of the transcript). On the basis of this evidence, I cannot say that I believe all of what J.T.C. said.

[104] As the Crown points out in their brief (p.13, para. 30):

When conducting the *W. (D.)* analysis, I would, however, draw Your Lordship's attention to the questions and answers at page 150 of the transcript of the accused's statement wherein, it is submitted, he retreats from his bold denial, and in particular at line 17 states, "*No, it just goes back to one little.....one little thing.*" And then further at line 21, "*But, you got to go back and go back at this one....this one incident with what happened.*" There is a further exchange of questions, and then the accused states at line 27, "*If I tell you...*", and at line 29, "*Then it's more like a confession, isn't it? I'm not giving no confession.*"

[105] Second, if I do not believe the testimony of J.T.C. but I am left with a reasonable doubt by it, I must acquit. In this regard, the Crown submits as follows (p.15, para.31):

It is respectfully submitted that any denial as set out at page 149 of the transcript is effectively reversed and there is what is tantamount to an admission of guilt at page 151 and 152 of the transcript, wherein the accused says that he is guilty.

[106] With respect, I do not regard the exchange between Sgt. Chisholm and J.T.C. as an unequivocal admission of guilt by J.T.C.. On the contrary, when I review the reproduced passages and the totality of Exhibit 11, I am left with a reasonable doubt.

[107] Third, even if I was not left in doubt by the evidence of the Accused, I would have to ask myself whether, on the basis of the evidence which I do accept, I was convinced beyond a reasonable doubt by the evidence of the guilt of J.T.C.. Said another way (see *R. v. H.(C.)W.*, *supra*), after a careful consideration of all the evidence, if I am unable to decide whom to believe, I must acquit.

The Evidence of Children/Timing of Disclosure of Abuse

[108] In assessing the evidence of the Complainant and T.A.C., I am mindful of the evaluation criteria as expressed in *R. v. W.(R.)*, [1992] 2 S.C.R. 122. At para. 27, Justice McLauchlin (as she then was) stated:

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.

[109] At para. 31, the Court went on to state:

...reliance on the stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint. In fact, the literature suggests the converse may be true; victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed.

[110] In addition to Supreme Court of Canada authority, I have considered appellate decisions including the recent *R. v. G.(A.D.)*, [2015] A.J. No. 470. Concerning the timing of the disclosure of the abuse, the Alberta Court of Appeal stated:

31 The doctrine of "recent complaint" established a presumption against the credibility of a sexual assault complainant who failed to disclose the assault immediately. It has been criticized for relying upon the stereotype that victims of sexual abuse are likely to disclose the acts: *R. v. W. (R.)*, [1992] 2 S.C.R. 122 (S.C.C.), at 136. The doctrine has long been abrogated from Canadian law by s 275 of the *Criminal Code*.

32 The law is clear that no presumptive adverse inference may be drawn against a complainant who does not disclose sexual abuse immediately. Yet this

does not mean that no consideration whatsoever can be given to the timing of the disclosure of abuse: *R. v. M. (T.E.)*, 1996 ABCA 312 (Alta. C.A.) at paras 9-11, (1996), 187 A.R. 273 (Alta. C.A.), leave to appeal to SCC refused [1997] 2 S.C.R. xv (note) (S.C.C.). The importance of delayed disclosure will vary depending on the circumstances of the particular complainant: *TEM* at para 11. Victims of sexual assault will have different reasons for reporting abuse at different points in time. It is up to finders of fact to evaluate the testimony of complainants and determine their credibility on the basis of all the evidence, including the timing of their disclosure.

33 No inference should be drawn regarding a complainant's credibility that is based on assumptions about how a victim of sexual assault is supposed to react to the assault. The Supreme Court of Canada has made clear that sexual assault cases should be decided "without resort to folk tales about how abuse victims are expected by people who have never suffered abuse to react to the trauma": *R. v. Shearing*, 2002 SCC 58 (S.C.C.) at para 121, [2002] 3 S.C.R. 33 (S.C.C.). There is no inviolable rule on how victims of sexual assault will behave: *R. v. D. (D.)*, 2000 SCC 43 (S.C.C.) at para 63, [2000] 2 S.C.R. 275 (S.C.C.). It cannot be assumed that sexual assault victims will react to abuse in any objectively identifiable way. Findings of credibility should not be affected by the timing of disclosure alone — that is, affected by a comparison between a complainant's disclosure and the disclosure of a hypothetical 'objectively reasonable' victim.

...

38 The Crown contends that the trial judge focused on peripheral matters, contrary to the legal principles applicable to evaluating evidence about events that occurred when the witness was a child. The Supreme Court has recognized that there may often be understandable inaccuracies in such evidence. Since children experience the world differently than adults, it is hardly surprising that they may be confused about certain details, such as time and place, which are important to adults: *W. (R.)* at 133. Children are also prone to forget details with the passage of time: *R. v. F. (C.)*, [1997] 3 S.C.R. 1183 (S.C.C.) at para 41. The evidence of children should not be held to the same exacting standards as adults: *R. v. B. (G.)*, [1990] 2 S.C.R. 30 (S.C.C.), at 54-55. Regarding evidence about events that occurred in childhood, any inconsistencies, particularly those related to peripheral matters, should be considered in the context of the age of the witness at the time of the events: *W. (R.)* at 134.

[111] It is with these principles in mind that I have gone about assessing the evidence led by the Crown's witnesses who were testifying about events when they were children: i.e., B.A.S. and T.A.C..

Factors Impacting Reasonable Doubt

[112] I have carefully reviewed the evidence which I have previously set forth in this decision. With respect to B.A.S. and T.A.C., there are significant areas where their testimony is challenged or refuted by the Defence, including:

- It is difficult to reconcile the Complainant's first memory of abuse on the basis of an outfit she says she recalls wearing at age two or three.
- Age two or three seems too young for a child to be learning how to tell time.
- B.A.S.'s recollection of exact events and words from this age are difficult to accept. For example, the screen door slamming shut and her mother yelling "where are you?"
- Whereas B.A.S. testified she did not like going in the living room with J.T.C., by her own testimony, this pattern continued until around age ten.
- Whereas B.A.S. knew what she was wearing for clothing as early as age two, she did not recall the outfit she was wearing when later on J.T.C. performed oral sex on her.
- B.A.S. described the C. household as "busy" with several family members coming and going yet she maintains she was left alone countless times in the house with J.T.C..
- B.A.S. initially denied taking her son to the C. residence. When shown Exhibits 4 and 5 she acknowledged being there with him. This demonstrates she maintained contact with J.T.C. and brought her young son into contact with him.
- B.A.S. agreed that certainly by the year 2007 she wanted to have nothing to do with J.T.C. ever again but once shown Exhibit 6 she agreed she invited J.T.C. to her May [...], 2007 wedding.

- Also when shown Exhibits 7 and 8, B.A.S. agreed that she sent Christmas cards addressed to J.T.C. (and E.J.C.).
- Contained within one of the Christmas cards were photographs of her (then) three children, including two (T, age one and a half or two and K aged three) who were around the age B.A.S. was when she says the abuse started.
- After Exhibits 9 and 10 were shown to her, B.A.S. then acknowledged she could have been present around the time of one of A.'s birthdays at the C. residence.
- T.A.C. did not tell her mother and/or the police after B.A.S. told her of the abuse.
- T.A.C. said B.A.S. told her about "everything... a lot of detail" whereas B.A.S. said she didn't tell her "in great detail".

[113] When I assess the above-highlighted evidence of B.A.S. and T.A.C. through the lens set out by the Supreme Court of Canada and Alberta Court of Appeal, I am left with reliability concerns. I would add that although I found B.A.S. to be a credible person, she clearly had difficulty remembering events dating back 30-38 years. Indeed, there were obvious conflicts in her testimony when compared with other family members.

[114] Furthermore, B.A.S.'s evidence did not all go back to her time as a child. Indeed, when I assess her testimony covering the time from when she was a late teen up until her late thirties, I am left with concerns. The cross-examination of B.A.S. cast doubt on several of her assertions. In this regard, I am especially troubled by the Complainant's ongoing visits to the C. residence after she says she confided in friends and relatives about J.T.C.'s alleged abuse. Similarly, there are the Christmas cards (inclusive of child photographs) and wedding invitation addressed to J.T.C. (and E.J.C.). These items (handwritten by B.A.S.), included J.T.C.'s name. Given her allegations, it is incongruous to me that B.A.S. would extend such greetings and the invitation to J.T.C. within the last 6-7 years.

[115] With respect to the evidence of T.A.C., I have above noted a couple of difficulties. Furthermore, from observing T.A.C. on the witness stand, I formed the impression her recollections were based on relatively recent discussions with B.A.S..

[116] With respect to the Crown's other witnesses, several points emerged causing me to question proof beyond a reasonable doubt, including:

- M.M.F. did not think she left B.A.S. with J.T.C. alone on many occasions.
- M.M.F. thought B.A.S. first told her about the abuse when B.A.S. was six or seven, whereas B.A.S. says she told her mother when she was fourteen.
- M.M.F. later said B.A.S. did not tell her anything was going on between B.A.S. and J.T.C..
- When shown Exhibits 4 and 5, M.M.F. thought it was likely B.A.S. and her boyfriend who took A. to the C. house on their own.
- M.M.F. never reported anything to the New Glasgow police.
- When she was told of the abuse by B.A.S., I.B.M. did not go to the police or confront J.T.C..
- M.R.D. agreed J.T.C. had never sexually touched her.
- Once she learned of the allegations against J.T.C., M.R.D. did not go to the police or anyone else.
- E.J.C. confirmed J.T.C. worked mostly the afternoon (4:00-12:00) and backshifts (12:00-8:00) as well as sometimes overtime on Saturdays and Sundays.
- E.J.C. testified P.C. and T.C. would often be home when J.T.C. was there with B.A.S.

[117] In *R. v. S.(D.D.)*, 2006 NSCA 34, Saunders J.A. considered an appeal of an accused convicted of sexual touching and sexual assault for acts alleged to have been committed against his daughter when she was 12. In allowing the appeal, our Court of Appeal quoted with approval from an earlier decision (*R. v. Brown* (1984), 132 N.S.R. (2d) 224 (N.S.C.A.), per Matthews J.A.), including para 27:

Here, as with many cases of sexual assault, credibility of the complainant and the accused is a major issue. In such cases there is always the danger, as the case law attests, that the trial judge will be lured into seeing the issue as whether to believe one or the other. Not only is that not in accord with the law, it may have the effect of shifting or reducing the burden of proof. To repeat: the question which the trier of fact must answer is not simply respecting the belief in the testimony of the witnesses but whether, the whole of the evidence leaves that trier with a reasonable doubt as to the guilt of the accused.

(underlining by Justice Saunders)

[118] Having regard to the *W.(D.)* test, I am left with a reasonable doubt. In short, there are simply too many problems with B.A.S.'s version of events and the evidence of others who testified at the trial. Having regard to the whole of the evidence, I am not convinced beyond a reasonable doubt of the guilt of J.T.C..

Chipman, J.