SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. J.S.M.*, 2015 NSSC 312

Date: 20151030
Docket: CRS No. 428555
Registry: Sydney

Between:

Her Majesty the Queen

v.

J.S.M.

Restriction on Publication: Section 486 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	June 8, 9, 10, 11, 12, 25 and 27 August 2015 in Sydney, Nova Scotia
Counsel:	R. Stephen Melnick, for the Crown David J. Iannetti, for the Defence

By the Court (orally):

Introduction

[1] The accused, J.S.M., is charged with one count of sexual assault pursuant to s. 271 of the *Criminal Code*; one count of sexual interference, pursuant to s. 151(a); one count of invitation to sexual touching, pursuant to s. 152; and one count of indecent exposure, pursuant to s. 173(2). The complainant is K.T. The indictment period on all counts is between January 1, 2000, and December 31, 2006. There is no dispute as to jurisdiction, identity of the accused, or continuity of exhibits.

Evidence

[2] The complainant was 22 years old at the time of trial. She was born on […]. As a child, she was friends with the accused's younger daughter, E.M., who was her age. The accused had another daughter, S.M., who was about four years older. The complainant was at the accused's home frequently, as she and E.M. were very close friends. The complainant's home and the M. home were close to one another on [street address] in Glace Bay, NS. The complainant, as well as other friends of the M. girls, would sometimes come to the M. home before school.

[3] The complainant said the first incident occurred in a basement living room at the accused's home, where she, L.M., and E.M. were playing pool. She estimated that she was eight or nine years old at this time. The accused came down the stairs, wearing a royal blue bathrobe, and sat down on the stairs. He sat with his legs open, talking to them, and she could see that he was wearing nothing under the robe. She said seeing his penis was upsetting to her. She said L.M. and E.M. would also have been able to see what she saw from where they were.

[4] The complainant said there were other occasions when the accused called her to bring him his newspaper or puffer, sometimes to his bedroom and sometimes to the stairs where he was waiting. On these occasions, he would be sometimes be waiting in the blue robe, or in a green one, with nothing on underneath. When he called her to the bedroom, she said, he would sometimes be on the bed, propped up with one hand on his hip and his leg up, or otherwise exposing himself. On at least one occasion he was wearing pajama pants with his penis hanging out the slit in the crotch (which she also called "caper" pants). At other times he would be on the bed naked. On cross-examination she added that on

at least one occasion he appeared naked at the top of the stairs. She could not say exactly how many times this occurred, but said it was more than five times. On cross-examination she estimated, variously, that he called her up between ten and twenty, or between fifteen and twenty, times. Otherwise, she simply said it happened multiple times.

[5] The complainant described an incident when the accused wanted to measure the heights of her and his daughters, and sometimes other children. He would wear a robe or pajama pants. He would have them stand behind a door, with their hands in front of them. He would stand very close to her, with his back to the others. When he measured her height, she could feel his penis touching her hand. He was again wearing the "caper" pants.

[6] The complainant described incidents where she was at the accused's house for sleepovers. E.M. would sleep on a two-person couch, while she would sleep on a couch or a futon; she said the futon was acquired after renovations in 2004. Sometimes both she and E.M. would sleep on the futon. The accused would crawl in next to her on the futon at these times. She said this would happen between midnight and 2 a.m. or 3 a.m. She said she slept over at the house many times.

[7] The complainant said that during sleepovers the accused would lie down next to her and make her stroke his penis, while whispering to her, saying things like "how do you feel?" and "is it okay if I touch you?" She said she would lie lifeless at these times and let him touch her, and he would make her touch him as well. He would touch her legs, pelvic area, and vagina. He would also touch her face and neck, as well as her chest under her shirt. He would kiss her. Usually he would touch her over her pants, but she said on one occasion he went inside her pants and touched her vagina directly. He would also put her hand in his pants (holding her hand in his own) and make her move it up and down on his penis. Sometimes he would ejaculate. She said that having had sex education in grades five and six, and having been taught by her parents, she knew what it meant to ejaculate. She said there were two or three times he ejaculated into her mouth on the futon. The complainant said she usually kept her eyes closed.

[8] When these incidents happened, she would be wearing pyjamas, and sometimes shorts if it was summer (she described the shorts as black soccer shorts from her soccer uniform).

[9] The complainant said these incidents occurred when she was between the ages of seven or eight and eleven years old. She then stopped going to the house

for a time. When she returned, there was at least one more further incident. She estimated that the accused lay down beside her some twenty times over a period of three years, although this was not an exact number. She said she had tried to block the incidents out. When these incidents did occur, E.M. would usually be present, and visible to her, and sometimes L.M. would be present.

[10] The complainant described the layout of the accused's basement, both before and after renovations were done on it (she said the incidents started before the renovations). According to the accused's wife, Mrs. J.M., the renovations were done throughout most of 2004. Before the renovations, the complainant said, there was an open living space in the basement, with a fireplace, bookshelves and windows. There was a door on the left side of the staircase. There was a small office with an opening for a window, but no window in it. She described it as being once past the doors, there would be living space which included a couch, chairs, TV, windows, another door that led to a to the right of the basement stairs. The couch was against the wall with the windowless opening. The renovation involved knocking out a wall and opening up the space. There was one large space, with a bathroom. She said she would walk straight down the stairs and directly into the bathroom. There was storage space next to the bathroom. There was a pool table, a futon, a wooden rocking chair, the loveseat, and the TV. There were windows with blinds.

[11] On another occasion, at the home of the accused's sister, in the swimming pool. The accused was in the pool. He suggested that they play a game, where she, L.M., and E.M. swam under his legs. However, when she went underwater he pulled up his bathing suit so that his penis was hanging out the side. She said this only happened once. She believed it happened when she was in grade six, when she was eleven or twelve years old. The complainant also described an occasion when the accused was in the bathtub and called her into the bathroom, as well as occasions where he had her hold his penis while he urinated.

[12] The complainant started working a paper route the summer when she was going into grade seven (she said it was June 2005). She kept the route until she graduated in 2011. The accused was on her route. Sometimes when she approached the newspaper box or mailbox he would open the door and greet her in his robe and invite her inside, where, after a brief conversation, he would tell her to get on her knees to perform oral sex on him (or as she described it, "suck his dick"). He would kiss her, and at one point told her that he would show her how to French kiss. She said this happened some fifteen times over a two-or-three-year period.

She said she was no older than sixteen, and estimated that she was twelve going on thirteen; she subsequently changed this to between eleven and thirteen. She estimated it as a timeframe of one-and-a-half to two-and-a-half years. She said it got to the point where she did not want to do the paper route, and her father had to help her. She said she stopped performing oral sex on the accused when she was thirteen. Later, in September 2013, the complainant told a therapist at Cape Breton University, Carrie Evely, that the demands for oral sex during her paper route started when she was 14 years old.

[13] The complainant testified that her father, D.T., started helping her with the route when "this started to happen." She said she never told him what was happening, but he offered to help. There were days when she would stay in bed and he would deliver the entire route. On other occasions, they would divide the route and each take different sections. She said that when they shared the route, she would not necessarily do the accused's house, but rather her father would do it. Although she did not tell him why she was avoiding it, her father would do the part of the route that included the accused's house. His house was two down and across the street from theirs. Having her father do this part of the route made it easier for him to get to work on time. The complainant said that by the end of Grade Ten and Grade Eleven, her boyfriend S.E. helped her on occasion, perhaps twice, although he lived about 15 minutes away in Port Caledonia. S.E. said he did not assist her in delivering the morning paper, as he lived too far away. She said that by the time she was thirteen she would leave the paper in the newspaper box or the mailbox at the accused's house.

[14] D.T. believed that his daughter started delivering the newspaper when she was in Grade 6 and stopped in high school, possibly Grade 12. The complainant's father said he would help her by doing one section of the route before he went to work. He would also take her to [street name] so that she could do the lower end of the street. He would do the ones closer to their house. He said the accused's house would be on the upper end of [street name], where the higher street numbers were. He said there would be occasions where both the complainant and himself would have delivered the paper to the accused's house. He said she would also collect money from him.

[15] D.T.'s evidence was that his daughter never told him she did not want to deliver to the accused's home. He agreed that there were occasions when he would deliver all the papers himself.

[16] L.M., a friend of the complainant and of the accused's daughters when they were children, testified that she also spent time in the basement at the accused's home, including on sleepovers. L.M. agreed that the accused would sometimes call one of them upstairs to bring him his inhaler. She also recalled him wearing a dark blue robe, a recollection she repeated on cross-examination. She also recalled waking up during a sleepover and seeing the accused in the basement. He appeared to be asleep. She also agreed that he would sometimes measure their heights.

[17] L.M. recalled one instance of J.S.M. sitting on the stairs with his legs open and exposing himself, consistent with K.T.'s evidence. (There was other evidence from L.M. that I would characterize as bad character evidence, which I have not considered.)

[18] L.M. testified that in February 2012 the complainant sent her a Facebook message asking whether the accused had ever done anything to her. L.M. replied that he had not, and asked if had done anything to K.T., who answered that he had. K.T. came to L.M. 's house that evening, and told her that J.S.M. had touched her and that she had touched him, meaning that she had touched his penis and she had touched his genitals. With respect to the degree of detail K.T. disclosed to her, she said it was overwhelming, and that what she recalled was a "like a broad conversation" and that they discussed whether anything was going to be done. L.M. told K.T. that she would be there to support her (I note that I do not regard this comment as undermining L.M.'s reliability or credibility). In cross-examination, she was directed to an alleged inconsistency with her police statement, in that her statement did not refer to the fact that K.T. came to her home after they exchanged Facebook messages.

[19] The defence led evidence which challenges the Crown's evidence on some point. There was evidence from the accused's wife, Mrs. J.M., and his daughters E.M. and S.M.

[20] The accused's wife and daughters confirmed that he would sometimes call for someone to bring things upstairs, including his inhaler. However, they denied that he had a robe, or that he had Caper pants. Mrs. J.M. said he wore sweatpants, which she described as any pants with an elastic waist. E.M. testified that her father would wear sweat pants, but not a robe; on cross-examination she said she could not recall a robe.. When her friends were waiting in the basement for the schoolbus in the mornings, she said, he would be dressed for work or wearing pajamas. She said that in the evening her father would wear pajama pants or Nike

wind pants. (Her mother testified that he only started wearing pajamas later in life.) S.M. also initially testified that she never saw her father in a robe, but agreed on cross-examination that it was possible that he had one, but she did not remember it.

[21] Mrs. J.M. denied that there would have been alcohol in the house when the children were young.

[22] There was no dispute that J.S.M. he would measure the heights of his daughters and their friends. On cross-examination Mrs. J.M. said she was usually present, but not always.

[23] Mrs. J.M. said her husband slept with her during the girls' sleepovers, and insisted that she would know it if he got up, since she was concerned about his asthma and would get worried if he left the bed. She said on cross-examination that both she and her husband would go down to check on the girls during sleepovers, however. E.M. testified that her father would occasionally come down and watch a movie with them, or to check on them, but did not remain downstairs during sleepovers. She said she did not remember her father coming down during the night, and said she was a light sleeper.

[24] Mrs. J.M. believed that the pool table was acquired around December 2003. She testified that the renovation began in February 2004 and went on until Christmas. Thus there were no sleepovers during most of that time. The futon was acquired after the renovation, between January and March 2005. E.M. stated that the pool table came after the renovations, as did the futon.

[25] J.M. said E.M. and K.T. began to drift apart around grade four or five. E.M. testified that after grade 6 she would only have seen K.T. occasionally. She said they started to drift apart around 2005.

Computer-based evidence

[26] The complainant described her later communications with the accused, first on MSN Messenger, then on Facebook. On Messenger, and on Facebook before 2010, at his request, she deleted his messages. He would ask her to be sure no one was around when they exchanged messages. She blocked the accused on Facebook, and he started a separate account under the name J.M. to talk to her without his name being seen. She accepted a "friend" request from the accused on Facebook. Their conversations were entered into evidence (Exhibit 1-A, tab 8).

According to the complainant, this document was printed at the police station after she gave her police statement.

[27] The complainant said she believed that the messages were from the accused, given that the name that appeared on them was S.M.; the Facebook profile had pictures of him, his daughter, and his motorcycle; she recognized his e-mail address; and he would talk about things that, as far as she knew, only the two of them knew about. She said the messages dated from between 2010 and 2013.

[28] The complainant said the exhibit does not contain all of their conversations, since she deleted some messages at the accused's request. However, those that she saved, she said, were for the purpose of supporting her story when she came forward. She said she allowed this Facebook contact to continue because she was still close friends with the accused's daughter E.M., and she hoped she could make the relationship with the accused into one that did not bother her. However, he regularly raised sexual themes in their Facebook conversations.

[29] There was expert evidence from Cst. Samuel Bromley, an RCMP technological crime investigator with training in, *inter alia*, internet evidence analysis, which involved recovering "artifacts" from computer systems. Artifacts are remnants of past searches, histories, and interactions on the internet that remain on the computer. He was qualified as an expert in forensic analysis of computer and mobile devices, including but not limited to laptop computers, computers, mobile cell phones, iPads, and other electronic and mobile devices to acquire, identify, maintain, and analyze data from devices capable of storing electronic data.

[30] The complainant described her own understanding of the sign-in process, including her understanding that once a message is sent, the sender cannot alter it. Based on her own experience using the system, a sender cannot delete a message once it is sent, but a recipient can delete a message he or she has received. Constable Bromley made reference to Facebook's operation as well. His understanding was that a recipient might be able to modify a message's appearance, but the original version of the message would remain on Facebook's server, and would not be modified permanently. Once the recipient exits the browser or turns off the computer, the changes would be lost, and the original text would reappear the next time it was accessed. While it is questionable whether the workings of Facebook itself was entirely within his expertise, I am satisfied that

Cst. Bromley could speak to the general point that the content of a website, such as Facebook, resides on the server, not on the user's computer.

[31] The Facebook conversations were put before the court in two forms which were both entered as Exhibits. The first version consisted of a printout purporting to be from the complainant's Facebook account, produced at the police station when she attended to give her statement. This was printed after Constable Kalolin Francis had her log in to her account. Constable Francis said she gave K.T. sufficient privacy to log in to her account. This version does not replicate the appearance of the messages on the screen, but only reproduces the text. This version went in as Exhibit 1A, printed from Cst. Francis's printer on October 1, 2013.

[32] Subsequently screen shots were obtained, when the complainant signed in on Cst. Bill Turner's computer, and he captured screen shots of it. This was entered as Exhibit 2. Sergeant Kenneth Routledge testified that he asked the complainant to re-attend for another version to be printed because the first one lacked the page colouring and pictures from the Facebook site. Cst. Turner testified that he used a program called Snag to take screenshots of the pages, which he saved and printed. He said he did not leave the complainant alone while she logged in, but that he stood behind her as she did so. The complainant testified that when Exhibit 2 was printed, the profile picture that had previously been there, which showed the accused's his daughter, and his motorcycle, had been removed.

[33] Constable Bromley was provided with five items seized from the accused: a MacBook Pro laptop computer issued to the accused by [employer], an external hard drive with a backup titled "S.M.'s MacBook Pro," a thumb drive, and iPhone and an iPad. Constable Bromley reported that he found one active user account, one system account, and one deleted account on the laptop. The active account was under the user name "s.m.", and was password-protected. In a keyword search, he found several thousand hits for variations of the complainant's name and her e-mail addresses.

[34] Constable Bromley conducted a keyword search of unallocated space on the laptop's hard drive. This produced fragments indicating that the computer had been in communication with the accused's Facebook page; fragments indicating that the computer had received a direct one-to-one message from a twitter account named "K.T."; a Google search strings with the phrases "who fucked k.t." and "voideo [sic] of K.T."; a Bing search string with the phrase "how many people have fucked

K.T."; a photo artifact with a picture from the complainant's Facebook page on March 31, 2014; and a browser artifact of a Paypal payment from a PayPal account under the name S.M. to K.T.'s e-mail address.

[35] In his search of the external hard drive, Cst. Bromley found artifacts of 45 separate Facebook pages relating to K.T., including the "Info" page, the "Photos" page, and the Facebook "Wall" page. He also found Twitter artifacts showing a direct message link to K.T.'s twitter account. There was also a Google search string for "video of K.T. glace bay" and a Bing string for "how many people have fucked K.T."

[36] Constable Bromley found nothing of value on the thumb drive, and the iPhone and iPad were password-locked and RCMP technology was not able to bypass the locks.

[37] In short, Cst. Bromley found thousands of keyword hits relating to the complainant, fragments of messages between Facebook accounts of S.M. and K.T.; a photo of K.T.; and searches on multiple search engines with strings searching for videos of K.T. and searches for information about her sexual partners; visits to her Facebook page, and evidence of a PayPal payment to K.T. He concluded that "a person using the MacBook Pro user account "S.M." was in contact with K.T. and was following her via Facebook and Twitter." He also concluded that "a person using the MacBook Pro user name "S.M." actively searched for K.T.'s sexual partners and videos of her" and that "[a] person using the Paypal account of "S.M." sent a payment of $100 United States Dollars to K.T.'s email address." As he put it in his testimony, he had no doubt that "someone using this computer" visited K.T.'s Facebook page, and that there were communications between the user and K.T.'s Facebook page. (In her own evidence, the complainant said she received $100 from S.M. and Mrs. J.M. for a cancer charity collection.) He also confirmed in his evidence that the actual content of the Facebook conversations was not recoverable from the computer or the hard drive, and that it would not be expected to be. As he put it, Facebook is a web page, and web pages are not stored on computers' hard drives.

[38] Constable Bromley gave evidence that the accused's Facebook account was shut down on October 3, 2013. While defence counsel argued that this meant he could not have shut the account down, or that his account might have been tampered with, the evidence of his wife, Mrs. J.M., and his daughters, was that they had access to his account, and specifically that they knew his password. I am

satisfied that counsel's suggestion that someone else was interfering with the account – which is supported by no evidence – is no more than speculation.

[39] Sgt. Routledge obtained a production order to obtain particulars of IP addresses and subscriber information in respect of J.S.M.'s two Facebook accounts. Facebook provided the police with IP addresses associated with the Facebook conversations. He also obtained a production order requiring Bell Security to provide subscriber information. He provided Bell Security with the list of IP addresses. Bell Security confirmed that the IP addresses related to Glace Bay, NS, and provided subscriber information for the IP addresses, which were related to two Facebook accounts: [e-mail address], and [e-mail address]. The subscriber/owner was S.M., [street address], Glace Bay, NS.

[40] Based on the information obtained under the production orders, Cst. Bromley was able to identify specific IP addresses indicating that Facebook had been accessed by the users of the "S.M." and "J.M." (the "[e-mail name]" account was linked to a Facebook address in the name of "J.M.") accounts at [employer, and specifically in the [employer's building]. He was also able to tie the S.M. account to IP addresses in Brazil, Mozambique, the United States, Thailand, South Korea, Indonesia, and Britain. The J.M. account had been accessed in Canada, Brazil, and the United States. (I note that the complainant had referred in her evidence to a second Facebook account in the name of J.M.; I am not satisfied that anything turns on this. She was not cross-examined on the point, nor was it raised in argument. I also note that she also described an account under the name of "J. and whole bunch of numbers at the end and then at hotmail dot com", which she recalled from when they communicated via MSN Messenger. I am satisfied that this is a reference to the "[e-mail name]" account.)

[41] There was evidence from Mrs. J.M., E.M., and S.M.[daughter] that they had access to the accused's Facebook account under the name S.M. @Hotmail.com, including knowledge of the password. Mrs. J.M. testified that she did not have her own Facebook account, but did have access to J.S.M.'s account. She said he gave her his password. She also said she used it to see what the kids were doing on Facebook. She denied having any conversations with K.T. on Facebook, but said she did look at her wall. She said this was because K.T. was her children's friend. She estimated that she did this between ten and fifteen times between 2000 and 2006. On redirect she said she believed Facebook existed from 2008, and did not exist between 2000 and 2006.

[42] E.M. testified that she would have used her father's laptop in his office in the [employer's building] at [employer], and that she knew his password. She said she would go onto his Facebook account, but did not recall sending any messages on it. She said she would have looked at K.T.'s Facebook wall. Specifically, she did not recall sending any messages from the "S.M." Facebook account. She believed her father had two Facebook accounts, with the second being in the name of "J." She did not have the password for the "J." account. S.M. also said she used her father's computer at his office, and also said she did not enter the searches for K.T., nor did she send the Facebook messages.

[43] I am satisfied that the accused's wife and daughters viewed K.T.'s Facebook Wall and viewed photographs, but I find that they did not write the Facebook messages found in Exhibits 1A and 2, including those set out below. I am satisfied that the Facebook messages in evidence were in fact written by the accused.

[44] The Facebook exchanges are largely taken up with J.S.M. asking questions about the complainant's future educational and employment plans, whether she had a boyfriend, whether she smoked, and other apparently innocuous matters. In later messages in the sequence, he provides advice about university programs; the accused was [position held] at [employer]. The allegedly inculpatory passages are ones that make reference – either directly or indirectly – to sex (including questions and comments about the complainant's sex life) or to secrets shared by "S.M." and the complainant. The complainant's evidence was that as far as she knew, the only "secrets" between her and the accused related to the alleged sexual abuse when she was a child. I will reproduce several of these exchanges. The first took place with the date stamp 5/9 (no year given), between 10:00 and 10:02 p.m.:

> **S.M.**
>
> you and I have hand a special relationship over the years and I know you be fine
>
> Will be fine
>
> **K.T.**
>
> Well I hope so
>
> **S.M.**
>
> You're a great kid..with lots to offer someone
>
> **K.T.**
>
> thanks
>
> **S.M.**

and now a beautiful woman…god you grew up quick

[45] The exchange continued with S.M. inquiring about why the complainant and her boyfriend had broken up. He then said, at 10:13 p.m.:

S.M.

was it hard to break off…your second great love

[46] There was no apparent answer given to this question. After further discussion of the breakup, the following exchange occurred between 10:20 and 11:28 p.m.:

S.M.

yessss its not race….i hope that I haven't been a negative experience for you

K.T.

I got over it

S.M.

was it that bad..

sorry

K.T.

no its ok

S.M.

are you sure..your a great kid

should I not chat with you

K.T.

no its fine

S.M.

i fell bad if your pissed

K.T.

im not pissed ahah

S.M.

are you sure…i never want to make you feel bad….nad i hope i didn't..

some day i will tell you more

K.T.

no honestly im ok

tell me more what?

S.M.

stuff

you're a very special person

i don't share with many people

are you there

sorry I assume I piised you off

K.T.

no i was getting a drink

im not mad what so ever

i hardly get mad

S.M.

are you ok with it

K.T.

ya

S.M.

thank you i was concerned…you were…i'm not sure how to explain it

there was just you..not sure if I should tell you

K.T.

go ahead

S.M.

is this just you and I

and not sharing outside

sorry but can you answer more quickly..i know you have lots of people n line

;ine

K.T.

i wont say anything

to anyone

S.M.

wellthis is a bit direct is that ok

K.T.

ya

S.M.

can we shift face books to discuus this

discuss

K.T.

What do you mean

S.M.

go to [j]'s

or do you want to stay here

K.T.

just stay herre nobodys around

S.M.

ok do you remember the first time you saw my cock

K.T.

that was a long time ago

i don't know if i remember

S.M.

Should i tell you this

K.T.

i don't know

S.M.

well you were really interested is that ok to say

K.T.

ya

S.M.

but it was an accidence

but i was interesting

K.T.

ya

i have to go to bed

S.M.

what was your feeling at that time

K.T.

im really tired and i have to get up early

S.M.

so should we continue wit the short version

i need about 10 miuntes

K.T.

just say what you have to say

S.M.

well your were someone who was very special to me……its hard to say quickly

K.T.

but im only 18

S.M.

you were the only one that I shared stuff with

K.T.

how could i be so special to u

S.M.

I know it sound stupid but you were

i hope you didn't fell any pressure to do anything you didnt want to do

K.T.

no

S.M.

it was just something special..and

sorry but this sounds creepy..but you

i have

K.T.

what?

S.M.

this thing..creep i know but should i be honest

K.T.

you you want to be

S.M.

maybe

should i be

K.T.

sure

S.M.

well i have always had this think you you and you know it..sorry

K.T.

its ok

S.M.

you know what i want

K.T.

what

S.M.

are you pissed

K.T.

no

im just tired

S.M.

well i know but there are things some time i would like to share with you i know your tired

are you ok with my feelings

K.T.

ok goodnight

yes

S.M.

well tell me something other good night

K.T.

thank you for sharing your feelings

S.M.

something more interesting or I will feel like shit…you didn't share

K.T.

im sorry

but i really have to go, ill talk another time i don't mean for you to feel like shit

im just ready to fall asleep

S.M.

can we caht again

K.T.

ya just not now im to tired

S.M.

god night

delet this line of conversion..love she

[s]

[47] In a later conversation, dated 7/14, they discussed the complainant's future plans, along with questions from J.S.M. about how much she smoked and drank, and whether she was dating anyone. After a discussion of her smoking, the following exchange occurred between 11:37 and 11:45 p.m.:

S.M.

too bad….are you going to

i'm pleased that you were honest with me about smoking….i assume you don't tell everone

K.T.

No people don't ask I hide it well

S.M.

ok well i glad to trust me

trust is important….

we do have our secrets

K.T.

Ya

S.M.

have you every told anyone…..

are you there

[48] There was no direct response to this question, as the conversation indicates that the complainant needed to charge her phone. However, the exchange continued with J.S.M. asking questions about her dating, and the following conversation occurred between 11:54 p.m. and 2:37 a.m.:

S.M.

ok so how long have you been single

K.T.

Since january

S.M.

have you been dating much

how does it work for stuff

K.T.

What do you mean

S.M.

Like dating and stuff

K.T.

It's ok I'm not really interesting in anyone

S.M.

can i be direct

K.T.

Ok

I'm goin to charge my phone now

S.M.

ok

what about dating and bj and stuff when start

K.T.

What

S.M.

how many dates is that ok to ask

K.T.

8

S.M.

when was you last

is that ok to ask

K.T.

Why do you want to know all this?

S.M.

sorry just interested hope it didn't piss you off

are you pissed

question this really you

or does someone have your phone

are you there

hey are you charging your phone

K.T.

Ya my phones in the other room

S.M.

is this really you or someone on your phone

K.T.

It's me

Just tell why you want to know all this

It's not right that you know that

S.M.

sorry just interested in what your up too..didn't mean to piss you off

K.T.

No I'm just wondering that's all not pissed off

S.M.

is it ok to ask….if this is really you tell me something only you would know

well are you there

K.T.

Ya I'm at a party

S.M.

is it you….tell me something only you know

K.T.

Like what I have a password on my phone

S.M.

anything that only you and i would know

and what can i ask with out pissing you off

are you there

if i know it you theres stuff

hey are you there

K.T.

Ya I'm here

S.M.

ok what can i ask im interested in what your up too is that ok

K.T.

Ya just hanging out having some drinks

S.M.

and its really you right

K.T.

Yea

S.M.

can i ask any question

K.T.

Ya

S.M.

but how do i know it really you

well are you there

K.T.

I don't know

I'm here ask me

S.M.

cock who was your first

can i be really direct about some stuff

K.T.

Sure

Can I tell you how I really feel?

S.M.

yes

K.T.

I'm scared to live because of what you did

S.M.

really oh my god

K.T.

I'm older now I understand what happened

S.M.

i'm so sorry

K.T.

I was a kid

I have to deal with it everyday and I hate it

S.M.

yes what can i do

K.T.

You've done enough

S.M.

sorry i will wont bother you again….

K.T.

That's it?

S.M.

no what do you want me to do

K.T.

You knew the whole time how wrong it was

I was 12 you think you didn't scare me for life?

S.M.

what can i do

K.T.

I don't think there's anything you can do

I just though I'd tell you how I felt

S.M.

im really sorry, it never happen to anyone else

K.T.

I don't believe that

S.M.

thank you for your honesty

its true

K.T.

Since I've answered all you questions over the years can you answer mine honestly

S.M.

ok

K.T.

You've never done it with anyone else?

S.M.

no one else

K.T.

What about [S] ? That's really direct but I'm curious

S.M.

no

no one else

K.T.

No what you can bE honest with me

S.M.

yes is this really you

K.T.

Ya

S.M.

ok

K.T.

What about [S] ?

S.M.

what do you mean

the answer is nooooo

K.T.

Alrite just think it would be Someone else other then me

S.M.

sorry

K.T.

For what

S.M.

just you

K.T.

Ok

S.M.

what now

K.T.

I don't know I'm just really confused

S.M.

what can i do to help you

K.T.

If u knew I'd tell you

It kind of hurts me

What would I of been like if it did t happen

S.M.

i'm not sure what di you think

K.T.

I'd be a better person

S.M.

in what way

K.T.

Id have more confidence

You have no idea what I've been through

S.M.

can you tell me

K.T.

It sucks big time

I feel like I'm locked in a box always In my head I think I didn't something wrong to deserve this life

S.M.

in what way…you always impressed me as someone who had everthing together

are there other factor

K.T.

Ya it's hard to process I think I'm a horrible person because of it I don't know what to think of myself

S.M.

your not, you're a great person….but you at stage in your life were your trying to figure what you want to do..it cause

you have great potential

K.T.

Ya plus what happens when I was a kid. I just want some closure so I can move on with my life

It's so hard trying to understand it

S.M.

What can i say to help you

K.T.

Nothing really I've been dealing with it for years

S.M.

do you want to get together and chat

K.T.

No

S.M.

ok

K.T.

Don you understand what I'm trying to say

S.M.

Yes i think so

K.T.

What do you think ?

S.M.

you want to move on

K.T.

Years ago

It hurts me

S.M.

ok

K.T.

You have a family my best friend was your daughter

S.M.

yes

K.T.

I have to tell you what's on my mind I have to get over it

S.M.

i know

K.T.

So can you tell me why you did this to me ?

[49] This appears to be the end of the conversation.

[50] The Crown and the accused submitted a Joint Exhibit Book at the outset of the trial, containing various exhibits, including statements by the accused and the complainant. The accused waived the requirement of a *voir dire* and admitted the voluntariness of his cautioned statement to the police. He took no issue with the admission of the statement into evidence and advanced no Charter argument in relation to it.

[51] The complainant's interpretation of these Facebook exchanges is that they were largely sexual in nature. Some of this content is directed at her current life, such as inquiries about her boyfriend; an example is "what about dating and bj and stuff when start … how many dates is that ok to ask." The complainant understood "bj" to be an abbreviation for "blow job." Other exchanges, however, were clearly referencing some form of past sexual activity between the accused and the complainant. I note the following details in particular:

> (1) In the context of the discussions, his description of the complainant's former boyfriend as her "second great love" implies a past "relationship";
>
> (2) He expresses the hope that "I haven't been a negative experience for you", to which she answers "I got over it." He goes on to say "was it that bad..sorry";
>
> (3) He repeatedly expresses a concern for the privacy of their communications, asking if it is really K.T. he is communicating with, suggesting moving to "J.s" Facebook account, and expressing concern about where her phone is located; as well as asking her to "delet [*sic*] this line of conversion [*sic*]";
>
> (4) He asks "do you remember the first time you saw my cock";
>
> (5) He says "I hope you didn't fell [*sic*] any pressure to do anything you didn't want to do", to which she says "no"; in another conversation he said, "we do have our secrets", followed by "have you every [*sic*] told anyone";
>
> (6) He says "cock who was your first", leading to an exchange during which he expresses surprise ("really oh my god") and apologizes ("I'm so sorry"). He makes no dispute when she says "You knew the whole time how wrong it was" and "I was 12 you think you didn't scare [*sic*] me for life." He adds "im really sorry, it never happen [*sic*] to anyone else." She says "You've never done of with anyone else? And he answers "no one else." She then asks "What about S., and he denies it; when she asks again, he says "what do you mean/the answer is nooooo".
>
> (7) The conversation eventually ends with K.T. saying, "You have a family my best friend was your daughter" and "I have to tell you what's on my mind I have to get over it." He answers "I know." The exchange ends with K.T. asking "So can you tell me why you did this to me." No answer appears on the Facebook printout.

[52] The accused was arrested at the airport on his return from a work trip to Brazil. In his police statement, the accused said little about the substance of the charges; he said "I'm innocent," then repeatedly said he would follow his lawyer's advice. When asked when he had last seen the complainant, he said "[m]aybe three weeks ago, I said hello to her at the University." Prior to that, he said, "I mighta met her on the street or something. That woulda been it." He denied having any other communication with her. When the Facebook conversations were put to him,

he admitted that he had two Facebook accounts, one under his own name and one at the university. He denied having an account in the name of J.M. He made no direct reply to Sgt. Routledge's statements of belief in the allegations, although he later said "no" to the allegation that "[y]ou got a relationship with her", after the Facebook conversations were put to him. He also denied knowing what was in the material being read to him; when Sgt. Routledge said, "[y]ou wrote it", he said, "[y]ou're assuming I wrote it."

[53] Other out-of-court statements, including those of the complainants and various others introduced by the defence in the course of cross-examination, are inadmissible as proof of the offences, and may only be used for impeachment purposes to establish inconsistencies between the statements and their trial evidence. They may not be used to corroborate or confirm evidence given at trial. I note that this exclusionary rule does not apply to statements of the accused (such as the Facebook messages), which are admissions, admissible against the accused, with weight to be determined by the court: see David Watt, *Watt's Manual of Criminal Evidence 2015* (Toronto: Carswell, 2015) at §36.02.

[54] Evidence that is otherwise hearsay may be admitted in some circumstances as part of the "narrative", so as to provide a cohesive account of how the matter came before the court. Paciocco and Stuesser make the following comments in *The Law of Evidence*, 7th edn. (Toronto: Irwin Law, 2015), at p. 539:

> … Ordinarily, when evidence gains admission as "narrative" it has no probative value on its own. It comes in simply as background information, received to permit witnesses to tell their stories naturally and to give the trier of fact the context to understand the admissible evidence…

[55] The authors go on to cite (at 540) the following passage from *R. v. J.E.F.* (1993), 26 C.R. (4th) 220, [1993] O.J. No. 2589 (Ont. C.A.), at para. 42:

> … To qualify as narrative, the witness must recount relevant and essential facts which describe and explain his or her experience as a victim of the crime alleged so that the trier of fact will be in a position to understand what happened and how the matter came to the attention of the proper authorities…

[56] The statements by the complainant to S.E., L.M., C.B., and to her mother are not narrative. In the case of S.E., the disclosure by the complainant was to do with moving on with their relationship. The disclosure to L.M. and the subsequent discussion at L.M. 's home were essentially concerned with an inquiry as to whether she had been touched by the accused, which I would not regard as proper

narrative. The statement to Ms. B. appears to be simply a recounting of the event, which would not be proper narrative. The statements to the complainant to her mother help to explain why she did not go to the police immediately after telling her; her evidence was that her mother told her not to tell her father and to move on with her life.

[57] The statement to social worker Helen Boone is narrative, as is that to Carrie Evely, the CBU therapist. These disclosure preceded the report to the police by a short interval, and help to explain how the matter came before the court.

Assessment of evidence

[58] I am mindful, of course, that the accused is to be regarded as innocent until proven guilty on a criminal standard. It is well-established that "while the Crown always has the burden of proving the essential elements of the offence(s) to a criminal standard, it is not required to prove every single piece of evidence beyond a reasonable doubt": *R. v. J.E.W.*, 2013 NSCA 19, [2013] N.S.J. No. 76, at para. 12. The majority of the Supreme Court of Canada considered what constitutes a reasonable doubt in *R. v. Lifchus*, [1997] 3 S.C.R. 320, which was summarized as follows by Warner J. in *R. v. Mosher*, 2007 NSSC 189, [2007] N.S.J. No. 275, at para. 5:

> 1. A reasonable doubt is not a doubt based upon sympathy or prejudice. Rather it is based upon reason and common sense.
>
> 2. It is logically connected to the evidence or absence of evidence.
>
> 3. It does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt.
>
> 4. More is required than proof that the accused is probably guilty; if he is probably guilty, I must acquit.
>
> 5. Proof beyond a reasonable doubt is closer to absolute certainty than it is to probable guilt.

[59] This decision will rest heavily on findings of credibility and reliability. I note the following comments of Rosinski J. in *R. v. A.G.P.R.*, 2011 NSSC 47, [2011] N.S.J. No. 102:

> 27 As to the assessment of the credibility of witnesses, while it is by no means an exhaustive list, I find useful the aspects cited, in no particular order, by Provincial Court Judge Clyde F. Macdonald in *R. v. D.L.C.* [2001] N.S.J. No. 554 at para. 8, where he said, in part:

> And I certainly keep in mind in this case, as well, that the task of finding the facts ... involves the weighing of the evidence but it is certainly not an exercise in preferring one witness is evidence over that of another. And of course, that's because the doctrine of reasonable doubt applies to the issue of credibility ...
>
> And I certainly keep in mind the test that I've indicated coming out of the Supreme Court of Canada. I'm going to indicate some aspects of a witnesses testimony that I find helpful and this determination is as follows. They are in no particular order:
>
> > 1. The attitude and demeanor of the witness. I ask whether the witness is evasive, belligerent, or inappropriate in response to questions and I keep in mind the existence of prior inconsistent statements or previous occasions where the witness wasn't truthful. Those are useful to me.
> >
> > 2. I consider the external consistency of the evidence. By that I mean, and by that I mean, is the testimony of the witness consistent with independent witnesses which is accepted by me, the trier of fact; and
> >
> > 3. I consider the internal consistency of the testimony. By that I mean, does the witnesses testimony or evidence change while on the stand.
> >
> > 4. I concern myself with whether the witness has a motive to lie or mislead the Court. I consider the ability of the witness to originally observe the event, to record it in memory and recall the event; and
> >
> > 5. Of course, the passage of time since the event in question is a factor in this regard. This is one factor in a lot of cases, and in this case, I find is most important.
> >
> > 6. I concern myself with a sense of the evidence. Does common sense, when applied to the testimony of the witness, suggest the evidence is impossible, improbable or unlikely? And what other results are there when I apply my common sense to the evidence?

28 As this list suggests, a witness' credibility is a mixture of their reliability; (are they accurately and honestly recalling or observing matters?) and impartiality; (are they disinterested in the outcome of the case and do not favour any party over another?)...

29 As to whether at the end of the case, on the evidence, the Crown has proved all the essential elements of these offences, I must always be mindful that Mr. R. is presumed innocent until found guilty by the Court. In cases such as this one, where the credibility of the witness is determinative, it is especially important to properly assess credibility in light of the presumption of innocence…

[60] I am mindful of the dangers of assessing reliability and credibility when a witness testifies about historic events. As Blair J.A. said, for the majority of the Ontario Court of Appeal said in *R. v. H.P.S.*, 2012 ONCA 117, [2012] O.J. No. 748:

> 34 Even if the complainant appeared to be "sincere," "truthful," and "honest" - as the trial judge noted several times throughout his reasons - and even if the complainant believed what she was saying, it does not follow necessarily that what she was saying was reliable. Credibility alone, in this sense, is not enough. This is particularly important where the accused is facing charges based entirely on allegations of historical physical and sexual abuse, and where also -- as here - there were serious reliability issues.
>
> 35 Memory is fallible. Courts have long recognized that even an apparently convincing, confident and credible witness may not be accurate or reliable and that it is risky to place too much emphasis on demeanour alone where there are contradictions and inconsistencies in the evidence... As Finlayson J.A. noted in [*R. v. Stewart* (1994), 18 O.R. (3d) 509] at pp. 516-17:
>
> > It is evident from his reasons that the trial judge was impressed with the demeanour of the complainant in the witness box and the fact that she was not shaken in cross-examination. *I am not satisfied, however, that a positive finding of credibility on the part of the complainant is sufficient to support a conviction in a case of this nature where there is significant evidence which contradicts the complainant's allegations*. We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. *The issue, however, is not the sincerity of the witness but the reliability of the witness's testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record*... [Citations omitted, emphasis by Blair J.A.]
>
> 36 Here, a regular theme in the trial judge's acceptance of the complainant's testimony was that she was "sincere," she was "honest," she was "doing her best to be truthful." But he does not appear to have focussed on whether her testimony was reliable or accurate. David M. Paciocco and Lee Stuesser describe the distinction between "credibility" and "reliability" in this context as follows in their text, *The Law of Evidence*, rev. 5th ed. (Toronto: Irwin Law, 2010), at p. 29:
>
> > "Credibility" is often used to describe the honesty of a witness. "Reliability" is frequently used to describe the other factors that can influence the accuracy of testimony, such as the ability of the witness to make the relevant observation, to recall what was observed, and to communicate those observations accurately.

[61] The Supreme Court of Canada reversed, at 2013 SCC 4, but nothing in the majority reasons calls into question these basic principles; see also *Watt's Manual of Criminal Evidence 2015* at §16.01.

[62] Where a witness testifies as an adult about events that allegedly occurred when she was a child, there are particular considerations. This subject was discussed in *R. v. R.W.*, [1992] 2 S.C.R. 122, [1992] S.C.J. No. 56, where McLachlin J. (as she then was) noted several recent developments in the law respecting young children's evidence. She pointed out that the common law view that such evidence was inherently unreliable no longer existed (para. 23). Secondly, the law now suggested that "it may be wrong to apply adult tests for credibility to the evidence of children" (para. 24).She concluded:

> 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.

[63] In *R. v. J.A.H.*, 2012 NSCA 121, [2012] N.S.J. No. 644, the appellant claimed that certain inconsistencies in the evidence that had allegedly not been resolved by the trial judge. Bryson J.A. said, for the court:

> 51 With respect, *J.M.M.* has no application to the facts of this case. J.M.M. involved the failure of the trial judge to reconcile the complainant's own testimony with her previous inconsistent statements, the statements of other witnesses and circumstantial evidence, all of which suggested that the sexual assaults could not have happened or happened in the ways alleged. Moreover, many of the serious allegations in J.M.M. occurred when the complainant was a teenager -- not nine as here or eleven, when M.H. testified. The court's expectations of the complainant's reliability were correspondingly higher in J.M.M., and the serious discrepancies in evidence material to the alleged offences, more problematic.

52 In *J.M.M.*, Justice Saunders described the type of very serious evidentiary contradictions which can attract appellate intervention::

> [70] I will refer to two cases to illustrate my point. Each appeal followed conviction at trial on charges of a sexual nature. In both, the appeals were allowed, the convictions set aside, and a new trial ordered because of errors made by the judge in assessing credibility and addressing the burden of proof. The first case is *R. v. R.W.B.*, [1993] B.C.J. No. 758 (C.A.) (Q.L.) where Rowles, J.A. found that the trial judge failed to properly address the issue of credibility or apply the rule of reasonable doubt to that issue. She observed:
>
> ...
>
> > 29 In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.
> >
> > 30 The trial judge characterized the evidence called on behalf of the accused as a "flat denial" and said "the rest of it is directed to the proposition that all of the time had been accounted for" and "that there would have been no opportunity for the accused to have done the things this young woman said he did." The trial judge went on to say that he was "really not that concerned about certain discrepancies, if they were discrepancies, in S.'s testimony" and that he was "not concerned because in my view such inconsistencies as were pointed out were upon the trivial side."
> >
> > 31 With deference to the learned trial judge, his characterization of the purpose of the defence evidence is inaccurate. The evidence as to timing was not, as the trial judge stated, directed simply to the matter of there not being any opportunity for the incident to have occurred, although that was part of it. The question of timing was important in this case, not only because of the limited opportunity in which the events the complainant described could have taken place, but also because of the lack of consistency between the complainant's evidence and the evidence of other witnesses. [Emphasis added by Bryson J.A.]

> 53 In this case, none of the alleged discrepancies touch the evidence of the offence itself. The trial judge was aware of them and mentions at least two of them in his decision (para. 50). None of the "discrepancies" renders M.H.'s evidence unreliable, internally inconsistent or contrary to other reliable circumstantial evidence, as in *J.M.M.*
>
> 54 The alleged conflicts between M.H. and B.N. are not on "key issues" (*R.E.M.*, para. 29) nor do they relate to facts on which the charges were based or the conviction founded. The judge did not misapprehend this evidence.

[64] The principles set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, are applicable where the accused testifies. As for situations where the accused does not testify but does lead evidence, Saunders J.A. said, for the court, in *R. v. J.M.M.*, 2012 NSCA 70, [2012] N.S.J. No. 364:

> 74 The question arises whether the approach urged in *W.(D.)* applies to cases where the accused does not take the stand in his own defence. In the present case the appellant did not testify. However, he did call evidence which was in direct opposition to the complainant's account. The Ontario Court of Appeal recently dealt with this issue directly. In *R. v. B.D.*, 2011 ONCA 51, Blair, J.A., writing for the Court, observed:
>
> > [114] What I take from a review of all of these authorities is that the principles underlying *W.(D.)* are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if - viewed in the context of all of the evidence - the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt: *Challice*. In that event, they must acquit.
>
> 75 I would, respectfully, adopt Justice Blair's analysis as a proper statement of the law on this point.

[65] The silence of the accused is not a basis on which guilt can be inferred; this would offend the presumption of innocence. However, the court is not required to ignore the accused's silence in all circumstances. In *R. v. Noble*, [1997] 1 S.C.R. 874, [1997] S.C.J. No. 40, Sopinka J. said, for the majority:

> 77 Some reference to the silence of the accused by the trier of fact may not offend the Charter principles discussed above: where in a trial by judge alone the trial judge is convinced of the guilt of the accused beyond a reasonable doubt, the silence of the accused may be referred to as evidence of the absence of an explanation which could raise a reasonable doubt. If the Crown has proved the case beyond a reasonable doubt, the accused need not testify, but if he doesn't, the Crown's case prevails and the accused will be convicted. It is only in this sense that the accused "need respond" once the Crown has proved its case beyond a reasonable doubt. Another permissible reference to the silence of the accused was alluded to by the Court of Appeal in this case. In its view, such a reference is permitted by a judge trying a case alone to indicate that he need not speculate about possible defences that might have been offered by the accused had he or she testified. As McEachern C.J.B.C. stated (at p. 171):
>
> > In other words, the court will not speculate that the accused may have some unstated defence, such as, in this case, that someone may have stolen his driver's licence.
>
> 78 Such treatment of the silence of the accused does not offend either the right to silence or the presumption of innocence. If silence is simply taken as assuring the trier of fact that it need not speculate about unspoken explanations, then belief in guilt beyond a reasonable doubt is not in part grounded on the silence of the accused, but rather is grounded on the evidence against him or her. The right to silence and its underlying rationale are respected, in that the communication or absence of communication is not used to build the case against the accused. The silence of the accused is not used as inculpatory evidence, which would be contrary to the right to silence, but simply is not used as exculpatory evidence. Moreover, the presumption of innocence is respected, in that it is not incumbent on the accused to defend him- or herself or face the possibility of conviction on the basis of his or her silence. Thus, a trier of fact may refer to the silence of the accused simply as evidence of the absence of an explanation which it must consider in reaching a verdict. On the other hand, if there exists in evidence a rational explanation or inference that is capable of raising a reasonable doubt about guilt, silence cannot be used to reject this explanation.

[66] Sopinka J. noted that "since these permissible uses only arise after the trier of fact has reached a belief in guilt beyond a reasonable doubt, the uses may be superfluous" (para. 90).

Criminal Code provisions

[67] The relevant *Criminal Code* provisions are ss. 271 (sexual assault), 151(a) (sexual interference), 152 (invitation to sexual touching), and 173(2) (indecent exposure). The indictment period on all counts is between January 1, 2000, and December 31, 2006.

[68] The elements of sexual assault were recently summarized in *R. v. G.S.*, 2015 ONSC 3728, [2015] O.J. No. 3391:

> 28 A sexual assault consists of four elements. Those are, first, an assault and, secondly, circumstances of a sexual nature. An assault is the intentional application of force by one person to another without the other's consent. An assault becomes a sexual assault when the assault is committed in circumstances of a sexual nature, such that the sexual integrity of the complainant is violated.

[69] At the relevant time, the offence under s. 151 was defined as follows: "[e]very person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years…" Section 152 made it an offence where a person "for a sexual purpose, invites, counsels or incites a person under the age of fourteen years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of fourteen years…" Subsection 173(2) made it an offence where a person "in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years…" Each of these three provisions has been amended to apply where the victim is under the age of sixteen years, since the indictment period.

[70] I note that s. 173(2) was an offence punishable on summary conviction during the indictment period; the indictment option was only added pursuant to S.C. 2010, c. 17, s. 2, effective April 14, 2011. Subsection 786(2) of the *Criminal Code* provides that "[n]o proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree." None of the offences charged fall within the six-month limitation period. Although the Crown suggests that the defence agreed – essentially by not raising the issue while agreeing to committal – I am not satisfied that this constitutes agreement for the purpose of s. 786(2). Accordingly, the s. 173(2) charge is a nullity.

Evidence and findings

[71] There were inconsistencies in the complainant's evidence. She admitted on cross-examination that some aspects of her trial evidence were inconsistent with evidence she gave at the preliminary hearing, as well as with aspects of the statements she had given to the police and others. She also agreed that certain

aspects of her trial evidence amounted to new particulars of alleged incidents that were not described in prior statements or at the preliminary.

[72] In argument, counsel for the accused sought to introduce the preliminary hearing transcript as an exhibit, apparently as evidence of inconsistencies in the complainant's evidence. The Crown objected to marking the entire transcript as an exhibit. The complainant had acknowledged inconsistencies between her trial evidence and her preliminary hearing evidence. Parts of the transcript were properly referred to for this purpose. In my view, marking took the transcript as an exhibit is unnecessary and serves no useful purpose. The *Criminal Code* contemplate the use of passages from the preliminary hearing for cross-examination on prior inconsistent statements (see, e.g., ss. 715 and 540(7)) and the *Canada Evidence Act*, R.S.C., 1985, c. C-5, sets out a procedure (see s. 10). The same principle would apply to other statements made by the complainant, such as those to K.T. and LM., and the statements of other witnesses. Otherwise, such evidence is simply hearsay.

[73] Given the complainant's admissions of the inconsistencies and additions in her trial evidence, there is no need to prove them by entering the entire preliminary hearing transcript. The evidence before the court is the evidence adduced at trial, including the evidence of inconsistencies illustrated by reference to statements made at the preliminary and acknowledged by the complainant.

[74] The following are the particulars of some of the inconsistencies:

> (1) In her statement to Ms. Boone in September 2013, the complainant stated that she started to perform oral sex on the accused when she was fourteen years old. However, at trial she testified that she stopped performing oral sex on him when she was thirteen.
>
> (2) At the preliminary, the complainant testified that during sleepovers, the accused only touched her vagina over her clothing, while at trial she stated that on one occasion he touched her vagina under her clothing.
>
> (3) The complainant stated for the first time at trial that on some occasions when he called her upstairs to bring his puffer or newspaper, the accused would be at the railing naked.
>
> (4) The complainant stated for the first time at trial that the accused would sometimes be wearing "Caper pants" when he measured the heights or her and the other girls.
>
> (5) At trial, the complainant testified that the oral sex at the door while delivering newspapers stopped when she was thirteen years old. On cross-examination, she

> said her recollection was that it stopped when she was twelve or thirteen. However, she agreed that in her statement to Ms. Evely she said she started delivering newspapers when she was about thirteen, and that the first time it happened was about a year after she started delivering papers, when she would be fourteen.

[75] There were also inconsistencies between the evidence of the complainant and that of her father in respect of his assistance to her in delivering newspapers. There were differences in their evidence in respect of deliveries to the accused and the different routes they delivered to.

[76] There were also inconsistencies, or at least potential ones, between the complainant and other witnesses. The complainant said she first saw the accused's penis when she, L.M., and E.M. were downstairs playing pool, when she was between seven and nine years old. However, the accused's wife, Mrs. M., said the pool table was only purchased in December 2003, by which time the complainant would have been ten years old. L.M. could not say whether the pool table was present before or after the renovations. Additionally, the complainant said some of the touching occurred when she was sleeping on the futon, which was purchased after the renovations. She said the sleepover stopped in 2004. However, Mrs. M. said the futon was not purchased until 2005.

[77] The inconsistencies in the complainant's evidence were similar in nature to – though, I believe, less serious than – those described by Bourgeois J. (as she then was) in *R. v. J.M.M.*, 2012 NSSC 382, [2012] N.S.J. No. 581. In that case, the weaknesses in the complainant's evidence, combined with the evidence of the accused, raised a reasonable doubt and led to an acquittal; Bourgeois J. commented that they led to the impression that the complainant "was making it up as he went along" (para. 31). I would not come to that conclusion here, however. Further, Bourgeois J. cited *R. v. D.D.S.*, 2006 NSCA 34, and the Court of Appeal's reference to *R. v. R.W.B.*, [1993] B.C.J. No. 758, where the British Columbia Court of Appeal spoke of assessing the "totality of the inconsistencies" in order to determine reliability, adding that "[t]his is particularly so when there is no supporting evidence on the central issue" (cited in *J.M.M.* at para. 17). In this case, however, there is supporting evidence on the central issue, that being the Facebook conversations.

[78] I am satisfied that the complainant is credible, notwithstanding the uncertainties and inconsistencies in her evidence. I am mindful that she is recalling events that occurred in childhood and early adolescence. Even where her evidence

on certain points is contradicted by the witnesses for the accused, it is supported on certain points by other evidence. For instance, the complainant's recollection of the accused wearing a robe is contradicted, with varying degrees of certainty, by his wife and daughters, but is supported by L.M. In other instances, her recollections may be mixing different points in time, as with the presence or the absence of the futon and the pool table. This does not lead me to a wholesale rejection of her evidence. Finally, I conclude that the admissions in the Facebook conversations are strong evidence supporting the complainant's general account of events. To be clear, I am satisfied that the messages were written by J.S.M., there is no evidence to suggest they were in any way altered, and they are clear evidence of sexual activity between the complainant and the accused when the complainant was a child. I am required to decide on the totality of the evidence. I need not speculate about possible defences the accused might have raised that are not supported by evidence.

[79] Based on my review of the evidence, I make the following findings of fact based on the evidence:

> (1) The complainant, K.T. , was born on […];
>
> (2) K.T. lived at [street address], Glace Bay, NS;
>
> (3) K.T. was a childhood friend of E.M.;
>
> (4) E.M. lived at [street address], Glace Bay, NS, with her sister, S.M., and her parents, J.S.M. (the accused) and Mrs. J.M.;
>
> (5) K.T. had occasional visits and sleepovers at the M. home between 2000 and 2006, with another friend, L.M., also present;
>
> (6) During sleepovers at the M. home, K.T. and L.M. would sleep in the basement, with the K.T. on a couch or futon, and E.M. on an adjoining couch;
>
> (7) During the school year K.T. and L.M. would frequently go to the M. home before school and wait in the basement with E.M.;
>
> (8) The accused, J.S.M. would sometimes ask K.T. , L.M., or E.M. to bring a newspaper or his puffer/inhaler to his bedroom;
>
> (9) K.T. started a newspaper route which included the M. residence when she started Grade 7 and continued until Grade 12;
>
> (10) K.T. had a Facebook account;
>
> (11) J.S.M. had two Facebook accounts: [e-mail address, and [e-mail address];
>
> (12) J.S.M. wrote messages to K.T. on his Facebook accounts;

(12) J.S.M. possessed an Apple MacBook Pro laptop computer, an iPhone, an iPad, and an external hard drive, issued by his employer, [employer's name];

(13) J.S.M.'s electronic devices were seized by Sgt. Ken Routledge at Sydney Airport on October 1, 2003, and sent for analysis to the RCMP forensic laboratory in Dartmouth, NS. The electronic devices seized from the accused were in the continuous possession of the Sydney Police from the time they were seized until they were analyzed by Cst. Bromley, a tech crime investigator with the RCMP;

(14) K.T. and J.S.M. exchanged Facebook messages, and K.T. deleted those prior to 2010 at J.S.M.'s request, while she saved messages between October 2010 and September 2013;

(15) Sgt. Routledge obtained a production order to obtain particulars of IP addresses and subscriber information in respect of J.S.M.'s two Facebook accounts. Facebook provided the police with IP addresses associated with the Facebook conversations;

(16) Sergeant Routledge obtained a production order requiring Bell Security to provide subscriber information. He provided Bell Security with the list of IP addresses. Bell Security confirmed that the IP addresses related to Glace Bay, NS, and provided subscriber information for the IP addresses, which were related to two Facebook accounts: [e-mail address], and [e-mail address]. The subscriber/owner was S.M., [street name], Glace Bay, NS;

(18) J.M., E.M., and S.M. had access to the accused's Facebook account under the name [e-mail address], including knowledge of the password;

(19) J.M., E.M., and S.M. viewed K.T.'s Facebook Wall and viewed photographs, but they did not write the Facebook messages found in Exhibits 1A and 2;

(20) The M.'s obtained a pool table for their home in December 2003, and renovations were done on the M. home in 2004, around the same time as they obtained a futon;

(22) J.S.M. owned a blue robe.

(23) On multiple occasions during the indictment period, the accused J.S.M. required K.T. to perform oral sex on him while she was delivering the newspaper to his home.

(24) On multiple occasions during the indictment period the accused J.S.M. came into the basement during slumber parties, lay down with K.T. on the couch (and later the futon) on which she was sleeping, and required her to stroke his penis, sometimes to the point of ejaculation; on one or more of these occasions he ejaculated into her mouth;

(25) On multiple occasions during the indictment period, the accused J.S.M. deliberately exposed his penis to K.T., as well as to L.M.

[80] While the accused himself did not testify, I believe it is appropriate to consider the *W.(D.)* analysis in this case; evidence was led on his behalf, and his police statement was in evidence. First, I would find that, to the limited extent that the police statement amounts to a denial of the complainant's allegations, I do not believe the accused. He appears to deny having any recent contact with the complainant, and, more particularly, attempts to deny knowledge of the Facebook communications. To the extent that he denies writing the Facebook messages, I do not believe him. Nor does his statement raise a reasonable doubt. Further, the additional evidence adduced on behalf of the defence is not sufficient to raise a reasonable doubt. Finally, not being left with a reasonable doubt by the defence evidence, I am satisfied of the accused's guilt beyond a reasonable doubt.

[81] Based on my findings of fact, I am satisfied that the offences of sexual assault, touching for a sexual purpose, and invitation to sexual touching are made out. I find the accused guilty of those offences. In particular, I conclude that the elements of each offence are established by the accused's actions during newspaper deliveries, and in his behaviour when he came down to the basement during slumber parties.

LeBlanc J.