**SUPREME COURT OF NOVA SCOTIA**
**Citation:** R v. A.G.P. R., 2011 NSSC 47

**Date:** 20110203
**Docket:** CRAD 324990
**Registry:** Annapolis Royal

**Between:**

Her Majesty The Queen

v.

A. G. P. R.

**Editorial Notice**

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

**Restriction on Publication:** Restriction on publication pursuant to s. 486.4 of the *Criminal Code*

**Judge:** The Honourable Justice Peter Rosinski

**Heard:** January 24, 2011, in Digby, Nova Scotia

**Oral Decision:** January 24, 2011

**Written Release:** February 3, 2011

**Counsel:** Lloyd Lombard, for the Provincial Crown
Darren MacLeod , for the Defendant

**By the Court**:

[1] This is the decision regarding A. G. P. R.. There is a Publication Ban in place.

**INTRODUCTION**

[2] Mr. R. has pleaded not guilty to two charges that at or near *, County of Annapolis, Province of Nova Scotia on or about October 24, 2008, that he did:

> 1. Commit a sexual assault on S.B. contrary to s. 271(1)(a) of the ***Criminal Code***; and
>
> 2. He did for a sexual purpose touch S.B., a person under the age of 16 years, directly with a part of his body to wit his hands contrary to s. 151(a) of the ***Criminal Code***.

[3] S.B.'s date of birth is October *, 1996. Whereas Mr. R.'s date of birth is September *, 1990. Mr. R.'s position is that these alleged violations of S.B.'s sexual integrity simply did not happen.

[4] S.B. testified that she was a friend of A. M.. On October 24, 2008 S.B. stayed overnight at A.'s house. Also present that night were A.'s mother, M. R., her partner P. and her son Mr. R., the accused in this case. In summary, S.B.'s evidence is that: Mr. R., at about 4 am in the morning, after everyone had gone to bed, entered A.'s room where A. was sleeping on her bed and S.B. was located on the mattress on the floor right beside that bed. Mr. R. undid S.B.'s bra and began touching her breasts. She did not consent to this. This lasted a short time and then he left for about two minutes. Upon his return into A.'s room, she pretended to be asleep. Mr. R. rolled S.B. from her back onto her stomach and put his finger inside her vagina. Then he licked her vagina. Lastly, he put his penis in her vagina and "*after four seconds or whatever*", he ejaculated onto her back and arm and then went into the bathroom area. S.B. did not consent to these sexual touchings either. S.B. woke up A. M., whose mother was alerted to S.B.'s complaint shortly thereafter. S.B. says she wiped the ejaculate off her arm and back with a t-shirt she had with her. Once awoken, M. R., she says, did some investigation of her own

into the complaint immediately, but as it was 5 am at that time, she suggested to S.B. that she remain at the house until daybreak, which S.B. did. S.B. returned home and told her father what had happened and he called the police shortly thereafter.

**EVIDENCE HEARD AT TRIAL**

[5] S.B.'s evidence consisted of her video taped statement to police, taken October 24, 2008 and entered as Exhibit 1 and the transcript resulting entered as Exhibit 2, which she adopted, both of which she adopted and authenticated as required by s. 715.1 of the ***Criminal Code***. S.B. also gave further direct evidence and was cross examined extensively. Defence and Crown Counsel agreed that the continuity of exhibits presented at trial was admitted to be proven.

[6] Constable O'Connor was the investigator and testified regarding the investigation by the RCMP of the allegations and what physical evidence was seized and obtained. She noted that S.B. was subjected to a sexual assault victim examination by Doctor Craswell, MD, October 24, 2008 at approximately 9:44 am. This is Exhibit 14 tendered by consent of both Counsel without the necessity of

Doctor Craswell's attendance, and similarly, the Exhibit 15 is the evidence, if you will, of Nurse Gillian Koens, who was also, by consent, admitted, and also consented to be absent. Constable O'Connor also gathered physical evidence with a view to having forensic DNA testing done on at least some of those items. She seized at the hospital, at approximately 1 pm on October 24, 2008, S.B.'s t-shirt, bra, pants, underpants, socks, sweater, hair braid and some paper from the floor. This is contained in her report as Exhibit 4. Entered as exhibits without dispute for the truth of their contents and continuity thereof having been admitted were:

Exhibit 3 - form 2 Sexual Assault History;

Exhibit 4 - form 4 Forensic Evidence Record. This is a collection of the physical evidence including the clothes and rape kit samples involved in this case;

Exhibit 5 - RCMP 2 page Property Report. This involved the explanation of the tagging of physical evidence with identification numbers;

Exhibit 6 - Case Chain of Custody Report;

Exhibit 16 - the t-shirt of S.B.;

Exhibit 17 - the underwear of S.B.;

Also entered as an Exhibit was Exhibit 23; a sketch of the interior of M. R.'s residence as drawn and authenticated, or testified to, by M. R. .

[7] In relation to the handling of physical exhibits by Forensic members of the RCMP, Counsel agreed, in addition to the continuity of their handling of the exhibits, to admit therein respective qualifications to perform the analyses and draw the conclusions they did and give opinions incidental thereto. That is:

Exhibit 7; the Affidavit and CV of Joselle Crain, Search Coordinator in the Evidence Recovery Unit;

Exhibit 8; Affidavit and CV of Shauna Post, Forensic DNA Analyst in the Biology Analysis Unit;

Exhibit 9; Affidavit and CV of Louise Cloutier, Forensic DNA Analyst in the Biology Analysis Unit;

Exhibit 10; Affidavit and CV of James Scott, Forensic DNA Analyst in the Biology Analysis Unit;

Exhibit 12; Affidavit and CV of Marie-Josée Villeneuve, Laboratory Attendant responsible for the receipt possession, transfer and disposition of all exhibits at the RCMP Case Receipt Unit in Ottawa, Ontario.

[8] I should note that the above noted admissions by Counsel were greatly appreciated by the Court, as it allows the Court to focus on the material controversies in this case. In light of those admissions, the Crown presented its expert witness, Michelle Fisher, whose qualifications as "*Reporting Scientist*" for the RCMP and as supported by her CV and reports at Exhibit 11, were consented to by both Counsel. Miss Fisher testified as to the interpretation of the DNA data, comparisons of DNA profiles, particularly as between the crime scene samples and known samples and whether such comparisons yielded "matches" so called. Also, to the statistical significance and importance of such matches and she also commented on the reports done by the other RCMP staff, whose Affidavits, CV's and reports were in evidence, and who reported to her. Miss Fisher's evidence in summary was, in my view, as follows. We also can find her summarized report at pages 12, 13 of Exhibit 13 which is a June 21, 2010 a letter to the Crown Attorney's office.

[9] The following items of S.B. were examined for the presence of DNA:

> Exhibit PE2 t-shirt;
>
> Exhibit PE5 underwear;
>
> Exhibit PE11 swab of stains from her body;
>
> Exhibit PE16 vaginal swab;
>
> Exhibit PE17 vaginal pool;
>
> Exhibit PE19 anal swabs; and
>
> Of course, the police had available to them, PE13 which was a known sample of S.B.'s DNA.

[10] Two reports were generated; the first being dated March 27, 2009 found at page 67 of Exhibit 11. As to Exhibit PE2, the t-shirt, which was described as *"one Roots large white t-shirt"* page 85, Exhibit 11: There was a positive preliminary test for semen using the "fast blue" test on the four by five centimetre patch of the t-shirt, which was then reduced to an area referred to as 1-aa, the outside left back. As to PE5, the underwear, there was a positive preliminary test for semen as well,

and again, in an area identified as 2-aa. Regarding PE 11, the swab from the body, no semen was found and it was a negative preliminary test. As to PE16, the vaginal swab, there was a positive preliminary test for semen. As to the vaginal pool, PE17, no semen was found, there was a negative preliminary test. As to PE19, the anal swab, similarly, no semen found. Negative preliminary test. After the positive test for semen on area 1-aa of PE2, the t-shirt, but having found no presence of actual semen detected by further preliminary testing, Miss Fisher requested a re-examination of PE2, which resulted in the second report dated June 22, 2009. In the second report, found at page 97 of Exhibit 11, the results were as follows regarding PE2:

> There was a positive preliminary test for semen using the "fast blue" test, for an area characterized as 1-ab, being the remainder of the four by five centimetre piece of cloth from which the trial exhibit 1-aa was removed, remained and was tested on February 9, 2009. See page 88 Exhibit 11. [my paraphrasing]

[11] In relation to the conclusions of each of these reports, they are as follows:

1. The first report concluded that, in relation to DNA testing on the t-shirt, Exhibit PE2, in area 1-aa "*no human DNA was obtained*". Page 68 Exhibit 11. As to the underwear, Exhibit PE5 and the vaginal

swab, Exhibit PE16, they were found to have DNA that matched the known sample of S.B. in PE13, but that "*no male DNA was detected*." Page 68 Exhibit 11.

2. In the second report, the conclusion was as follows:
Respecting area 1-ab, that being the remainder of the garment cuttings from the t-shirt: "*no human DNA was obtained*." Page 97 Exhibit 11.

[12] As to the testing methodology, Miss Fisher testified that for detecting semen, different tests are used for garment and non-garment physical evidence. For garments, where there's suspected sperm present, the testing goes through four stages. One, visual examination by the naked eye. Two, the "fast blue" test, where, if the testing is negative, the testing ends. Whereas if it's positive, the testing will continue on to the next test, which is the microscopic examination, and lastly, the P30 test (Page 146 line 17 of the transcript). In so far as non-garment items, and this would include, she suggested, vaginal swabs, etcetera, for suspected sperm presence (see pages 153 to 155 of the transcript) the testing was similar. One, the "fast blue" test. She noted that even if it was negative they would carry on to do all three preliminary tests; therefore they would also continue on to do the microscopic examination. Thirdly, the P30 test, and only if all three were negative would no DNA testing be done.

[13] What conclusions can one draw from a positive preliminary screening test for semen? Miss Fisher testified no final conclusion can be drawn because the tests may also indicate the presence of other triggering materials than only semen. That is, a positive “fast blue” test also can be triggered, by the presence of the following:

> Some vaginal secretions;
> Fungus;
> Spermicidals;
> Faecal stains; and
> Some lye soap residue.

[14] Similarly, a positive P30 test can also be triggered by the presence of non-semen related items such as:

1. male urine;
2. female breast milk;
3. estrogen treatment drugs;
4. also drugs used for men having prostate cancer; and
5. antidepressant medications.

[15] Therefore, in spite of a positive preliminary test for the presence of semen, Miss Fisher's evidence suggests that there is no physical evidence present, as would otherwise be suggested by S.B.'s testimony; that is:

> No male DNA as carried in semen onto the skin, arm or back of S.B.;
> No semen on the shirt with which S.B. wiped off the ejaculate;
> No semen present in her vaginal pool or swab; and
> No semen present on her underwear.

[16] In the case at Bar, because the "fast blue" test was positive for semen on the t-shirt, underwear and vaginal swab, all these exhibits were sent on for DNA testing. The swab from S.B.'s body did not produce a positive result after screening tests, so it was not sent on for DNA testing.

[17] At trial these possible explanations were mentioned which could account for the failure to find human male DNA on or in the exhibits, but yet still be consistent with a sexual assault as testified to by S.B.:

1. The swabs from S.B.'s body, the **arm and back** may not have shown male DNA or semen residue because:

(a) S.B. showered at home between the time of the alleged assault and her attendance at the hospital where the swabs were taken; and

(b) Even if Mr. R. ejaculated, DNA may not have been present in his semen if there were no sperm present, and that may be the case where:

(i) if he has had a vasectomy, or certain illnesses that reduce or wipe out the presence of sperm;

(ii) negligible amounts of sperm present if after multiple ejaculations in a short sequence sperm presence was exhausted temporarily.

Moreover, according to Miss Fisher, although Locards' Exchange Principle suggests that "*every contact leaves a trace*" thereof, sometimes we cannot detect DNA presence due to scientific limitations. In the case at Bar, this may be possible where the ejaculation took place after only a four second vaginal penetration and Mr. R.'s immediate withdrawal of his penis was such that the significant amounts of ejaculate were deposited on S.B.'s arm and back area.

2. Miss Fisher's above noted observations could also explain why there was no human DNA or semen with sperm content found in the **vaginal pool and swab**.

3. There was no direct evidence in testimony that suggested there should be any DNA semen residue on S.B.'s **underwear**.

4. In spite of admissions regarding the continuity of the physical exhibits, once seized at approximately 1 pm October 24, 2008, it was suggested at one point in S.B.'s testimony that the **t-shirt** seized at that time may not have been the same shirt she used to wipe off the ejaculate from her arm and back. It is now agreed by Counsel and clear that, from the evidence, Exhibit 16 is in fact the t-shirt that S.B. used. Miss Fisher concluded in her testimony, since no human DNA was found on the samples of the t-shirt, PE2, being items 1-aa and 1-ab, either the triggering substance on the preliminary testing, or screening tests, was not semen or was semen but negligible or no sperm cells or skin cells were present. As to why no human DNA was found on any of the exhibits in the case at bar, if there was ejaculation, she stated, "*I cannot come to a conclusion*" as it was beyond her realm of expertise.

[18] Now what did S.B.'s evidence specifically reveal about her taking a shower after the alleged assault and which shirt she used to wipe off the ejaculate? According to S.B.'s testimony one might expect to find residue of Mr. R.'s semen, possibly DNA from sperm cells, on:

1. her arm and back;
2. her t-shirt.

[19] S.B. testified, and I accept her evidence **standing on its own** in this regard, that:

1. It was really hot in the home that night, because the stove was on among other things;

2. She wore to bed only a bra, gym pants and underwear and socks;

3. Only after the second assault did she put her t-shirt, Exhibit 16, on and then only put it over her tank top and bra;

4. She left her tank top at home before going to the hospital in the morning of October 24, 2008 and it became ineligible (after it was laundered) for testing as a result;

5. She showered at home before going to the hospital in the morning of October 24, 2008;

6. She did use Exhibit 16 t-shirt to wipe wet ejaculate off her arm and back.

[20] Some of the reasons why I found S.B.'s evidence credible, on these points was:

1. Her attitude and demeanor suggested she was not testifying with an axe to grind against Mr. R., nor did she give the affect of disinterest as if nothing had happened and she was fabricating testimony;

2. Secondly, her evidence was internally consistent on important points and inconsistencies in her evidence generally were few and minor;

3. Her evidence was detailed and made sense. For example, although this was in her statement, but again, as an example, and though not in Court, she was asked, on page 11. The question is:

> *So he came in twice into the room. The first time when he came in you said he was touching you. Can you tell us more about that? What? Where was he?*
>
> *Answer: He undid my bra and then he, he touched my boobs. Then he just started talking to himself. I don't know what he was saying though, and then he's...He tried to take my pants off that time, but he couldn't because I was leaning. Like I was laying down wrong so he couldn't get them off and then he tried rolling me over, but he couldn't and then I moved my leg and then he just went back to his room and he was touching my arms and stuff. He saw my ring and then I thought he was going to try and steal it, but then he just went like this to me...[she gestures in the video]...and then just like, I think he said 'calm down' and stuff.*

I point out that excerpt, not for the sexual activity, but the reference to the comment "*he saw my ring and then I thought he was going to try and steal it*".

4. Fourthly, I recognize however, that two years have passed since the incident to which S.B. testified, and her memory may have lapsed on that account on minor matters.

**DEFENCE EVIDENCE**

[21] **M. R.** testified. Her date of birth is October *, 1973. She testified that:

> .... her daughter, [A.], is the same age as S.B.. S.B. had not overnighted there before. Exhibit 23 is a generally accurate, not to scale diagram of the interior of her home. Although she went to bed at 12:45 am she woke up at about 3:15 to 3:30 am and slept again thereafter only off and on until [A.] and S.B. came into her room at about 4:55 am to disclose S.B.'s allegation. She confronted Mr. R., who had been asleep. He denied doing anything. She examined the bed sheets and shirt upon which she would have expected ejaculate to be visible to the eye, but could not see anything unusual, nor feel anything to the touch other than a rust stain she observed. Although S.B. wanted to go home at 5:30 am she persuaded, Miss R. persuaded S.B. to stay until 8:30 am when S.B. walked to her home, which is "*three houses up the road*" and a five to six minute walk. S.B. had a white t-shirt on and pyjama pants when Miss R. tucked the girls in that night at 11 pm. S.B. had the same outfit on at 4:55 am although she conceded S.B. could have had a tank top on underneath the t-shirt. The pyjama pants were different than the "pants" S.B. had on when she arrived at the house that day. The door to Mr. R.'s room scrapes, and scraped, when opened making noise. She noted, only a blanket hung in the open doorway of [A.]'s room that night.

[22] Generally speaking, I found Miss R.'s evidence to be given in a forthright manner. She was not shaken on cross examination, and I conclude her evidence is credible.

[23] **Mr. R.** also testified:

> He knew S.B. from seeing her on the bus, her hanging around with [A.] and from him being at S.B.'s brother's house to play video games. On October 24, 2008 he says that in response to his question as to whether S.B. was going to be staying the night, S.B. answered to him "*don't be coming into the room and touching me*". He did not have much contact with S.B. that evening before everyone went to bed. [A.] and S.B. had gone for a bike ride at one point before she made the response to his question about whether she would be staying overnight. He went to sleep, he says, at some time not long after 10:30 pm and the next thing he remembered was his mother waking him and confronting him about S.B.'s allegations. He went back to sleep and woke up after S.B. had left the house. On cross examination he repeatedly answered "*I never left my room that night*". He claimed that he did not masturbate himself in the three days prior to, or on the day of, October 24, 2008. He noted the door to his room is impossible to open without making noise, such that "*the whole house would hear*."

[24] Although not generally shaken on cross examination, I did find Mr. R. contradicted his mother's credible evidence in one respect. Mrs. R. testified that the DVD in the livingroom of the home was broken that day; whereas he testified that he took the DVD from the livingroom into his bedroom so he could get away from the S.B. and A. who were being too loud and so he could watch a movie, which he said he did. I carefully followed his evidence as he gave it and found it guarded and less than spontaneous without obvious reason, but I would not go so far as to say that it was not plausible. For example, he was reluctant in revealing the extent of his prior contact with, S.B. at her brother's residence, but offered up, in direct examination, that S.B. said to him "*don't be coming into the room and be touching me.*" I do not believe she said any such thing to him. I note, she was not

asked about this. It may have been just through oversight and so she was never given an opportunity to respond to that suggestion. Nevertheless, with minor exceptions, his evidence **standing on its own**, is plausible. It is **capable of** raising a reasonable doubt.

**RELEVANT LAW**

[25] If what S.B. says did happen, and is found to be so beyond a reasonable doubt, then both the offences under section 151 and 271 here are proved beyond a reasonable doubt. The Defence here is in outright denial. Credibility of the witnesses is a key concern in the analysis of whether the Crown has proved the essential elements of these offences beyond a reasonable doubt.

[26] I keep in mind the provisions of the ***Criminal Code*** regarding the essential elements of each of these offences including sections 150.1(2), 151, s. 265, 271, 273.1 and 658(1) regarding proof of age, as well as the following cases from the Supreme Court of Canada:

*R. v. Ewanchuk*, [1999] 1 SCR 330

*R. v. Chase* [1987] 2 SCR 293

[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. DLC* [2001] NSJ 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?) I also keep in mind that S.B. was just 12 years old on October 12, 2008, and the way a Court should approach the evidence of children is set out in the Supreme Court of Canada decision *R. v. RW* [1992] 2 SCR 122 at paras. 26 to 29, I believe it is, per McLachlin, J. as she then was.

[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. The Supreme Court of Canada has spoken in several cases about how this assessment should be done by trial Judges and juries: *R. v. DW* [1991] 1 SCR 742 and *R. v. JHS* [2008] 2 SCR 152. Recently our Court of Appeal has commented on how such assessments should be done in circumstances where there are no other direct witnesses to the alleged sexual assault and thus, the only direct evidence of the assault comes from the complainant. This is *R. v. EMW* (2010), NSCA 73, for which Leave to Appeal to the Supreme Court of Canada was available as of right, and the hearing has been inscribed for the Spring 2011 term of the Supreme Court of Canada.

[30] Nevertheless, in paras. 54 and 112-14, the Majority opinion in that case and the Dissenting opinion **agreed** that the trial Judge, Provincial Court Judge Jamie Campbell, correctly stated the law regarding the proper analysis of credibility under DW in cases such as the one at Bar. Judge Campbell's analysis is more

detailed in structure than one normally sees, but was prompted by a legitimate concern on his part to determine:

1. What happens if a believable complainant's testimony is the only basis for possibly rejecting an accused's testimony?

2. Can the testimony of the complainant ever be relied on as the only basis for disbelieving the testimony of an accused's in a criminal trial?

[31] To these questions Judge Campbell responded with a decision tree analysis at para. 52 of his Decision. And it was as follows:

A *He must be found not guilty if his evidence is "believed". His evidence can only be "believed" after considering it in light of all of the evidence. If he is believed it means that his evidence is, itself, enough to establish reasonable doubt.*

B *He must be found not guilty if the evidence of the two witnesses is equally believable. In that case, reasonable doubt may have been found in the extent to which a reasonable doubt remains as to the complainant's evidence, or in the extent to which the accused's evidence has raised a reasonable doubt.*

C *He cannot be convicted simply if her evidence is believed [standing] on its own without being tested by his evidence. That fails to consider the extent*

> *to which believed evidence still leaves room for reasonable doubt. It also marginalizes the accused by failing to even consider his evidence.*
>
> D *He cannot be convicted simply if, having tested the evidence of each by the evidence of the other, her evidence is preferred or found to be more believable or even much more believable than his. That is not consistent with the standard of proof beyond a reasonable doubt. It fails to consider the extent to which the evidence has been accepted as more reliable or credible may still contain an element of reasonable doubt. It also fails to consider the extent to which evidence that is found to be less credible or reliable is not absolutely disbelieved. It may still support a reasonable doubt.*
>
> E ***He can be found guilty if, after testing the evidence of each against that of the other, the evidence of the complainant has not only been preferred, but has displaced any reasonable doubt that could be found in any of the evidence as to any essential element of the offence***. [my emphasis added]

[32] Now I realize in this case, we also have potentially corroborating forensic evidence, or the absence thereof, and which, when expected to be present, may also be evidence that I may consider. I pause here to make one observation about the probative value of DNA evidence and the burden of proof associated therewith. As the Ontario Court of Appeal said in *R. v. Paul* (2009), ONCA 2184 or [2009] O.J. 2184 at para. 33:

> The burden of proof applies to the entirety of the evidence and not to individual pieces of evidence, unless, of course, proof of an essential element of an offence depends entirely on a single piece of evidence.

[33] In the case at Bar, the conclusion that Mr. R.'s DNA was on or in any of the seized police exhibits from S.B., could be determinative of his guilt. It certainly would be determinative if the DNA could be proved to have originated from the presence of Mr. R.'s sperm. In such circumstances the Ontario Court of Appeal suggested the burden is on the Crown to prove beyond a reasonable doubt that the seized exhibits contain Mr. R.'s DNA. Although, the sentiment that a single piece of evidence, such as a confession, has to be proved beyond a reasonable doubt, because it is determinative of guilt [See the Supreme Court of Canada decision *R. v. ARP* [1988] 3 SCR 339 at para. 71] is understandable in that context, because DNA evidence, though powerful, does have limitations generally and may have specific limitations in any given case, I will apply the usual burden of proof to the DNA evidence in this case. That is, on the balance of probabilities.

**CONCLUSION REGARDING THE FORENSIC EVIDENCE**

[34] I found S.B. to be a credible witness generally. I am inclined to believe her testimony that she used Exhibit 16 to wipe ejaculate off her arm and back, that she showered at home before going to the hospital and that she was wearing a tank top under her t-shirt, which she only began to wear to bed after Mr. R.'s second visit to assault her.

[35] The difficulty I have is not in understanding why there is no male DNA in her vaginal pool or swab samples, or on her body after showering before her physical examination at the hospital, **but** why there is no human DNA on the t-shirt she identified as being the one which she used to wipe Mr. R.'s ejaculate off her arm and back?

[36] Miss Fisher was of the view that if Mr. R.'s semen contained sperm in more than negligible quantities, then if he ejaculated on Exhibit 16, the t-shirt, forensic testing should have revealed human male DNA thereon, if and only if, his semen contained sperm which carry DNA. That is, I understand that virile males may have no DNA present, no sperm present in their semen for various reasons, some of which Miss Fisher listed in her evidence. Thus the absence of Mr. R.'s DNA on the t-shirt is not conclusive; however, if he is shown to normally have sperm in his

semen, then the absence of any of Mr. R.'s DNA on the t-shirt is meaningful and probative.

[37] Exhibit 24 was entered by consent for the truth of its contents, subject to some qualifications which, while generally noteworthy, do not in my view diminish the conclusion of the testing, which establishes that Mr. R.'s semen contains sperm and did so, by inference, on October 24, 2008. No male human DNA was found on the t-shirt in locations that S.B. had indicated should show traces of semen and DNA. I must conclude that there is no male DNA, and none specifically from Mr. R. on the t-shirt, and that I would, generally speaking on the evidence **in this case**, otherwise have expected his DNA to be present on the shirt.

[38] Having said that, I acknowledge that there was no expert evidence specifically on this point after the December 6, 2010 testing was available information. Thus, there was no answer to the question: would an expert expect Mr. R.'s sperm count to be sufficiently high and in the circumstances otherwise, such that they would expect detectable sperm samples to be present on the t-shirt, Exhibit 16.

**CONCLUSION: SUMMARY OF MY FINDINGS ON CREDIBILITY**

[39] In answer to Judge Campbell's decision tree analysis from EMW at para. 52, I supply the following answers in this case:

1. I do not believe [on a balance of probabilities] Mr. R.'s evidence in light of all the evidence.

2. I do not find Mr. R.'s evidence to be equally believable to that of S.B.'s [but it is] **capable of** raising a reasonable doubt standing on its own.

3. I believe S.B.'s evidence standing on its own. That is not however, tested against all the evidence in this case. As I said earlier, her evidence has "ring of truth" about it.

4. However, after testing the evidence of S.B. and Mr. R. against each other, and in light of all the other evidence in the case, including the forensic evidence, although I am gravely suspicious about Mr. R.'s conduct on October 24, 2008, I cannot conclude that the Crown has proved beyond a reasonable doubt that these offences happened.

Therefore, I must find Mr. R. not guilty and acquit him of both charges.

**J.**