

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. E.R.L., 2011 NSSC 329

**Date:** 20110729

**Docket:** CRH 330641

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

E.R.L.

**Restriction on publication:** Section 517 of the *Criminal Code of Canada* ban on publication in effect

**Editorial Notice**

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

**Judge:** The Honourable Chief Justice Joseph P. Kennedy

**Heard:** July 4, 5 and 6, 2011, in Halifax, Nova Scotia

**Oral Decision:** July 29, 2011

**Written Decision:** August 29, 2011

**Counsel:** Paul Carver and Michelle James for the Crown  
Kelly J. Serbu for the accused

**By the Court:**

[1] Good afternoon, counsel, ladies and gentlemen.

[2] We're back in the matter of The Queen v. E.R.L.

[3] Firstly, I'll say what I perhaps should have said earlier, that I want to thank counsel for the way this matter was presented. These cases are difficult and I was completely satisfied with the manner in which counsel put this case forward - the case is well before this Court.

[4] E.R.L. stands charged on four counts - the other thing I'll say is that it's going to take some time to give this oral decision - it is really too long for an oral, but this is the best and the most efficient way to get it done. Otherwise, it would have taken much longer to have completed a written decision and have it go out. Obviously copies of this oral decision will be made available expeditiously on request.

[5] So, it's the matter of The Queen v. E.R.L. - four counts. I will read those counts into the record quickly.

[6] E.R.L. is charged that he did between the 1<sup>st</sup> day of August, 2005 and the 14<sup>th</sup> day of April, 2008 at or near Dartmouth, unlawfully commit a sexual assault on M.C.E.G., contrary to s. 271(1)(a) of the *Criminal Code*. That's count number one.

[7] Count number two - and further that he did at the same time and place - that being Dartmouth, Nova Scotia - he did for sexual purposes touch M.C.E.G., a person under the age of fourteen years, directly with a part of his body contrary to s. 151(a) of the *Criminal Code*.

[8] Count number three - that he did at the same time and place - Dartmouth, Nova Scotia - between the 11<sup>th</sup> day of April, 2008 and the 14<sup>th</sup> day of April, 2008 unlawfully commit a sexual assault upon K.P.C.G., contrary to s. 271(1)(a) of the *Criminal Code*.

[9] And finally, count four - and further at the same time and place - that's Dartmouth - between the 11<sup>th</sup> day of April, 2008 and the 14<sup>th</sup> day of April, 2008,

did for a sexual purpose touch K.P.C.G., a person under the age of fourteen years directly with a part of his body, contrary to s. 151(a) of the *Criminal Code*.

[10] E.L., the Defendant, was married to the maternal grandmother of the complainant children - the two complainant children - so that he had access to those children when they would visit their grandmother.

[11] The children, M. and K., are twin girls born July \*, 2000. At the time of the trial they were 10 years of age.

[12] M.G. testified she is the mother of the two children, K. and M. She testified that on April 13<sup>th</sup>, 2008 she was giving her daughter K. a bath. K. was seven years old at the time. The child became emotional, began to cry, complained about being sore, and told her mother, words to the effect, that E.L. had touched her inappropriately the night before.

[13] The mother subsequently questioned the twin daughter, M., and this child also complained of improper touching by E.L. In the case of M., suggested that it happened on a number of occasions over a period of two or three years.

[14] As a result of those statements by those children the police were eventually contacted and interviews were conducted - videotaped interviews by a police officer and social worker, and after those interviews were accomplished these charges were laid.

[15] Both children gave these video recorded statements. The statements were given on April 24<sup>th</sup>, 2008 - it would be eleven days after the complaint to the mother. The children were seven years of age at the time of the videotaped interviews.

[16] I had *voir dres* - we held *voir dres* specific to those videotaped interviews and I determined after those *voir dres* pursuant to s. 715 of the *Criminal Code* that these video statements could be presented - could be incorporated as part of the prosecution evidence.

[17] Both of the children, now ten years of age, testified and they were cross-examined on their video statements as well as the evidence that they gave before this Court, so there was lots of opportunity for cross-examination. Both of the

children identified those videos, accepted those videos and as a result, pursuant to s. 715 they became part of the Crown's case.

[18] I am first going to address the charges specific to K.G. - charges three and four of the Indictment. These charges relate to the events of April 12<sup>th</sup>, and to an extent - April 13<sup>th</sup>, 2008.

[19] As indicated the child's mother, K.'s mother, M.G., testified. She said that on the late afternoon of April the 12<sup>th</sup>, 2008 she was stricken with severe gallbladder pain so she contacted her mother, P.B. She asked her mother to come and take her to the hospital and to make arrangements for her children to be looked after - the children being the twin girls who are the complainants in this matter and their brother. As a result of that call, her mother, the children's grandmother P.B., takes her daughter to the \* Hospital and on the way delivers the children to her own home - the grandmother's home - where her then husband, the Defendant, E.L., has agreed to mind the children while his wife and her daughter are at the hospital.

[20] So the children are with the Defendant, E.L., April 12<sup>th</sup>, 2008, being looked after by the Defendant from approximately suppertime on that day until about 11 or 11:30 p.m. when the grandmother - his wife - comes back to her home from the hospital with her daughter. She immediately puts her daughter to bed - she is still not recovered, she has been medicated, she's not recovered from the gallbladder incident.

[21] Let me speak to what K. says in her video statement about what happened while she was with E.L. on that day. I did not swear K. - I accepted her promise to tell the truth. As indicated she, at the time of trial, was ten years old.

[22] I'm going to have to quote extensively from the videotape statements. I believe it's necessary in order to make findings in relation to the matter and I ask you to bear with me.

[23] K., in her statement which was given 10-11 days later on April 24<sup>th</sup>, 2008 - seven years of age - speaking to Constable Stephanie Carlisle, Halifax Police - Metro Police - this is what she says and I will be, as counsel will quickly discern, skipping through various portions of the statement - portions that I consider to be relevant to the issue.

[24] Page 8 of the transcript that was prepared of that statement. I'll start with line 13 (this is the police officer asking the questions):

Q. And why are you here today to talk to us?

A. To talk about what happened.

Q. Okay.

A. When I was at Nanny P.'s.

K. and her sister M. often referred to their grandmother as Nanny P. - apparently as a result of a previous marriage, but at any rate when they're speaking of Nanny P., I'm satisfied they're speaking of P.B..

Q. Okay. What happened?

A. Well at nighttime, E. was in bed.

Q. Uh-huh.

A. Like, not in his own bed.

Q. Uh-huh.

A. He has this couch up to that thing and we were in there, me and M., and so was E..

Q. So you and M. and E. were in the pull-out - the couch thing?

A. Uh-huh.

Q. Okay, and then what?

A. Well, then a couple of minutes later we were watching TV at first when he set up the bed, and the TV was still on when were [sic] . . . and I was sleeping and I woke up and I saw M. watching TV.

Q. You woke up and what?

A. I saw M. watching TV ...

Q. Uh-huh.

A. ... because they TV was on and I was watching TV too.

Q. Uh-huh.

Line 13:

A. E. touched me right here.

And at that point on the videotape I noted that the child, the child K., was pointing to the area of her lap - a seven year old child at that point.

Q. Right where?

A. There. (Points to the lap area.)

Page 9, lines 18 and 19:

Q. Can you stand up and show me?

A. Like, when you go to the bathroom and it comes out. That part.

Q. Okay. What do you call that part? Do you have a name for that?

A. No, no, I don't.

Q. What do you call that in your house? What would your mommy call it?

A. We just say like it's an ...

Q. So he touched you where your pee comes out? Is that what you said?

A. Yes.

That question is obviously a leading question, but I do make reference to line 18 when the child said, without a leading question in reference to where she had been touched, she says "Like, when you go to the bathroom and it comes out. That part". I do though point out again, at p. 10, line 1 and 2, "So he touched you where your pee comes out? Is that what you said?" - that question is leading. Answer: "Yes".

Q. Okay, and where were you when this happened?

A. I was at Nanny P.'s house when that happened.

Q. At Nanny P.'s house?

A. (Nods "yes".)

Q. Okay.

A. Because Mommy was at the hospital because at first she had a cramp in her back.

Q. Yeah.

A. And she was so painful and she went to the hospital. So we had to stay at Nanny P.'s house for supper.

Q. Uh-huh.

A. We were watching a movie.

I go to p. 12 of the transcript, line 1:

Q. Okay. So when E. touched you, was that before Nanny and Mommy came home from the hospital or after?

A. That was, like, before.

Q. Okay. Okay, and how long do you think he was in the bed with you guys?

A. He was in the bed till Nanny G. came, until Nanny G. told him to go to his own bed in the spare room ...

"He was in the bed until Nanny G. came, until Nanny G. told him to go to his own bed in the spare room" - I'm satisfied that Nanny G. and Nanny P. are the same person.

Q. So your Nanny told him to go to his own bed?

A. Uh-huh, and then he said, Can you please move over, because he wanted to try and get in.

Q. He said, Can you please move over?

A. Yes.

Q. And he wanted to try to get in where?

A. In the bed.

Q. Did you move over?

A. No, I said, Go back to your own bed.

Q. Okay.

I do want to point out that at the preliminary, it was pointed out that K. said that he did go back to his bed - oh I'm sorry - she says in the video statement that he did not get into the bed, that she did not move over and she said to E.L. "Go back to your own bed". At the preliminary, she testified that he did get into the bed and then again at trial, she said that he did not.

Line 20:

A. And then in the morning we had breakfast and then we watched TV. We played till Mommy woke up and we had breakfast and then we went home.

Page 13 of the transcript, line 5:

Q. Excellent. So I'm going to ask you a little bit about ... a little bit more about when E. came in the bed with you.



A. All right.

Q. Can you tell me a little bit more about what happened?

A. That was all that happened.

Q. So he came into the bed ...

A. (Nods "yes".)

Q. And did he say anything to you before he touched you?

A. No, no he didn't.

Q. Okay. So you say he touched you ...

A. Wait ...

Q. Where did he touch you?

A. I ... you know the other part? I think he did say something.

Q. What did he ...

A. Oh, baby. That's what he said. That's what I heard him say.

Q. He said, Oh baby?

A. (Nods "yes".)

Q. And when was he saying that?

A. He was saying that in bed.

Q. Uh-huh.

A. He said, Oh, baby, lay down. That's what he said.

Q. Was he saying that to you?

A. Yes, yes he was.

At the preliminary inquiry, K. could not remember E.L. saying anything to her when he was in bed in the first instance. I don't know whether that's an inconsistency or simply a failure to remember at that time, but it certainly is inconsistent to this extent. She testified as to what he said, or she told the police officer what he said at the time of the video conference or the video statement and at the preliminary did not remember E. saying anything.

Page 14, line11:

Q. Okay. You pointed to the place that he touched you.

A. Yes.

Q. And you said it was ... can you show me again where it was?

A. Right here.

And I indicate, having watched the video, points to lap, points to her lap.

Q. Okay, and that place is where? That's where ...

A. Yes.

Q. Okay. You don't have a name for that place?

A. No.

Q. So it's where ... you told me earlier it's where the pee comes out?

A. Like a penis, like that kind of thing?

Q. No, no, you mentioned earlier that that's ... he touched you where the pee comes out.

A. Uh-huh.

Q. Is that what happened?

And this is p. 15:

A. Yes.

Q. Okay. Did you have your clothes on?

A. Yes.

Q. Okay.

A. And he pulled my pants down, that is true.

Q. He pulled your pants down?

A. Yes, that was true.

Q. What part of his body touched you?

A. His hand.

Q. His hand? His whole hand? All of his hand?

A. Just his finger.

Q. Just his what?

A. Just his fingers.

Line 17:

Q. Okay, and can you describe how he touched you with his fingers?

A. I forget.

Q. Okay. When he touched you, was it soft or was it hard? Like, was it like this?

And the officer motions with a fist, bangs a fist on her thigh.

A. No, soft.

Q. Soft, and ... it what?

A. Like it was .. (inaudible).

Q. Okay, and he used his fingers?

A. Yes.

Q. Okay, and did .. did he touch ... so he pulled your pants down?

A. (Nods "yes".)

Q. Did you say anything to him when he pulled your pants down?

A. No.

Q. No?

A. No.

Q. Did he ask you to pull your pants down?

A. Yes, he did.

Q. Okay. Did he ask you to do anything?

A. That was the only thing he asked me to do, but he also asked me to move over because he was trying to get back into bed when Nanny P. said, "Go back in your own bed".

Q. Okay. Okay. Did he touch any other part of you?

A. No, no. That's all he did, not any other part.

Q. Pardon?

A. Not any other part.

Q. Okay. Has there been any other times that E. has ever touched you ...

A. No.

Page 17 of the transcript of the video conference given by the seven year old, K.  
Line 18:

Q. Okay. So when you were in bed at Nanny P.'s ...

A. Yes.

Q. ... right, and the TV was on ...

A. Yes.

Q. ... and E. was in the bed with you guys ...

A. Yes.

Q. .. did you see him touch M.?

A. No, just me.

Page 18, line 14:

Q. Okay, did you have panties on?

A. Yes.

Q. Okay, so you had said earlier that he had asked you to take your pants down?

A. Yes. That was when Nanny came and Nanny said, E. go back to your own bed. Then I pulled them back up.

Q. So Nanny was there when you pulled them back up?

A. When Nanny was going upstairs, I did.

Q. Oh, okay. So Nanny didn't see that?

A. No.

Page 19, line 11:

Q. Okay, so when he touched you where you pee, was it under your panties or over your panties?

A. Under.

Q. Okay. So it was ... he touched the skin?

A. Uh-huh.

Q. Okay. So it wasn't on top of your panties?

A. No.

Line 18:

Q. Okay. Did it hurt?

A. No.

Q. No?

A. No.

Q. Okay, how did it feel?

A. It felt kind of weird. That was all.

Q. Weird?

A. Yeah.

Page 20, line 5:

Q. That's okay. And you said earlier he used his fingertips?

A. His fingers.

Q. His fingers?

A. Uh-huh.

Q. How many fingers do you think?

A. Two.

Q. Two?

A. Or three.

Q. Okay. And what did he do with them? Can me show me on the couch?

A. He used them to touch me.

Q. Okay.

A. And that was all.

Q. Can me show me on the couch with your fingers how he touched you?

A. Like, he touched me like this. (Motions with her hand.) Like that.

Q. So like a rubbing like that? (Motions with hand.)

A. Uh-huh.

Page 21:

Q. Okay, and how long did that last, do you think?

A. He didn't do it in the morning. He only did it at night and he still kept ... he kept doing it till Nanny came and he stopped.

[25] In her testimony before this Court, when she was testifying before the Court as opposed to her video statement, under cross-examination K. said that in the hide-a-bed couch she was lying in the middle. E. was to her left and M. is to her right. She said E. just had boxers on, meaning boxer style shorts and she explained what she meant by that. She said they were green; said she couldn't remember if he

had a shirt on. She repeated that her grandmother when she got home said, "E. go back to your own bed" and E. left. But she testified that he returned a couple of hours later and "asked me to move over but I wouldn't", so he didn't get back in the hide-a-bed.

[26] The other twin, the other girl, M., testified. She gave a videotaped statement that we spoke of that became part of the Crown's evidence. She said some things about what happened on October 12<sup>th</sup>.

[27] M. said - I'm going to quote again, this time from M.'s videotaped statement, to the extent that M. is speaking of events - I said October 12<sup>th</sup>, I meant April 12<sup>th</sup> - events that the girls said took place when they were at their grandmother's and their mother was in the hospital on April 12<sup>th</sup>, 2008.

[28] I'm quoting from p. 26, line 5, of the transcript of M.'s videotaped statement:

Q. Okay, when was ... what ... what went on that night when your Mommy had stomach pains?

A. Hmm.

Q. Do you remember?

A. We went to E.'s and my Nan's and we ... we watched ... we watched ... what's is called again? Well, it's ... Thumbelina.

Q. Okay, you watched Thumbelina?

This is seven year old M. giving the videotaped statement.

A. Yeah. And then he started doing it. I was just going away from it as fast as I can. But that was the sign of that ... that stopped it (?).

Page 27 of the transcript, line 1:

A. He was ... he (?) was right in the middle. Actually he was right there and I was ... she didn't want to be scratched. And I was all the way over here.

Q. Okay, and what was E. doing?



A. He was trying to get close to me ... to me.

Q. And did ...

A. And doing ... doing that again.

Q. Did he do that again?

A. Uh-huh. Not really.

Q. Not really?

A. He reached over tried to but I was so squished that it really didn't matter. I got used to it. So ... yeah. Sorry.

I go over to p. 28 of the transcript, line 16:

Q. Okay. Did you fall asleep at all ...

A. No.

Q. ... while you were on the couch?

A. K. was. She's so sleepy.

Q. Was your Nan around at all while you were on the couch?

A. No.

Q. No. You said that E. tried to reach over ...

A. Uh-huh.

Q. ... and touch you.

A. Uh-huh.

Q. So he didn't touch you that night? Did you see him do anything else?

A. Well, once he went in the bed. He was ...

Q. He went ...

A. His pants was off and his underwear was off.

Q. When you went where?

A. Stomach pains. When Mommy had stomach pains.

Q. His pants were off and his underwear were off?

A. But Mommy came home and then he stopped. . . . [and it says "E." but clearly she meant to say Nana] E. (sic) said, Why aren't you going to your bed? He said, Just a minute. All right. And then ... and he didn't touch me either. That's my story.

Q. So did he keep his pants off the whole time?

A. No. When he went back to bed, he put on some pajamas.

Q. Okay. So when your grandmother told him to go back to his bed, where was he?

A. In his bed.

Q. Okay, when you guys were on your bed ...

A. And E. was and she said ... she said, Go back in bed. He did.

Q. Okay. Was he under the covers or over the covers?

A. Under.

Q. Under?

A. Started to reach me again. But he didn't ...

Line 7 - we're on page 30 of the transcript:

Q. So when you guys were in the bed ... so when E. came in the bed, he had his pants off and his underwear off?

A. Yes.

Q. Okay. Did he ask you anything?

A. No.

Q. Did he ask K. anything?

A. Uh-huh. Oh, yes.

Q. What did he ask K.?

A. Scooch over.

...

Q. Did he ask her anything else?

A. No.

Q. Did you see him touch K.?

A. Uh-uh.

Q. No? Okay. And so he went back to his bed when your Nan told him to?

That is the videotaped statement of M. to the extent that she speaks to April 12<sup>th</sup>, 2008.

[29] In her testimony before this Court as to the events on April 12<sup>th</sup>, 2008, M. said - this her testimony now as a ten year old before this Court. She said, "E. pulled out the bed and then came out naked ... just comes to bed. I was so scared." K. is in the middle - E. is on the other side of her. "Nana says to E. 'Are you coming with me? Put some pajamas on'. I scrunched over. K. is scrunching over. It's creeping me out. E. moved over. I was so scrunched I couldn't move. He didn't touch me. When Nana comes, E. gets out of the bed naked. I saw his bum."

[30] The grandmother, P.B., testified to events on April 12<sup>th</sup>, 2008 - testified before this Court.

[31] She told the Court that when she arrived home with her daughter - the children's mother - from the hospital at 11 p.m or so, firstly she gets her daughter to bed because she's medicated and not well, and then she finds that the girls are - the girls being K. and M. - are still awake in the rec room. The rec room is the room in which the hide-a-bed couch was contained.

[32] She said that E.L., the Defendant, is on the same level. He's in his undershirt and underwear and he tells her that he is going to the bathroom. She testified that she could smell alcohol - she could tell that he had been drinking. In fact, she said that she had found an empty bottle in which she referred to as his liquor stash that she said had been full proximate to that time, words to that effect.

[33] She takes the dog out, is gone in combination about five minutes. When she gets back into the house E. is on the hide-a-bed with the girls. He's under the covers. She says he has his arm draped around K. She says E. is on the right, K. is beside him, M. is on the far left. When she enquired as to what he was doing, he said that the girls were scared, indicating that he was trying to comfort them.

[34] She says "I get him out, back to his bedroom and I shut the door". P.B. testified, "I was concerned - an adult in bed with young children". She said as a result - well, firstly she said that she checked the clothing of the children, that nothing was awry - there was nothing that caused her concern about their clothing. She testified that she wasn't comfortable with what she had seen so subsequently that night, every ten or fifteen minutes she said she would go back down and take a look and check. She said she did that ten or fifteen times. She did that to see if everything was okay, to see if things were as she had left it.

[35] She said that when she make those checks, that E.'s bedroom door remained closed .. the spare bedroom being on the same level as the rec room. She said that evening he had been wearing grey briefs, not boxers.

[36] The Defendant, E.L., did not testify in this matter as is his right - it is his right to remain silent, that is not uncommon that defendants do not testify, and I only mention this to point out that while defence counsel did a creditable job in

exposing and pointing out difficulties and contradictions in the children's evidence, that there was no contradictory evidence presented by the defence.

[37] I want to make reference to two cases - some case law. The oft-cited *R. v. W.(R.)* - Justice Beverly McLachlin as she then was, she now of course is the Chief Justice of this country - at that time was a puisne judge of the Supreme Court of Canada back in 1992. That cite is (1992) 74 C.C.C. (3d) 134. Justice McLachlin is talking about the proper approach to the evidence of children.

[38] She firstly speaks to the change in the law, relatively recent change in 1992, the removal of the old notion that evidence of children is inherently unreliable. She said that notion is gone. Law has changed - 1992.

[39] She then says at p. 143 of that decision, ". . . when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said" - and this is Justice McLachlin citing Justice Bertha Wilson from *R. v. B.(G.)*, [1990] 2 S.C.R. 30, Justice Wilson says this:

... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

[40] That was Justice Wilson - back to Justice McLachlin. She says:

As Wilson J. emphasized in *B. (G.)*, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should

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

[41] Specific circumstances - that was Justice McLachlin.

[42] The other case that I cite, the only other case, will be *R. v. C.S.M.* This is a 2004 case, 185 C.C.C. (3d) 471. This is Justice Fichaud - closer to home - the Nova Scotia Court of Appeal, and he makes reference in that decision to *R. v. W.(R.)* and then says at para. 52:

The Supreme Court has recognized that adult tests of credibility may need adjustment for children. A child may not have a mature ability to perceive, recall and recount details. Children are as subject to credibility assessment as are adults. But a reliable assessment of a child's credibility is more likely from a "common sense" approach than from meticulous parsing of sentences in the child's transcript.

[43] This is Fichaud, J.A., adopting *R. v. W.(R.)* talking about the common sense approach. That, in fact, has been the approach taken of children's evidence for the last twenty years in this country.

[44] Fichaud, J.A., went on to say, goes on to point out, the importance of a trial judge being alive to those inconsistencies in the evidence, to the importance of trial judges considering the inconsistencies in the process of the evaluation of the credibility of the child.

[45] Alright, I'm dealing with Counts 3 and 4 - those counts that pertain to the complainant K. and I have set forward some of the evidence that child gave and some of the evidence that others gave in relation to the events of April 12<sup>th</sup>, 2008.

[46] Finding - I believe the testimony of K.G. She impressed me as a thoughtful, intelligent child. She was trying her best to remember. She was trying to be truthful about what happened at her grandmother's house on the night of April 12<sup>th</sup>, 2008. I assessed her evidence as a seven year old at the time she gave that video

statement. The statement had the advantage of proximity to events, having been taken about eleven days later. And I assessed her evidence as a ten year old in this Court - three years later. Yes there were inconsistencies. At the Preliminary Hearing she said that E. returned and got back into that hide-a-bed with the girls after he was told to leave by her grandmother. At trial and in the videotape she said that didn't happen - that she would not move over for him - inconsistency.

[47] As previously indicated, during the video statement she said that E. said to her when he got into, when he was in bed, "oh baby, lie down". At the Preliminary she testified she didn't remember him saying anything - either an inconsistency or a failure of memory.

[48] K. said E. was wearing green boxer shorts and her grandmother, who had no reason to say otherwise, would have an adult power of memory and observation said that he had .. E. was wearing grey undershorts - they were not boxers.

[49] M.'s testifying that E. was naked. K. does not mention that, doesn't say that. Notwithstanding that it was something that you would think that she might remember.

[50] It was pointed out by Mr. Serbu, defence counsel, that it was the police officer who suggested to K. that she was touched where the pee comes out - leading question - p. 14 of the transcript, lines 22 and 23. In fact, though, as I pointed out, prior to that suggestion, K. had, without any leading, said at p. 9, line 13, "E. touched my right here" and pointed to her lap, and said at line 18 and 19, "Like when you go to the bathroom and it comes out. That part". That testimony was not as a result of any leading question.

[51] I'm satisfied that this child, K., was telling the police officer that she was touched in the area of her vagina although she did not know or use the word.

[52] There is significant corroboration - significant corroboration - for K.'s testimony.

[53] M., her twin - seven year old, ten year old - confirms that E.L. was in that hide-a-bed with those girls under those covers. And particularly, we have the evidence of the wife, the then wife of E.L., P.B. I'll say something about this witness - this witness is now unfortunately apparently estranged from her daughter

and grandchildren because of these events, but she impressed me as a witness who was not biased either for or against E.L. She simply explained the events as she remembered them happening on April 12<sup>th</sup> .. April 13<sup>th</sup>, 2008. I found her to be creditable. She confirms that the Defendant was wandering around in his underwear. That after she walks the dog that evening, she finds him in the hide-a-bed under the covers with the children - under the covers - arm around K..

[54] She believes he had been drinking at the time.

[55] She confirms both of the children's testimony that she directed him to get out of the bed and to go to his bedroom. And tellingly, I think, she regularly checks after that to ensure that he is staying away from the girls.

[56] She testified she wasn't comfortable with what she had seen. She said, "I was concerned - an adult in bed with young children". That seems to me to be a reasonable and understandable concern.

[57] I think most objective observers of what Mrs. B. says that she was witnessing on the evening of April 12<sup>th</sup>, 2008 would be concerned.

[58] But I'll go back to K. I repeat that I find the witness, K.G., to be creditable as to the most relevant, important parts of her testimony. I believe her evidence to the extent that I am able to find beyond any reasonable doubt, when I consider her evidence and the totality of the evidence before me - all of the evidence before me - but obviously particularly the evidence of K. I believe her evidence and when I consider the totality of the evidence, I am satisfied beyond any reasonable doubt that on April 12<sup>th</sup>, 2008 in that hide-a-bed E.L. touched K.G. with his finger or fingers directly in the area of her vagina. I am satisfied that such touching was manifestly for a sexual purpose.

[59] She was and is under the age of fourteen years. I find E.R.L. guilty pursuant to s. 151(a) of the *Criminal Code* - Count 4 of the Indictment. Count number 3, being a charge that relates to the same action - exactly the same action on the part of the Defendant - will be stayed based upon the *Kienapple* principle.

[60] As to Counts 1 and 2 - those counts that are specific to M.G. I'll deal with Count No. 1 - the allegation that E.L. did between the 1<sup>st</sup> day of August, 2005 and the 14<sup>th</sup> day of April, 2008 commit sexual assault on M.G., contrary to s. 271(a)(a)



of the *Criminal Code* - roughly a three year time span alleged - dealing also with the second count, the touching for a sexual purpose - same time span.

[61] M.G. is now ten years of age. I did not swear her as a witness, but accepted her promise to tell the truth. She presented as a very expressive, confident child and did not seem to be the least intimidated by the trial process. She adopted the videotaped statement made April 12<sup>th</sup>, 2008 as her evidence given three years ago when she was seven years of age. She made one minor correction about a bracelet, but I found it significant that she was concerned about making a correction.

[62] The statement was taken as indicated April 24<sup>th</sup>, 2008. During the videotaped statement, seven year old M.G. said that she was .. she thought at first, five years old when touching incidents began. In response to questioning by police officer Stephanie Carlisle, she says - and again I'm going to have to make reference to that videotape and that transcript - p. 17 - we're now speaking of the transcript of M.G. - line 5:

A. Okay. It was a birthday party, E.'s birthday party and ... we went there.

Q. Uh-huh.

A. So now ... so then E. says this weird noise when he does it.

Q. He makes a weird noise?

A. Uh-huh.

Q. Can you describe it?

A. I forget. Once he does it, but he hums it.

Q. He hums?

A. Like, mmmmm. Like that.

Q. Okay.

A. But that's all the sound he makes. But I forget.

Q. And where are you when E. is making that sound?

A. I'm on the computer and movies and TV shows.

Q. Okay. Let's talk about the computer first?

A. Okay.

Q. Where is E. when you're on the computer?

A. On his lap.

Page 18:

Q. You're on his lap. Okay, and where are his hands?

A. Inside, I told you ... like ...

Q. Okay. Are they ... so they're inside your pants? [leading question]

A. Mm-hmm.

Q. Okay, do you usually wear panties?

A. Yeah, and he goes inside my panties.

Q. Okay. Does he go in the ... in the front by your stomach or does he go ...

A. In the back and front.

Q. He goes in the back and the front?

A. Yeah.

Q. Okay. And what part of his body does he use to touch you?

A. Hands.

Q. Hands? Does he use one hand or two hands?

A. One.

Line 19:

Q. And what part of his hands does he use?

A. This hands ... his fingers.

Page 19:

Q. Okay and where is he doing that on you?

A. Inside.

Q. Okay.

A. And he goes inside right there.

Q. Okay. What part of your body is that you've just described ... you just pointed to?

A. My butt.

Q. Your butt. Okay. So he puts his hand where ...

A. Inside.

Q. Inside?

A. It's really scary, really gross and he's a sick man.

Q. Okay. Does his hand go anywhere else other than your butt?

A. No.

Q. Okay. So just back here?

A. And the back.

Q. And the back? So ...

A. And sometimes right here.

Q. Sometimes ...

A. Yeah.

Q. When you say "up here", where?

A. Like, you ... right there.

Q. Under your shirt?

Page 20:

A. Yes.

Q. Okay. Under the front of your shirt. Okay. So do your pants stay on?

A. Yes.

Q. Okay.

Line 6:

A. And I'm saying, Hi, K. So ... so he gets out. So he gets out.

Q. He takes his hands out, yeah.

A. No, no. I make him. But he doesn't know I make him.

Q. Oh okay. Okay. So ...

A. Good strat- ... strategizing.

Q. Good strategy. You're right. You did what you had to do, right? So where would everybody else be when this would happen?

A. K. would be on the side ... other side. But she ... she doesn't ... he doesn't do it to her.

Q. So K. would be in the computer room with you as well?

A. She doesn't know that I'm doing it. And everyone would ... everybody else would be partying.

Q. Okay.

A. And sometimes they're watching shows and getting beer and getting drunk sometimes.

Q. Okay. You mentioned earlier that sometimes things happened with E. when you would watch TV. And where would this happen? At whose house?

A. E.'s and my Nan's. She lied. She's believing E. now.

Skip to line 21, p. 21:

Q. Okay. So when you're over at your E.'s and your Nan's and you're watching TV, what goes on then? Who do you usually watch TV with?

A. Sister, sometimes brother. Everyone sometimes. Like, only once. Only once he never did it.

Page 22:

Q. Only once he didn't do it?

A. Yeah, when we were watching Ratatouille.

Q. When you were watching Ratatouille, he didn't touch you?

...

Q. Okay. So you were at your Nan's a lot. Where would your Nan be when ... when E. would be watching TV and movies with you?

A. She'd be watching television.

Q. Where would she be watching television?

A. Upstairs.

Q. So she wouldn't be there with you and E.?

A. Uh-uh.

Q. Would M. be there? Sorry, would K. be there?

A. Sometimes. . . .

Page 23, line 4:

A. When he ... he does it every single time when we go there.

Page 24, line 17:

A. Are you going to put him in jail? Please, please, please.

Q. Why should I put him in jail?

A. So he doesn't touch another little girl again.

Q. Well, we'll see what we can do.

A. Thank you! . . .

Page 33, line 11:

Q. Okay. Did it ever hurt?

A. Yeah.

Q. Uh-huh.

A. But you don't need . . .(inaudible) anything, right?

Q. No.

A. Well, he scratched me with his nails.

Page 31, line 12:

Q. Okay, I just want to get back to the first time that E. ...

A. Touched me ...

Q. ... touched you. How old do you think you were?

A. Five or six.

Q. Five or six?

A. Yeah. I don't know which one though.

Q. Right.

A. It could have been four ... it couldn't. Not three, not two, not one and not even a month old.

Page 32, line 15:

Q. Yeah. I need a little bit of clarification because I'm a little bit confused. You mentioned that when E. ... when you were in the computer room with E., he would put his hands behind.

A. Uh-huh. And inside.

Q. Inside. Okay. Was that the only place in your pants?

A. No.

Q. Where else did he ... where else did he put his hands down your pants?

A. Oh no, that's it. And my back, he did this. [points to her lap as I've indicated]

Page 34, line 8:

Q. On top of your vagina? [leading question, but in response to what M. seemed to be indicating with her hand]

A. It goes ... he does this and then in here.

Q. So inside your vagina?

A. (no audible response)

Q. Okay.

A. Is this case over?

Line 15:

Q. And what about with your bum, would it just be on top of your bum?

A. Under bum. Wait, he does this and then he does inside my cheek ... I'm going to trap him so he gets his hands out.

Q. So you squeeze your bum?

A. Uh-huh, like this.

Q. And trap him?

A. But he gets out because I have a nail ... it's like a bump that hurts a little bit.

Q. Uh-huh.

[63] So those were some cites from the transcript of the video conference that the 7 year old M. gives on April 24, 2008.

[64] The 10 year old M. testified before my Court - three years later. She testified, "He touched my vagina, my butt, my back with his one hand, his right hand." She said he touched her vagina "under my clothes".

[65] On cross-examination, the question was put, "How many times?" and M. replied that E. touched her vagina "I think 30 times". She was asked if she was certain and she said she was certain of that - 30 times.



[66] It was pointed out to her by defence counsel that at the Preliminary Hearing she had testified that E. touched her vagina once. She had no explanation for this discrepancy.

[67] At trial the material grandmother, P.B., as indicated, testified in relations to matters specific to M., she said that the children were commonly on the computer when they were at her house prior to April 12, 2008. She suggested that they were there roughly about four times a week. She said that they had to be supervised when they were on the computer; that it was her then husband, E.L., who provided that supervision. She said when doing so, he would sit in the computer chair and both girls would be on his knee or one of them would be on his knee. If one was on his knee, the other would be commonly standing next to the chair.

[68] She, P.B., said that she never saw any action in the computer room that caused her any concern.

[69] As indicated, the mother of the twin girls, the complainants, M.G. testified in relation to M. and the computer room, she said this: she confirmed that it was E.L. who supervised the children in the computer room - the reason for this supervision was that her mother was concerned about clicking on viruses if they were not watched. Apparently there was some other concern with them using all the ink by downloading pictures. So at any rate, there was required supervision. She said that they would always sit on his lap, meaning E.'s lap, M. more commonly sitting on his lap because she was more into computers at that time than K. was.

[70] Alright, I'm going to repeat my reference to the case law - *R. v. W.(R.)* and *R. v. C.S.M.* I have attempted to apply the logic of those decisions to testimony of M.G. as well.

[71] There is a significant and material contradiction in M.'s testimony. At trial she said, and I'm repeating from what I've previously said, at trial she said that E.L. had his finger on her vagina 30 times. She followed that up by saying she was certain of that. However, it was pointed out that at the Preliminary Inquiry she said that hand was on the vagina only once - big difference between 30 and one. That is a material inconsistency.

[72] I am, of course, concerned about this contradiction. In all of the evidence before me, she had indicated touching in the area of her butt and pointing into her lap. She had indicated touching numerous times.

[73] She was a good witness. She was precocious, I had indicated, confident, obviously intelligent.

[74] I find she was creditable when she said that E.L. touched her butt, pointed into her lap in relation to touching with his fingers when she was sitting on his lap and using that computer. I am satisfied that she was correct in relation to it happening within the time frame alleged in Count 1 and 2.

[75] Again, there is some corroboration - some - the grandmother, P.B., confirmed that E.L. supervised the children, the opportunity on the computer, commonly with one or both of the girls sitting on his knee. The children's mother, M.G., said that when playing the computer the girls would always sit on E.'s lap - M. more often than K. said the mother, so that the opportunity, as suggested by M., was there.

[76] There are some aspects of M.'s testimony that I think - this is certainly not exclusive, not that extensive - but there were some things that she said that I considered significant. Remember, and I'm now speaking of some of the things that she said on April 24, 2008 when she made that video. She said E. says this weird noise when he does it - he hums. This is a seven year old. She said she would call K. to get E. to stop touching her, to get out. Page 20 of that transcript: "I'm saying, Hi K. . . . so he gets out". She referred again to that "good ... strategizing".

[77] Those statements seem to me to be unessential details of what she says was happening to her, but the kinds of things, unessential things, that truth tellers, in my experience, tend to testify to. It's my experience that when people are making up stories usually they stick to the essential facts. Usually they stick to the basic stories.

[78] Those two statements by M. really weren't necessary to her story, to her explanation of what she says happened to her, but they're interesting statements from a seven year old and they, I find, are indicative of a truth teller.

[79] M.'s difficulty is associated with number of times that the touching, that she says the touching, happened. Remembering then, though, that she was five, six and seven years old at the time of the events.

[80] I conclude that she is unsure how many times this happened. I do, though, find that she was improperly touched while playing with the computer on the lap of E.L. during that period of time - that it did happen. It did happen - I believe M.'s testimony in that respect and I am satisfied on the totality of the evidence - all of the evidence, all of her evidence, the evidence of all of the witnesses before the Court.

[81] When I consider all of that evidence, I find beyond any reasonable doubt that that improper touching took place. I don't know how many times. M. doesn't know how many times, obviously, but I'm satisfied that it happened.

[82] Having so found beyond any reasonable doubt, I find E.R.L. did touch M.G. on her buttocks and in the vagina area between August 1, 2005 and April 14, 2008 while she was sitting on his lap using the computer at her grandmother's home. This touching was manifestly of a sexual nature. Having so found, I find him guilty on Count 2 pursuant to s. 151(a) of the *Criminal Code* and again I stay Count 1 on the basis of the *Kienapple* principle as it involved the same act.

[83] As to a date for sentence?

[84] MS. JAMES: From the Crown's perspective, My Lord, we'll be seeking preparation of a pre-sentence report.

[85] THE COURT: Why don't I give you ... you want a pre-sentence report?

[86] MS. JAMES: Yes please.

[87] MR. SERBU: Likewise, My Lord.

[88] THE COURT: How long is that taking these days?

[89] MS. JAMES: Generally about eight weeks on the Dartmouth side, My Lord.

[90] THE COURT: I'm sorry.

[91] MS. JAMES: About eight weeks or so on the Dartmouth side of things.

[92] THE COURT: Is Crown satisfied that the recognizance ..

[93] MS. JAMES: No, My Lord, I was just about to address that.

[94] THE COURT: You're going to speak to that?

[95] MS. JAMES: If I might.

[96] THE COURT: Well let's deal with that first.

[97] MS. JAMES: Thank you. Pursuant to s. 523, My Lord, I think it would be appropriate to have Mr. L. remanded into custody at this particular stage of the proceedings. He's just been convicted of two offences which I would suggest are very serious and likely to attract lengthy periods of incarceration in the ordinary course of things. I would note, as well, that following this allegation coming to light the accused did leave the province and was resident in the province of \* for some period of time, so in all of those circumstances I would suggest he ought to be taken into custody at this stage. We did provide Mr. Serbu last day with notice that that would be the Crown's intention should Your Lordship reach the decision that you've just .. conclusion that you've just come to.

[98] THE COURT: Mr. Serbu:

[99] MR. SERBU: Thank you, My Lord. The charges weren't immediately forthcoming with respect to this matter, Your Honour. Mr. L., when notified by the police, returned to the province, was released on his own recognizance with conditions. He posted some cash bail. He's been in attendance for every court appearance. He lives in the metro area. He is gainfully employed - employed full-time; has since been off work since the trial commenced. He's still attached to this area.

[100] THE COURT: Has he got a passport?

[101] MR. SERBU: He says no, he does not have a passport.

[102] THE COURT: No passport?

[103] MR. SERBU: No passport issued, no.

[104] THE COURT: Thank you. Mr. L. has appeared each and every time he's required to appear before this Court. He's not got a passport and will not be getting a passport between now and the time he's sentenced in this matter, so that will restrict him to .. serves to tend to restrict him to this country. I have no concerns about Mr. L. appearing for sentence in the matter nor do .. is there any evidence that he's been in breach of his recognizance to this point ... so I acknowledge the Crown request but I do not intend to hold him pending sentence.

[105] MS. JAMES: Thank you, My Lord.

[106] THE COURT: His recognizance will remain in full force and effect and I expect full and complete compliance with that recognizance. Can I have a date please? Are we into October?

[107] MS. JAMES: I would say likely, My Lord.

[108] THE COURT: October .. Mr. Serbu, I know you're busy ..

[109] MR. SERBU: October 3<sup>rd</sup>?

[110] THE COURT: That's Monday .. I'd be coming back off .. I can do that .. yes, I can do that on the afternoon of October 3<sup>rd</sup> at, say, two o'clock?

[111] MR. SERBU: One suggestion, My Lord. I know what happens sometimes is Probation Services is backed up and unfortunately we may only get that report on the Friday before. What I've asked this Court to do before and it has been done is that order that it be provided a week before. That way, counsel and the Court will have it one clear week before the sentencing.

[112] THE COURT: Absolutely. I so direct .. I direct counsel have that pre-sentence report at least a week before sentencing in the matter. We will sentence in the afternoon of October 3<sup>rd</sup>, 2011. All persons having an interest in the matter are invited to be back in this public court at that time and obviously I direct E.L. to be present back before the Court at that time and he knows that failing to appear .. consequences would be significant.

[113] MR. SERBU: What time do you want us back, My Lord?

[114] THE COURT: Thank you, close Court.

Kennedy, C.J.S.C.