IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. J.P., 2012 NSSC 365

Date: 20120820
Docket: SN. No. 380060
Registry: Sydney, N.S.

Between:

Her Majesty The Queen

v.

J. P.

Editorial Notice

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

Restriction on publication: Ban on publication and broadcast on name of Complainant.

Judge: The Honourable Justice Patrick J. Murray

Heard: June 12, 13, 14, 20, 21st, 2012, in Sydney, Nova Scotia

Written Decision: September 10th, 2012

Counsel: Gerald MacDonald, for the Crown
Elizabeth Cusack, Q.C., for the Defendant

By the Court:(orally)

[1] We are here this morning for me to give my decision in regard to this matter involving Her Majesty the Queen and Mr. J. P.. I have a few brief preliminary comments. First, there continues to be a ban on publication and broadcast of the name of the complainant, or related to information. Secondly I am going to outline my reasons for decision. I don't commit to issuing a written decision, but I may do so, or it may become necessary . If so, I reserve the right to edit the transcript of what I say today to amplify and reorganize my remarks if there is a written decision. The grammar may be improved, and there may be more complete references to the facts and case authorities and citations, but of course the end result certainly will not change.

[2] Mr. P. is 63 years of age. He's currently residing in Calgary, and has been since approximately 2001. He had been married to R. E.. A. M., mother of the complainant is R.'s sister, therefore the Defendant, Mr. P., is the uncle by marriage of H. M., the complainant. These offences which, as alleged, are sexual in nature, are alleged to have occurred over a period of six years between 1994 and 2000, when the complainant was between six and twelve years of age.

[3] They are alleged to have occurred essentially in two places, the home of H. M., her mother, and brother at [...], and the [...], both in the County of Cape Breton, Province of Nova Scotia.

[4] Throughout my decision I will refer to the complainant as H.M., in most cases, and at times I may refer to Mr. P. as Mr. P.

[5] By way of background, following a preliminary hearing held on February 13, 2012, the accused was committed to stand trial on three (3) charges under the Criminal Code of Canada. The first, is that he did touch a person, H.M., under the age of fourteen for a sexual purpose, directly with a part of his body, to wit, his hands, contrary to Section 151(a). Second, that he did for a sexual purpose invite a person, H.M., under the age of fourteen, to touch directly a part of his body, to wit, his penis, contrary to Section 152(a). Third, that he did commit a sexual assault on H.M. contrary to Section 271(1)(a) of the Criminal Code of Canada.

[6] These charges are contained as three(3) counts in one indictment dated March 5th, 2012. The indictment was amended at trial, with consent, to describe the "person", H.M. in counts one and two as a person under fourteen years of age,

and not sixteen years of age. The three charges as contained in the amended indictment will be attached to my decision as an Appendix "A".

[7] Prior to the preliminary inquiry held on February 13, 2012, the accused elected to be tried by Judge alone on May 9th, 2011. Once again the accused faces trial in Supreme Court related to several sexual offences said to have committed on his niece H.M. between January 1st, 1994 and December 1st, 2004. That is, from the time or year she turned six years of age until the time she was twelve years of age.

[8] At the time of the trial, H.M., was 23 years old. In her evidence she first described being kissed, and invited to kiss at a young age, with it progressing to french kissing (with his tongue in her mouth). She also described her uncle asking her to go for drives, and then going for drives to the cemetery, where he would put his hands up her shirt, and down her pants (under her underclothing), while he allowed her to steer the vehicle around a circular like driveway in the cemetery, her, as a child, being excited to do this.

[9] The drives were usually initiated with an invitation by Mr. P. to visit her grandfather's grave, or to go for a drive to Tim Horton's.

[10] I note here that I have described the nature of the allegations in a general way, ever mindful of the need to analyze the evidence in detail, including any inconsistencies. So too, I am mindful throughout of how the Crown has the burden of proof, and that the burden never leaves the Crown, it being to establish the essential elements of the offences beyond a reasonable doubt. The accused, Mr. P., has to prove nothing. It is the Crown that has the burden.

[11] I will say further at the outset that these offences, having alleged to have occurred, so many years ago, place the accused in a vulnerable position, as evidence is being recalled from years past, when the complainant was a child. Thus her recovered memory must be scrutinized carefully, before arriving at any conclusions or inferences. It is, of course, subject to some discrepancy by the sheer passage of time, and the number of years that have elapsed. Both Crown and Defence have acknowledged this, and agree the central issue in this case is one of credibility.

[12] The ability to recall and recall accurately, events which occurred some 12 to 18 years before a trial, is essential to a proper determination, weighing and re-weighing each witness's evidence, alone, and in conjunction with other witnesses, and of course, the totality of the evidence.

[13] Thus, I wish to say further at the outset, that the onus of proof ,which I have already said, is beyond a reasonable doubt, applies equally to the issue of credibility, and that I must be satisfied on the basis of that standard, whether evidence given is credible or not. Any reasonable doubt must be resolved in favour of the accused. Credibility is a question of fact.

[14] The last incident alleged by H.M., the complainant, in her evidence is that the accused exposed his penis to her and asked her to touch it, in the den at [...]. The Defence argues there are three different versions provided by her, and that her credibility is affected by this, and many other contradictions and inconsistencies in her evidence, and in the statements she gave to others, at the preliminary hearing, and previous police statements, notably those given to officers Lisa MacDonald and Sam Cote of the Halifax Regional Police, with whom she first spoke.

[15] This last incident occurring (allegedly) in the den at [...], when she was twelve, was as H.M. stated, the last incident. Her evidence is she realized then this wasn't normal, as none of her other uncles performed or behaved this way. This raised a further issue as to her reason for not disclosing what had happened to police until 2010.

[16] Some earlier disclosures were made to friends, and later her mother, and then to her family, prior to informing police. Whom she told, what she told, when she told, all became issues in terms of her credibility, as argued by the Defence. The issues are, in fact, numerous. For example, the Defence argues that she gave different reasons for not coming forward. First they (the Defence) said, she thought it was normal. Then she said, she was scared and did not come forward. This evidence must be examined critically, and I have attempted to do so in arriving at my conclusion.

[17] This is a so-called W.D. case. Mr. P. gave evidence in his own defence. Therefore the well known case of *R. v. W.(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) applies, and if I believe the accused I must acquit him. Even if I do not believe him, I must ask whether his evidence leaves me with a reasonable doubt,

in which event if it does, I must acquit him. Even if I am not left with a reasonable doubt, I must move on to further consider on the whole of the evidence whether the Crown has established the guilt of the accused beyond a reasonable doubt.

[18] The case law authority states the three part test need not be cited verbatim. The point of W.D., and its rationale, is for the Court to never lose sight of ,and to always been mindful (that) the burden lies with the Crown to establish guilt beyond a reasonable doubt. That is the burden of proof. It is the Crown who must meet the burden, not the accused, in this case Mr. P..

[19] And so I may, according to W.D., accept all, part, or none of what a witness or a set of witnesses may say. Credibility here, as I've said, is extremely important, and the test in W.D. must be scrupulously applied. The test is designed not to simply allow the Court to apply the burden of proof as a credibility contest between the complainant and the accused. This is so notwithstanding that the only two parties, truly in a position to know are H.M. on behalf of the Crown, (as well as other Crown witnesses); but in particular H.M., and Mr. P. on his own behalf.

[20] Mr. P. vehemently denies that any of these events took place. "Absolutely not", he responded to a series of appropriate questions as to whether he had anything to do with the events forming the subject matter of these charges.

[21] In considering this evidence the Court must not fall into the trap of deciding which witness's story is more credible, in a manner that would lead one to conclude that one story is more probable than not, and falling short of deciding whether there is proof beyond a reasonable doubt. (**R. v. L.J.W. 2006 NSSC 91)**

The Crown's Position

[22] I turn now to describe the Crown's position in more detail, and in point form:

(1) The Crown points out this is historical. That the Court must decide on the evidence emanating from the witness chair. Witnesses other than H.M. are there to provide context as to why the matter is now before the Court, and how that came about.

(2) These were events being recounted by H.M. as an adult, which occurred when she was a child. As a result there must be some allowances made, and while the Court must carefully consider inconsistencies, the Crown says H.M. remembered the core elements.

(3) The Crown said she told only what she remembered clearly. There are bound to be inconsistencies and contradictions, and they only strengthen the Crown's

case. If it fit together perfectly, then something would be wrong, it wouldn't be credible says the Crown.

(4) They say further that H.M. was restrained, and did not embellish or exaggerate. She remembered the den, its layout, and what happened there. She remembered the cemetery, its layout, the turn, and what happened there. Being lifted over and lifting herself over the console, to steer while she was being touched, molested, and rubbed. She remembered the car and certain details about the car.

(5) Further the Crown says there was opportunity. It was a big crowded house, yes, but there were quiet pockets within. J. P. did not like smoke, and would often leave the kitchen. He admitted taking H.M. for drives to Tim Horton's and [...]'s store; but Mr. P. says never alone. He admitted going to Tim Horton's four(4) to six(6) times out of ten(10) visits.

(6) Further the Crown says there was opportunity still, in spite of his work and the employment record submitted by Mr. P.. The Crown says further the incidents here were brief in nature, and even though the house was crowded at times, Mr. P. and H.M. could be alone in the den, down the end of a hallway, and away from the nook at the other end from where people gathered.

[23] The Crown says all of what was alleged and proven was logical, and fit together with respect to the charges, and that H.M. presented herself as a very credible witness despite being nervous, and despite some inconsistencies, and even some contradictions, she was a truthful and credible witness.

THE DEFENCE

[24] The Defence says that Mr. P. had little or no opportunity to commit these offences. They couldn't possibly happen as often as alleged; twice a week over a six year period, and if they didn't happen as alleged, they did not happen at all.

[25] First there is the house at [...]. It was crowded. It was owned by H.M.'s grandparents, G. and B. E.. G. died in 1998, B. died in 2009. At one point there were thirteen people residing there, including an aunt, uncles, cousins, and spouses. There was always someone or some family unit living in the attic. The bathroom on the second floor was shared by all. The grandmother later had a bathroom built in her bedroom. At any rate, it was non-stop coming and going, and the evidence was people socialized throughout the house.

[26] It was very open in the den. There were no curtains in the sunporch off the den. There were no closed curtains in the den. The den had a glass door which made it open and visible. With windows in the den, and the windows in the sunporch facing the driveway, you could see "right through" says the Defence. There are three entrances to the sunporch. The Defence says further you can see through the den door on the way to the bathroom upstairs. The landing was right there. One would have to be an absolute fool to commit this activity with the

comings and goings in that house. Even if the den door were closed, the evidence is the curtains were not. The house also had a squeaky floor which could detect movement. In short, it's just not credible that this activity took place in the house.

[27] The Defence argues the evidence was that Mr. P. spent most of his time in the kitchen nook with the adults, although he did watch TV in the livingroom and play with the kids, inside and out.

[28] With respect to the graveyard at [...], the Defence submits the cemetery is essentially a big open field. At twice a week over six years, 500 times, a bright red car, not noticed by anyone, an incredible story. There are houses as you approach and one house close at the back where H.M. alleged the car would stop for her to move over onto his lap to steer and drive the car with Mr..P. operating the brake and gas pedals.

[29] They say further that the "Tim's runs" could not possibly have occurred within the time suggested by H.M., 20 minutes to a half hour. The Defence says going to "Tim's" at or near [...] or [...] would simply not allow time to visit the graveyard and return to [...].

[30] The Defence submitted maps to show routes and alternative directions which could have been taken to other Tim Horton's. Therefore, they submit, H.M.'s evidence is just not plausible applying reason and common sense, and this casts a reasonable doubt on all of her other evidence.

[31] In addition, they say H.M. could not recall a single grade, or what grade she moved to [...], or any clothing except for shorts worn by Mr. P. during the alleged exposure in the den. They say also it is impossible to visit the graveyard in winter. The evidence given by Mr. W.L. on behalf of the church was that there were no burials in winter, again with one exception, when a family arranged to have the cemetery plowed.

[32] In regard to contradictions and inconsistencies, the Defence says further, that there are numerous contradictions and inconsistencies in her evidence in what they view as a story by H.M. I propose not to deal with all of them at this point, but they include:

> (i) inconsistencies between her trial testimony and statements given to Officer Lisa MacDonald and Sam Cote of HRM. An example is whether it (the exposure)

happened only once, or also several times while driving in the car.

(ii) inconsistencies in what she said at trial and her evidence at the preliminary hearing.

(iii) various versions of what happened in the den, in one, he asked her to touch it, and in another he told her.

(iv) various versions of her reasons for not coming forward, first because she thought it was normal and another because she was scared. There was also the so called threats that he would not be permitted back to visit, and that she would get in trouble.

(v) that she had memory problems. They say in recalling the number of visits it varied from twice a week, to once a day, to a lot, and I can't remember.

(vi) again it makes no sense Mr. P. simply had no time due to him working, periods of not visiting due to R. being "on the outs" with the family, his political involvement, his union work, his courses and certificate work.

(vii) this behaviour would not be exciting for a child after repeated times steering over a six year period, a six year old perhaps but quite boring for a 12 year old.

(viii) H.M. only remembered the Grand Prix, Mr. P. did not own this vehicle until 1997 when she was approximately nine, she was still eight, but approximately nine at that point, and it could not have occurred as she alleged.

(ix) she said never on weekends. At one point H.M. changed from "us" to "me" when giving evidence as to who Mr. P. played with.

> (x) the family conferred and decided prior to H.M. going to the police.
>
> (xi) the evidence of C. M. seemed rehearsed.
>
> (xii) evidence of M. S. first said H.M. was not drinking to police, and at trial said she was. This was at the time when she (M.) told her to call her mother and when H.M. did call her mother.

In sum, the Defence says the evidence of H.M. was given without exceptions in her testimony, that's the way it happened.

HOUSE AT [...]

[33] Much evidence was presented regarding the house of G. and B. E.. Their home was a busy one and home to A. M. and her two children as well as H.M.'s uncles J. and J., D. L. and her husband G., J., R.'s son lived there as well, and other cousins S. and M., I believe. Some one or some family always resided in the sun room in the attic, not to be confused with the sunporch. Mr. P. would visit his in-laws house regularly with his wife R. according to his evidence and the evidence of others. There were periods of time when he would not visit or he would be unable. It was common for him not to visit because his wife had a falling out or disagreement with the family.

[34] Mr. P. too was a busy man. He was involved in hockey and with his employer's union [...]. This took him away at times. He worked some weekends. His own children were involved in "rep hockey" and he was a [...]. He [...]

[35] Returning to the house, there were two (2) booklets of photographs, extensively used at the trial, books one (1) and two (2), and entered as Exhibits 4 & 5. Book 2 was a series of photographs showing the layout of the house. Much attention was drawn to the layout of the house, described as a "funny layout" by the Defence. The evidence confirmed that the centre or gathering place was the nook off the kitchen. This was located near the back entrance of the house. From there one walked through the kitchen and down the hallway to get to the front of the house where the den, and next to it, the sunporch were located.

[36] The house was described as not a mansion, but a large enough house. More to the point were the number of people residing in it from time to time. Mr. & Mrs. E. appeared to be kind and welcoming parents and grandparents. Of particular note as well was that the den was the room of G. E., the grandfather, where he had a little TV and a ham radio. There were times in later years where

he slept there as well. Much of the TV was watched in the livingroom, hockey games mostly. Movies were also watched in A. M.'s bedroom where Mr. P. would be invited to watch them with the kids, as well, and he did watch them.

[37] Evidence was given by H.M. that she watched TV in the den. Mr. P. said he never watched TV in the den. H.M. said Mr. P. would often shut the door in the den but sometimes it would be open. Mr. P. gave evidence that he would help H. there with her homework and when he did the door would always be open. H.M. did not recall this. Mr. P. did not recall seeing H. watch TV in the den; he didn't say she did not.

[38] H.M. of course grew up in the house and knew its layout as did Mr. P. She knew for example the refrigerator to be in a location different in the photos than it was when she lived there. Of particular importance she said the couch in the den was in a different place than described by Mr. P. He said it was centered under the window, visible when looking through the den door. She said it was over towards, or against the fireplace wall in the corner, opposite or facing the sunporch window and therefore less visible from outside the den through the glass door, which was a French door. Mr. P.'s evidence is that either way you could still see in (the den).

[39] A fact mentioned and emphasized to some degree was that the grandfather would have been alive for four of the six years that these offences were alleged to have taken place.

CEMETERY AT [...]

[40] In regard to the cemetery on [...], the cemetery served the parishes of [...]. It was divided into an old part and a new part, the latter being created to form a second driveway which "looped" around. The older part is open. It contains the graves of G. and R. E.. Of note, is that the grave marker contains B. E.'s date of death, or rather year of death. It also contains the grave of H.M.'s great grandmother H. A..

[41] Mr. P. was familiar with the graveyard, he knew where G. E.'s grave was and he had built a chainlink fence around the great grandmother's grave, welding the links to a loop at the top of the posts which he pushed in by hand, as shown in Photos 15A and 15B of Exhibit 5. He made it at the "central shops" and did it at R.'s request.

[42] On cross examination Mr. P. was questioned about the house adjacent to the graveyard and agreed with the suggestion that it was the only one, the driveway being just after the cemetery on the left, when travelling west from [...]. It (the house) is shown as Civic No. [...] in 13.1, A and B. On that point, it is shown also in 12.1, A & B, at or near the turn; the view being blocked partially by trees in those photos. Also shown is a driveway "pushing off" from the driveway to the cemetery at or near the point in question, (the turn) where H.M. alleged she was lifted and lifted herself up over the console and allowed to steer the vehicle, while he placed his hands up and down her clothing, inside.

[43] For her part, H. M. was quite specific in her evidence about how this took place. She would be on his lap, she would steer, he would operate the pedals. She described the layout of the graveyard and in particular the entrance and the driveway layout containing a semi-circular turn or circular turn.

[44] Mr. P. provided Google maps, Exhibits 11, 12 and 13, showing the routes, distances and travel time from [...] to the Tim Horton's at [...], at or near the [...]. Also provided were maps providing the same information for a trip from [...],

(adjacent to the cemetery), to the Tim Horton's at or near the [...], at [...]. I am cognizant there was also a Tim Horton's in the [...].

[45] The drive from the residence to Tim Horton's measured 6.9 kilometers and driving time of eight (8) minutes approximately. The drive from the cemetery to Tim Horton's measured 9.9 kilometers with driving time of 13 minutes. Maps were entered as 6.2 and 6.2.2 of Booklet 1, for the driving time from the Tim Horton's in [...] at [...], to [...], and from the Tim Horton's in[...] to the cemetery at or near [...] . From the Tim Horton's in [...] to [...] is less than one (1) kilometer and one (1) minute away. From Tim Horton's to the cemetery it was four (4) kilometers , about six (6) minutes away. Mr. P. agreed in cross there was no stop sign at the right hand turn onto [...] from [...]which turns into [...].

THE ACCUSED

[46] Mr. P. was employed with [...] for about 25 years until 1999. He was a [...] but also heavily involved in union business. During the vacation periods he would often have to work to repair and maintain the equipment in the mines.

[47] He would typically work dayshift from 7 am to 3pm , he would return home, take a shower, and have supper. Thus the visits to [...] would occur around 5, 6, or 7 p.m. on week days. H.M. said at one point it would be daylight (or daytime) and weekdays, but then said the visits would occur over a seven (7) day week. Mr. P. visited on weekends and during Sunday dinners. He said the visits would often last about an hour.

[48] Sometimes he would have a sandwich in the kitchen, at the nook, with the family. There were smokers there, including his wife R., and when that occurred he said, "he was out of there," or words to that effect. He would play inside and out with the kids, watch TV, watch movies, go for coffee. He said in cross examination he would go for coffee, (as I've said), four to six times out of ten visits. He agreed the visits would be once or twice a week. He would sometimes go to [...], a local convenience store and take the kids there as well as to Tim Horton's.

[49] He was the beloved uncle, and if the family took sides in the divorce, it was his and not R.'s side. He took J. to hockey and fishing but stated clearly he was never alone with any of the children, including H.M. He denied, absolutely,

taking H.M. to the graveyard. He denied absolutely any of the incidents in the den, the kissing and the penis exposure. He denied absolutely everything. It simply did not happen, said Mr. P. in his evidence.

OPPORTUNITY

[50] Mr. P. testified in his own defence. As part of that defence he raised that he did not have an opportunity to commit these offences for various reasons. If I believe him that he did not, I must acquit him. Even if I do not believe him I must acquit him if I am left with a reasonable doubt. I repeat, even then if the evidence does not leave me with a reasonable doubt I must decide whether the evidence I do accept proves the guilt of the accused beyond a reasonable doubt.

[51] Mr. P. called as a witness W. A. L., 83 years of age who provided the court with a summary of burials over the ten (10) year period from 1990 to 2000. There were 14 in total. He noted one correction, Mr. W. L., who died in March as the record shows, but had to be buried in April of 1990 due to very bad weather. He noted he was down south at the time. Mr. L. noted also that, with one exception, there were no other burials in winter. According to the record (Exhibit 6), this

meant the months of January and February, but it must be added there were no deaths which occurred in the record he provided, in those months. One further exception was in the year 2002 when his mother died and he arranged to have the graveyard plowed, to allow for her burial. When asked generally about snow during those years he answered "there would be quite a bit of snow in there all the time". I note in 1995 there were burials in November and December, as well as in 1998 and 2000. I note in other years there had been burials in March so depending on the winter, mild or harsh, or somewhere in between, it could vary. The suspect months are January and February, and the record itself would be more telling if deaths had occurred, in those months .

[52] He spoke of the sign, being the original sign placed there 50 plus years ago displaying both parishes of [...]; the name of the old church in [...] remaining, after [...] joined up with [...].

[53] I have considered the Google maps earlier discussed. The travel time shown on Exhibit 12 from [...] to Tim Horton's at [...] was about eight (8) minutes. Exhibit 12 had, as travel time from the cemetery to the same Tim Horton's about 13 minutes, meaning it takes about five (5) minutes to get from [...] to the

cemetery or ten (10) minutes both ways. Adding ten (10) minutes to eight (8) minutes one way and eight minutes return to [...] , the total is 26 minutes. This does not leave much time for the cemetery or for picking up an order at Tim Horton's, but these are approximate times. I note also that Mr. P. said 40% of his runs were "[...] runs", being a very short distance, a minute or so from [...] to [...].

[54] While M.H. mentioned the Tim Horton's in [...] she also mentioned, and it is my impression from the evidence, that they would go to the Tim Horton's in [...] but this would have to be in later years, in the late 90s. Mr. P. said that Tim Horton's came there in the late 90's. He further said in direct, he never went to Tim Horton's in [...] from [...].

[55] I note also that M. did not recall the Tim Horton's in [...]. Her memory was as an adult, giving evidence as an adult. She said when cross examined, it was her recollection that the drive would be more than 20 minutes and it could take about a half hour to 45 minutes. She was cross examined on a previous statement and her answer was consistent in that she stated 30 minutes or a little more.

[56] I have considered the layout of the house and the graveyard. It is argued both places provided no opportunity for Mr. P. to commit these offences. In short, the house was just much too busy, the den much too visible. Mr. P. was asked in cross if there was ever a time when he could wander off with no one around, someone missing. Mr. P. said, reluctantly I thought, "I am not saying there wasn't", but in effect he said there wasn't, but later he said, yes he could slip away in the seven (7) to eight (8) bedroom house if need be, to avoid the smoke.

[57] I have considered the layout of the house and the den itself. Although there are large windows in the front of the house those would look into the sunporch and not directly into the den. The three separate entrances to the sun porch and the number of people around would pose in my view, a greater risk of privacy or the lack thereof. The house or houses across the street on [...] are separated by a long drive way and actually being able to see into the den from a neighbouring house, depending on the angle, the amount of sunlight, and daylight, would not be easy despite the second set of windows to the den, even with the curtains open. The position of the couch in the den is a telling issue, I think due to the den door being a French door, but notwithstanding it is down a hallway and depending on who is home at the time, any privacy it offered would depend on who was home from

time to time, and where they were located in the house. If the remaining people were in the kitchen, the opportunity, in my respectful view could exist on the basis of the house layout itself.

[58] Similarly I have considered the cemetery. I recall Mr. L. saying he never saw on a regular basis a [...] , but it is unclear whether he would be there on any regular basis, the caretaker mowing the grass, perhaps.

[59] We saw the figures on the number of burials averaging less than two a year. He (Mr. L.) said also that the trees with leaves makes the cemetery less visible from the nearby house, but with the leaves gone one could see through. On this point I note H.M. never said, or could remember specifically a season, except for it being warm. She said she remembered it was warm. My impression of her evidence is that it is not as rigid and steadfast as argued by the Defence, such that it had to have occurred in winter. Indeed the Defence is saying it could not have and request me to take judicial notice of certain facts in regard to snow and winter conditions, to refute her story, which they say was given “without exception”, that there would be visits all year round.

[60] I have considered the work, (the employment record) tendered by Mr. P. as Exhibit No. 7. In 1994 he worked mostly all day shift and very few weekends. For two (2) consecutive months in May and June he was on union business. He took three (3) weeks vacation in December and there was little other union business that year. In 1995 he again worked mostly all day shift and very few weeks, much less union business than in 1994 with vacation in June, July and spread out elsewhere. In 1996 it was again, day shift, very few weekends. He was laid off for one or two months in February and March, very little union time, vacation in December. The year 1997 was similar to previous years as was 1998 with some union business plus three (3) days absent without cause. In 1999 he worked only until August, had two and a half weeks in August for union business. He worked two Saturdays and was off for four (4) months.

[61] The Defence provided certificates, many of them to establish that Mr. P's time was taken up with courses or work related training. Some of these are undated and numerous of them are dated in 2001, after the alleged incidents. Some are 2000, and some are day courses. During the relevant years, 1994 to 2000, the average was one or two a year. Many are before the alleged time, in the 80's and one is in the 70's.

[62] In addition Mr. P.'s wife R. suffered from illness. He gave evidence in general terms about this. She was hospitalized in Halifax and Antigonish for extended periods of time. During these times he would not visit [...] as he would be visiting his wife. Evidence was also given that quite often they would stay away from [...], due to family conflict. This could extend to two, three months at a time and as well occur two to three times a year. It should be noted as well that Mr. P. coached "rep hockey" which would make for a very busy winter, on top of his other committments, which were considerable.

[63] I pause here to repeat that there is absolutely no burden on the accused at anytime. It rests always with the Crown. This applies to whether there was opportunity. Mr. P. does not have to prove a lack of opportunity to commit these offences, but he has raised it so I must assess, analyze and deal with it. The Crown must prove beyond a reasonable doubt that the offences were committed. A lack of opportunity could give rise to a reasonable doubt.

[64] I pause here further to reflect on the law and to state that allegations of so called historical sexual assaults are among the most difficult for a judge or a jury

to decide. This does not mean that such cases are incapable of being proven beyond a reasonable doubt. It does mean that careful analysis is required, as noted in para.43 by the Nova Scotia Court of Appeal in the recent decision of *J.M.M. v. Her Majesty the Queen* [1999] O.J., No. 2357 (C.A.)(Q.L.). In *J.M.M.* the Court further endorsed the comments of the court in *R. v. Gostick* and *R. v. W.B.* [1993] B.C.J., No. 758 (C.A.)(Q.L.), stating at paragraph 48:

> "The proper approach to the burden of proof is to consider all of the evidence and not to assess individual items of evidence in isolation." (*See R. v. Morin* [1988] S.J.C. No. 80.

[65] This is especially true where, as here, the principle issue is credibility and reliability. The evidence of H. M. here is obviously central to the Crown's case, and must be viewed with a critical eye, in light of the other evidence presented. In so doing I refer to the comments of Robertson J., in *Her Majesty the Queen versus P.W.M*, [2009] NSCC,423, where she discussed the challenge in this type of case, at paragraph 122;

> "The challenge of course is to ensure that in weighing the evidence of the complainant and the accused, as to these events, that the Court not merely engage in a "he said, she said" analysis **leading to a version of events over the other, thereby possibly shifting the burden to the accused that would ignore the required analysis of step two and three of *WD.*"** (Emphasis added)

[66] Finally, in respect of the evidence of children given as adults, I refer to the strong warning issued by McLachlin, J. in *R. v. W.R.,* [1992] 2 S.C.R. 122, where the now Chief Justice said about changes in the way the Courts looked at the evidence of children, at p. 134:

> "...Protecting the liberty of the accused and guarding against the injustice of conviction of an innocent person requires a solid foundation for a verdict of guilt whether the complainant be an adult or 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."

[67] The learned Justice (now Chief) said further:

> "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."

[68] Relying on the authorities I have cited, the law is that whether a witness is credible is a question of fact. Proof that an accused is probably guilty is insufficient. Proof beyond a reasonable doubt is closer to an absolute certainty

than it is to probable guilt. With this in mind I turn back to the evidence and in particular, the question of whether I can and should take judicial notice that snow and winter conditions would have prevented visits or access to the graveyard in question.

[69] I am thankful for the many cases on this point, including paragraph references which I have received from Ms. Cusack, Counsel for the Defence. Ms. Cusack on behalf of her client stated:

> "The graveyard was not plowed in winter. Regardless of the suggestion that expertise is called for to verify exactly how much snow would have been on the ground in any winter, it is very clear that one can take judicial notice that in Nova Scotia, particularly in Cape Breton, it snows every winter. There are always snowstorms during the winter in Cape Breton, whether one permits the evidence as to how many more there were then or not, it usually blows heavily at times and if you don't plow the snow, you can take judicial notice that it either stays on the ground, if it is cold enough or if it starts to melt and then freeze again, which is many times the case, it creates very treacherous conditions because you have freezing on top of the snow and you have melt that then freezes."

[70] While I am not so sure it is any different in Cape Breton, I see what counsel is asking for. There have indeed been cases where judicial notice of weather conditions has been taken but as in most cases, context is very important.

[71] In *Kraps Paradise Canyon Holdings Ltd., [1998]B.C.J. No.709(BCSC)* , a B.C. case, the Court took notice of "wet conditions," that would have been present in high mountain terrain "at that time of year." That time of year being early June of 1995. *Kraps* was cited in *Tapp v. Wawanesa Mutual Insurance Company*, 2012 SKQO (165) (CAN Lll), which in turn was cited, with approval, by Robertson J. in *Gary MacDonald and Rebecca Jane LeBlanc v. Laura Barbour and Charles Robichaud* 2012 NSSC 102, 2012 NSCC 102 (CAN Lll)

[72] In Nova Scotia, Robertson J. stated in *Barbour* above:

> "Judicial notice of weather in a general way has been sanctioned by the courts."

[73] The test generally is as cited by our Nova Scotia Court of Appeal in *R v. MacDonald*, [1988] 83 N.S.R. (2d) 293 (C.A.),where the Appeal Court stated:

> "Judicial notice may only be taken of a fact if
>
> > (a) the matter is so notorious as not to be the subject of dispute among reasonable men, or
> >
> > (b) the matter is capable of immediate, accurate demonstration by resort to accessible sources of indisputable accuracy."

[74] The second criteria I think in terms of weather, would require resorting to historical data as to the amount of snow, rainfall, and temperatures in any one year, and in any one region. We do not have that here nor do I think if we did we could still predict the amount of snow, ice, or drifting in any one area, at any given time or date, same for I suppose, average snowfalls.

[75] In regard to the first criteria and whether the matter is so well known, so notorious as not to be capable of a dispute among reasonable men (I add women), I am satisfied it can be said that it snows in winter. It would be more accurate in my view to say it normally snows in winter, meaning it usually does. Whether it snows less now than in years gone by, may be a common held belief but it is more difficult to say, that that is without dispute. As to what months it snows, that too is anyone's guess but it would be safe to say that it usually occurs in January and February, but as has been heard in evidence, and as we know, snow can fall in other months, sometimes in abundance. Similarly there are mild winters and severe winters.

[76] Can or should the Court take judicial notice of global warming for example? I think not, the Court can recognize it as an issue but to draw a specific reference

as to weather conditions, resulting from it is as dangerous as a slippery slope. There have been unexpected snowfalls in spring, but while unexpected they are not a total surprise.

[77] In my view the bare facts for which judicial notice can be taken are few and minimal. The more important point is what inference or conclusion maybe drawn from the fact that it usually snows during the winter months, whatever they maybe. The amount of snow and ice buildup at any given time is beyond the reach of the court as it is dependent on rain, melting conditions, temperatures from time to time,(and snow). It is a reasonable inference that visits to the graveyard would have been more difficult in winter months due to winter conditions, depending on the amount of snow and other conditions at any given time and in any given year. At times it may even have been impossible, without plowing, which was the evidence of Mr. L. in referring to two burials in his evidence. At other times it may have been entirely possible.

[78] I have considered all of the foregoing in terms of opportunity and I am satisfied, for the reasons I have indicated, that Mr. P. did have the opportunity to commit these offences, in spite of the things he was doing and involved in. I have

no doubt he was a busy man, but I am satisfied beyond a reasonable doubt that he still had the opportunity. Neither H.M., in her evidence nor the evidence of her brother or mother, was specific as to the time of year the visits occurred. She said she remembered it was warm and the article of clothing she remembered was Mr. P. wearing shorts, which she referred to as "cutoffs". This was of course related to the den incident. I am mindful she did not exclude any times of the year, and thus the Defence's position.

[79] In terms of the house, the evidence supports a finding that it was big enough to allow for Mr. P. to slip away and visit the den. In terms of the graveyard, the houses nearby in my view would not be a deterrent necessarily. Sometimes the most conspicuous places are the most private.

[80] In terms of the work record, he worked mostly all day shift and very few weekends. In terms of the drives to Tim Horton's, the evidence of A. M. is that the drive would be longer than 20 minutes to a half hour, extending to 45 minutes. I am prepared to accept that evidence. She was challenged also on a previous statement, and her answer appeared to be consistent. I am prepared to accept that as reasonable, given these are approximate, not exact times.

[81] In terms of judicial notice of "snow", H.M. was cross examined at length about the number of visits and when they took place. Consistently her response was, whenever he would ask me to go to Tim Horton's. There were periods of time he did not visit, he said months and months, and he would visit for months and months at a time. A conclusion that every week or every two weeks meant in every month in every year, places too literal an assessment on the evidence and is not a fair one. They certainly would usually occur whenever Mr. P. would visit, that is the evidence of H.M.

[82] I will comment further (later) on the furniture in the den. At this time I am mindful and generally concur with the Crown, that these incidents were brief in nature in terms of time. What this case must turn on, in my respectful view is the issue of credibility, as the parties themselves have stated. In this vein the series of contradictions and inconsistencies in the Crown's case as alleged by Mr. P. must be reviewed and considered.

[83] In my view, this will be determinative of the guilt or innocence of Mr. P. The law is of course he is presumed to be innocent of these offences, unless proven otherwise by the Crown, beyond a reasonable doubt.

CREDIBILITY - INCONSISTENCIES AND CONTRADICTIONS

[84] The Defence argues that the inconsistencies in the evidence led by the Crown, particularly H.M. are numerous. This, they say seriously affects her credibility, so much so that she ought not be believed, with the result that the Crown has failed to meet its burden, entitling Mr. P. to an acquittal.

[85] In addition, for his part Mr. P. states he's entitled to an acquittal, as there are just too many holes in the Crown's case, and it is not reliable. On the other hand Mr. P.'s evidence and the evidence led by him should be believed, entitling him to an acquittal on that basis.

[86] I was asked by the Defence to listen to and examine (on the taped record) the list of inconsistencies and contradictions in the evidence presented on these charges. I did. There are some 19 or 20 examples the Defence cited of instances

where the complainant contradicted herself or contradicted other evidence, or was inconsistent with herself or other evidence. The challenge for me is to apply the same level of scrutiny to all the evidence, whether it is H.M., Mr. P. or other witnesses. I shall deal with those I find to be of importance or the most challenging in terms of credibility. I would add however that I have considered them all.

[87] (i) "The Sign" in the graveyard. The Defence argues that H.M. did not remember the sign or know the name on it despite its prominency, size and length of time it had been there. Given the number of visits she alleges this, they argue, casts doubt on her evidence. Balancing her evidence, I note she remembered it was an "Anglican" cemetery. I note she was able to describe the layout and location as well.

[88] (ii) The Grand Prix and the LeBaron. The Defence tendered as Exhibit #3, a vehicle abstract showing ownership by Mr. P. of certain vehicles during this period. The only vehicle she could remember or recall details about was the 1994 [...] Grand Prix. Yet Mr. P. clearly did not own this vehicle until 1997, when the complainant would have been eight or almost nine years of age. Her allegations

are that these offences took place when she was between 6 and 12 years of age. This is somewhat troubling. The Crown argued that the LeBaron had beige interior as described by Mr. P. himself, and that the complainant had remembered that it was similar or brownish. She did not. She said it was "darker", darker than the interior shown in the car similar to the Grand Prix in the photos shown in Exhibit #2. By this she meant darker in the Grand Prix not the LeBaron. Mr. P. said the interior in his Grand Prix was a charcoal grey, therefore making it darker than the interior in the Exhibit she was shown. This therefore appears to be correct on her part. She remembered the console between the seats, and described being helped or lifted up and over onto the driver's side.

[89] (iii) The Kissing in the den. At trial H.M., described being asked to kiss Mr. P. She would proceed to do so on his cheek and he would turn his head, she said, kiss her on the lips and put his tongue in her mouth as well. She was challenged on cross-examination, that in direct she said he used his tongue the first time, but in cross said his tongue was on another day.

[90] In the preliminary, (pages 22 and 23), she said on the first time, the first kiss he used his tongue. She was asked which was the correct version and why the

difference. She said the correct version was the first time, he just tried to kiss her, and she said she didn't know why she said on the first occasion he tried to put his tongue. "I don't know" was her answer. So no reason was given by her, explaining the difference.

[91] She was later shown the police statement in which she confirmed that "a few months later he started with his tongue." So her statement to police was consistent with the corrected answer she gave on cross. I listened also to her evidence in direct and in direct she used words like "as it was progressing" but left the impression that "it", the tongue, happened on the first incident.

[92] (iv) The Exposure in the den. At trial in direct H.M. stated Mr. P. asked or invited her to touch it, referring to his penis. In cross she was challenged by Defence, reading from page 10 of the statement of Officer Lisa MacDonald that, he "told me to touch it", instead of asking her to touch it. She affirmed or agreed on cross examination that the correct version was that he asked her to touch it. I reviewed the contents of the Lisa MacDonald statement put to her on cross and in it, when asked what she remembered, she said "he just pulled it out and told me to touch him, asked if I wanted to." She was later challenged in cross a second time

on this in regard to the preliminary transcript and she confirmed her understanding of what was correct, it was him asking her to touch it. I have inferred from this evidence that some of these contradictions are not necessarily so but rather different interpretations of the same evidence.

[93] (iv) The Last exposure in the den versus "several times"- as told to Officer Sam Cote. H.M. was clear the exposure by Mr. P. of his penis in the den was the last incident, that's when she realized it was wrong and that was the last thing that happened. As the Crown put it, a light went on for her.

[94] It was put to her in evidence that she told Sam Cote that Mr. P. had exposed himself several times in the car while driving. There was also a difference in what was told to Mr. Cote as to the age when it started at the graveyard and the number of times Mr. P. would visit, three (3) times per week. She had told Officer Lisa MacDonald the exposure happened "just once". When asked why she said these things her answer was, "I don't know why I said that".

[95] There are additional discrepancies where for instance, H.M. told Officer Cote it was between the ages of 10 and 12 that she realized it was wrong. She agreed saying, “I could have said that yes”, later asserting it was around 12(yrs.).

[96] She was challenged also with saying in direct that Mr. P. was wearing cutoffs at the time of the penis exposure, but described them earlier as shorts, “like swimming trunks”. In redirect she explained that, by “like” she meant “resembled”, (resembled swimming shorts).

[97] (vi) The Age when it started at the graveyard, (“it” being the activity). The Defence argued that H.M. said at trial she was six or seven when a few months later she went to the graveyard, not much long after the first kiss, but in the statement to Lisa MacDonald she said she was probably around 10. When asked why she said, probably about 10 she answered, “I don’t know, I was nervous”.

[98] I am aware of, and considered the further contradictions in the evidence as submitted by the Defence including whether she did not disclose because she was scared or because she thought it was normal (as the reason for not coming forward). Her reason for coming forward in direct was that she did not wish to see

it happen to anyone else, and that it was because for a time she thought it was normal and as well because she was scared. She said in her evidence at preliminary, it was because she was scared.

[99] I am aware also of the three (3) versions as alleged of the den incident. One that she simply got up and left; two, that nothing was said; and three, that Mr. P. said that he wouldn't be allowed to visit.

[100] She had said he made one other so called threat, that she would get in trouble. She explained in cross she didn't know exactly what that meant. Her response was silence. My impression of the evidence is these threats did not relate solely to the den incident but rather to Mr. P. not being able to visit, which was something which (she said),"he mostly said". She said "I just didn't want to say anything". She did not disagree with the statement to Detective MacDonald that she said "the same thing";" I can't tell no one or he can't come back". She said further at that point she "didn't care because she knew it was wrong, but I still never told anyone until now".

[101] Ms. M. said in direct when asked the reason why she not come forward, said "I just didn't, I kept it to myself". I infer from this it was not necessary because she was scared or not because of threats. Included in the Cote statement was a reference to her "getting in trouble". This response in my view makes a certain amount of sense. I keep in mind what Chief Justice McLachlin said about taking a common sense approach to the evidence, child or adult.

[102] In that vein, I think the number and frequency of the visits must also be addressed in that they were described in various ways. They were said to happen "a lot" and as well "almost every time he came to visit", as compared to "a few times" as mentioned in a previous statement given to Detective Lisa MacDonald. Looking at the totality of the evidence, the evidence given by H.M. was "approximate" and could she said, be "more or less." She said also she was not 100% sure of the number of times, "whenever he asked me to go to Tim Horton's", not being sure of how often per week.

[103] The complainant agreed that Detective MacDonald was kind and sensitive in taking the statement, which is cause for concern when reflecting on matters of credibility.

[104] A. M. said in direct that Mr. P. would visit once everyday, if R. was getting along. H.M. said also at one point it was once a day in her statement.

[105] A key piece of evidence presented was the complainant's statement that the Grand Prix had an "air freshener". She did not describe it in detail except to say it was shaped like a race car. Mr. P. said in direct there was no air freshener.

[106] Mr. P. was less than sure whether there was an air freshener in the car when he returned after 2001. Mr. P. took a lot of pride in his car, he knew the license plate number, and still remembered it. J.'s evidence was that they would watch Nascar, and A. M. said they would go to "speed races".

[107] He hated smoking and would leave to avoid it. When she was asked about his vehicles, A. M. identified the air freshener. I was concerned she volunteered this, even though she was not asked specifically, but she described the vehicle in other ways as well. I had the same concern at one point about H.M. saying that he, Mr. P. ,"played with us",and then " played with me". A quick change as Ms.

Cusack noted. H.M. did say “they”, meaning Mr. P. and his wife, R., had an air freshener.

[108] In terms of the air freshener I am skeptical about Mr. P.’s evidence that he had none. I did not find his evidence convincing. I don’t believe I need to determine whether there was, in fact, an air freshener to decide this matter; but I am not satisfied Mr. P. was being truthful on that point.

[109] Generally I found that none of the Crown witnesses, particularly J. and A. M., bore or beared any ill-will or malice towards the accused in giving their evidence. They were there in support of H.M., yes. J. knew less it seems than anybody, and yet he loved J.. He was his godfather.

[110] A compelling piece of evidence is when J. said J. would only ask H. to go to Tim Horton’s. “He never asked any of us”, is what he said. For a young man in a difficult position, J.’s evidence went virtually untouched in cross-examination, in my view, on the critical points. He was balanced in the evidence he gave. Mr. P. stated in cross-examination there was never a time when any of the children were alone with him, “never individually” is what he said. And he knew this some 13 to

19 years after the fact, even though there was no reason (to), until these charges arose.

[111] A. M.'s evidence confirmed that H.M. and Mr. P. were alone, saying she felt guilty her kids were being singled out for special treatment, and that she encouraged it. For his part, therefore, I did not find Mr. P.'s evidence to be convincing on this point, and that casts doubt on the credibility of his other evidence.

[112] I did not believe him, and I am not left with a reasonable doubt by his evidence, in terms of his credibility. His delivery was smooth and even for the most part, but not persuasive to me, and therefore not credible.

[113] In reaching this conclusion I have considered (such things), that he passed up an opportunity to be self-serving when asked about side streets and lane ways available where he could have taken her; but in another example, when he was asked whether he would shut the den door, as stated by H.M., his answer was not direct. His answer was "the door was always open", not whether he opened it or not.

[114] On the totality of the evidence I find the evidence of H.M. taken in context to be credible. Yes, there are troublesome parts. I find, however, that evidence such as “I am not a hundred percent sure”, “I just didn’t”, “I was nervous” to be more credible than not in these circumstances. She said calmly, “I didn’t say that”, in response to a suggestion that she told Jonathan that the abuse stopped when she was 14.

[115] In the case law provided to me(R. v. Z.E.B.2006 Carswell NS 77), Gruchy, J. said, “prudence is necessary when accepting adult memories of children”. Similarly in Rv.D.(G.D.) 1995 NSJ No.529, Davidson, J. said, “it is helpful to enunciate some of the concerns long lapses of time have on recovered memory”. We have seen the effect a long lapse of time has on recovered memory. Peripheral details become sketchy. It is apparent from the evidence that H.M. would give evidence only on that for which she was certain.

[116] “I can only remember the Grand Prix”. She was not certain as to the number of visits, or the time of year, or the name on the sign, but remembered an article of clothing which was consistent with the time of year; it being warm. Her memory,

it is apparent, became more vivid as she became older, as indicative of her evidence of the Grand Prix, and the last incident in the den. As to any discrepancy, she said, “I remember it happening in the den”, or words to that effect. This explains to some extent, the evidence of M. S. and C. M., friends of the complainant, when they referred to her saying they would go to visit her grandfather’s grave, or a grave.

[117] M. S., a friend of H.M., of Dartmouth, gave evidence that H.M. told her of certain incidents involving Mr. P.. She encouraged her to tell her mother, and was there when she,(H.M) called. She said she, H.M., did not get into graphic detail on the phone. She(M.) knew only of the incidents in the car. She admitted to first telling the police H. had not been drinking, but was familiar with H.’s degree of sobriety, and she had “just started”, or had very little. She explained, for the most part, any contradictions, and on the whole I found her to be a credible witness. She knew it was a grave, if unsure as to whose.

[118] The Defence argued C. M.’s testimony was rehearsed. She was the first person H.M. told. Like M. S., she said H.M. was upset, but more relieved than anything. She was challenged on her police statement in July 2010 where she said

H. told J., but not her mom or brother. She explained that she meant they were both aware of it; but she did not know the circumstances of how it was disclosed to the family. She was told also that it was to visit the grandfather's grave like M.; but unlike M., bits and pieces were mentioned by H. to C. a few years earlier when they were teenagers. She admitted to never seeing Mr. P. and H. driving together, despite living close by, and told police she often saw J. in the kitchen when she would visit.

[119] This and other inconsistencies have caused me to consider the nature of any doubt I have. It is odd C. did not once see Mr. P. and H. driving together. On balance I did not find, however, C. M.'s evidence rehearsed, nor was she hesitant in providing her answers to questions.

[120] There are the previous items I pointed out regarding kissing versus tongue in the den, and the telling versus asking. I have explained given the age at the time, 6 or 7, H.M. was unsure of her age, and did not remember the exact age in relation to when the events occurred; but did remember it happened between 6 and 12, and she remembered the details of what happened. She generally knew how it progressed from kissing to the graveyard to the last incident in the den.

[121] I am mindful that being asked goes directly to the offence of inviting. Her memory of the age of when things started at the graveyard is, in some instances, linked to the Grand Prix, and these are peripheral details of which she is uncertain. She certainly believes, and stated she was younger than 9 when she went to the graveyard. It only makes sense that she could be mistaken, even confused, as to exact dates and times given her age, and the length of time that has elapsed.

[122] She was not confused about the incidents themselves. She remembered visiting the graveyard both before and after her grandfather died. The fact that she did not tell all of the story to her friends does not weaken her evidence, in my view. An example of her memory of the incidents was given in direct describing what would happen, and I'm paraphrasing, "I'd be in the front passenger seat, we'd park at the top halfway at the circular driveway. He'd let me steer the car, he puts his hands up my shirt and down my pants under my clothes. He'd put his hands under my arms, and I'd lift myself up and over. I was about 7 or 8", meaning approximately 7 or 8. She was still 8 when Mr. P. actually bought the (Grand Prix) vehicle. (I refer to the following testimony of H.M. in direct).

Q. Did he offer to let you drive?

A. Yes.

Q. Did you accept?

A. Yes.

Q. Is it possible in the course of lifting you his hands would slip?

A. Not possible. He put them up after I was sitting on his lap already.

[123] The specifics of this incident were not seriously challenged despite a very able cross-examination. It is further uncontradicted evidence that H. M. neither read or had an opportunity to review the notes taken by Officer Cote, which was not a formal statement. I am satisfied further that it was the complainant's decision, not her family's, to inform the police and that the family conference was to verify whether any other members were affected.

[124] Finally, H.M.'s explanation of thinking it was normal makes perfect sense. I am cognizant and have considered the evidence, and the conundrum that if it was normal there would be no reason to be scared, and if she believed she'd get in trouble, why didn't she think it was wrong?

[125] I have reviewed pages 143 to 148 of the preliminary transcript. I accept her evidence that she was both; she thought it was normal, and then scared to tell anybody as she got older and realized it wasn't. At the preliminary she said, "I just didn't, and I don't have an answer for that".

[126] She did contradict herself saying at page 148, "I was scared up until 11, 12 on, I was scared". At trial she said "I was just scared to tell. I don't know when it was". I infer from this she did not know exactly when it was.

[127] I find, as a fact, H. M. was a credible witness. In doing so I have considered whether the therapy she received and touched upon by her mother, may have adversely affected her memory. The evidence on this is quite thin. Upon her grandmother's death she became depressed, and A. M. said, "occupied with death not suicide". What I have considered and observed is that for a woman of 23 years she was, for the most, unshaken throughout her testimony. By this I mean she showed restraint. Any emotion she displayed was not only understandable, but in my view displayed predominantly her sincerity. In short her evidence had the ring of truth to it. She did not attempt to exacerbate what happened. For this reason I

am prepared to accept her evidence as to the location of the couch in the den where she was sitting and watching t.v. when the exposure, invitation and unwanted kissing took place.

[128] I concur with the Crown that she has described touching, touching her sexual parts, (developed or not), and he exposing himself and extending the invitation. That is what she described.

[129] Mr. P., as I said, is presumed innocent. I reject, however, the testimony of Mr. P. as to the lack of opportunity. Further, I do not accept or believe his evidence that he did not commit these offences, and having done so I have asked still whether his evidence gives rise to a reasonable doubt, or leaves me with a reasonable doubt. It does not.

[130] On the totality of the evidence I am satisfied the Crown has established proof beyond a reasonable doubt that Mr. P. committed the three offences in the indictment as amended, including each element thereof. I note in concluding there was virtually no evidence presented as to a motive to lie, and that it was not a live issue in this case.

[131] This concludes my decision.

J.