SUPREME COURT OF NOVA SCOTIA
Citation: ***R. v. J.P.***, 2019 NSSC 373

Date: 20191204
Docket: CRT No. 482571
Registry: Truro

Between:

Her Majesty The Queen

v.

J.P.

Defendant

Restriction on Publication: s. 486.4 CC and s. 517(1) CC

DECISION

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	November 5, 5, 6, 2019 in Truro, Nova Scotia
Oral Decision:	December 4, 2019
Written Release Decision:	**December 11, 2019**
Counsel:	Thomas Kayter, Crown Counsel Sarah White, Defence Counsel

NOTICE OF BAN ON PUBLICATION

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s. 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of:

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under subsection 146(rape), 145(attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the ***Criminal Code***, chapter C-34 of the ***Revised Statutes of Canada***, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 15 (seduction of a female between 16 and 18)), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the ***Criminal Code,*** chapter C-34 of the ***Revised Statutes of Canada***, 1970, as it read immediately before January 1, 1988; or (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of the subparagraphs (a) (i) to (iii).

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(a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or

(b) if the accused in respect of whom the proceedings are held is tried or committed for trial, the trial is ended.

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REPORTING OF THIS PROCEEDING IN ANY MANNER THAT WOULD IDENTIFY THE NAME OF ANY INDIVIDUAL WHOSE NAME IS COVERED BY THE BAN IS STRICTLY PROHIBITED WITHOUT LEAVE OF THE COURT. THE INTENT OF THE FOREGOING IS TO PROTECT THE WELFARE OF ANY CHILDREN OR VICTIMS REFERRED TO IN THE PROCEEDING AND/OR AVOID PREJUDICE TO ANY PERSONS FACING CRIMINAL CHARGES.

By the Court:

Background

[1] J.P. faces a four count Indictment alleging certain offences against R.B. These offences are as follows:

> THAT he did between the 1st day of June 2010 and the 1st day of September 2010 at or near Bible Hill in the County of Colchester, Province of Nova Scotia, did being in a position of trust towards R.B. , a young person, did for a sexual purpose use his fingers to touch directly the vagina of R.B., contrary to Section 153(1) of the ***Criminal Code of Canada***, and furthermore:
>
> BETWEEN the 1st day of June 2011and the 1st of September 2011 at, or near Bible Hill in the County of Colchester, Province of Nova Scotia, did being in a position of trust towards R.B., a young person, did for a sexual purpose use his fingers to touch directly the vagina of R.B., contrary to Section 153(1) of the ***Criminal Code of Canada***, and furthermore;
>
> BETWEEN the 1st day of June 2012 and the 1st day of September 2012 at or near Bible Hill, in the County of Colchester and Province of Nova Scotia, did commit a sexual assault on R.B., contrary to Section 271 of the ***Criminal Code of Canada***, and furthermore;
>
> Between the 1st day of June 2012 and the 1st day of September 2012 at, or near Bible Hill in the County of Colchester, Province of Nova Scotia, did being in a position of trust towards R.B., a young person, did for a sexual purpose put his penis into the vagina of R.B., contrary to Section 153(1) of the ***Criminal Code of Canada.***

Structure of These Reasons

[2] At the core of this case and central to its determination is an assessment of the evidence of the complainant, a youthful witness whose evidence is to be

examined with an awareness of the fact she is testifying to allegations dating to her childhood.

[3] These reasons will set out a summary of the evidence followed by a discussion and application of the relevant law.

[4] Before embarking on this summary of evidence, I intend to give a statement of the core legal principles - including the presumption of innocence and proof beyond a reasonable doubt - which underpin this entire proceeding. I am doing so at this stage of the decision because it helps me keep these principles before me and at the core of the entire decision-making process.

Legal Principles

[5] The fundamental protection in every criminal trial is the presumption of innocence. This is the primary and irreducible foundation of our criminal justice system. It has to be appreciated that this principle is not a slogan to be quoted and then forgotten. It must remain central to the entire analysis to be conducted.

[6] To be presumed innocent until proven guilty by the evidence presented in court is the fundamental right of every person accused of criminal conduct.

Running together with this presumption of innocence is the standard of proof against which the Crown evidence must be measured. To secure a conviction in a criminal case, the Crown must establish each essential element of the offence to the point of proof beyond a reasonable doubt.

[7] This standard has rightly been called an exacting one. It is a standard far higher than the civil threshold of proof, being a balance of probabilities. The law recognizes various standards of proof depending on the nature of the proceeding. The criminal standard towers above those other lesser standards.

[8] The Nova Scotia Court of Appeal and Supreme Court of Canada have provided clear direction on the issue of what is meant by proof beyond a reasonable doubt. They have instructed as follows:

- A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
- Even if it is believed the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances the Court must give the benefit of the doubt to the accused and acquit because the Crown has failed to prove the guilt of the accused beyond a reasonable doubt.
- On the other hand, it must be remembered that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

- In short, if based on the evidence before the Court, you are sure that the accused committed the offence you should convict because this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.
- It has to be remembered that the burden of proof never shifts to the defendant. This is irrespective of whether the defendant himself gives evidence.
- In this case the Defendant did not testify. Whether an accused testifies or not, at no time does the burden of proof shift to him and the resolution of the case does not turn on the court picking which version of the facts it prefers or finds more believable.

[9] On the issue of assessing the evidence of witnesses, the Court is aware of many cases which provide commentary with respect to the analysis of witness testimony. What we sometimes refer to as the "credibility" of a witness is really comprised of two distinct components of creditworthiness:

1. Honesty of recollection; and importantly,

2. Reliability of recollection.

[10] Honesty speaks to the sincerity and candour of a witness's evidence while reliability relates more to such factors as the witness's individual perception, memory and clarity. Both sides of the equation – honesty and reliability – impact the credit that can be afforded to testimony. A judge may accept all, none or some of a witness's evidence depending on the findings. A judge may

apply different weight to different portions of the evidence which it does choose to accept.

[11] A foundation for reasonable doubt can be found in any witness's testimony. So too, a finding of guilt may be safely grounded on the evidence of a single witness if, of course, it is found sufficiently credible and persuasive to meet the exacting burden of proof. In assessing the credibility of testimony, I am aware of the factors which have been pointed to by courts as helpful to this process. On this point, I have found ***R. v. Farrar***, 2019 NSSC 46, to be instructive.

[12] In assessing the reliability and credibility of each witness's evidence, I have considered these factors:

a. honesty;
b. interest (but not status);
c. accuracy and completeness of observations;
d. circumstances of the observations;
e. memory;
f. availability of other sources of information;
g. inherent reasonableness of the testimony;
h. internal consistency, including consistency with other evidence; and,
i. demeanour but with caution.

[13] It is my obligation to ensure that all these core principles underpin the entire analysis to follow.

Evidence

[14] The Crown produced three witnesses. The investigating officer, J.B., the mother of the complainant, and the complainant herself. The officer provided some background facts, but I do not intend to deal with his evidence except where it may be referenced by implication in another witness's evidence. The testimony of the complainant is obviously the core of the prosecution case and I will deal with it at some length. The evidence of the complainant's mother was quite brief. I will address it first, followed by that of the complainant.

[15] I want to note that in offering this summary of the evidence, I am not attempting to produce a transcript or recite back every single point covered in questioning. It is my intention to focus on central issues of relevance and elements necessary to put the Court's conclusions in context. I have, however, considered and weighed all the testimony, and each of the exhibits, in reaching my determinations even if each is not specifically set out and referred to here.

J.B.

[16] J.B. was called by the Crown. Her evidence was limited to fairly narrow issues. She is the mother of R.B. At the time covered in the Indictment they

lived in McCallum's Settlement with her husband, who was R.B.'s stepfather, and her son, R.B.'s younger brother.

[17] She described her awareness of the circumstances leading up to the disclosure of the complaint. She participated in the decision to have R.B.'s natural father lodge a complaint with the RCMP in Alberta, where he was resident. This investigation quickly transferred to Nova Scotia.

[18] J.B. provided evidence on her knowledge of the circumstances as to when her daughter would be at the home of J.P., both during the period covered in the Indictment and otherwise. The complainant was spending time at that home in those summers largely connected with her being enrolled in baseball. She would stay overnight there as well. Occasionally with her brother and occasionally without. She believed she would sleep on those occasions in the spare room of the mobile home.

[19] With respect to the frequency of the overnights, she estimated it would have been three to four times during the summers of 2010 through 2012, and perhaps a few times in the summer of 2013 but not often. When asked about 2014 she initially indicated that she could not recall an occasion, but it was possible. She believed it did not happen the summers following. In cross examination she

acknowledged having given a statement to police where she said the overnights may have gone on longer, up to possibly 2016 when she was 16.

[20] J.B. was asked about and confirmed that J.P. was the person who taught R.B. how to drive after she turned 16.

[21] When asked whether she believed there was ever an instance when R.B. stayed overnight at J.P's and went with him the next day to the airport to pick up R.B's father, who would have been coming in from Alberta, J.B. said she did not think this had happened. She had no recollection of it and believed she would have known of such a thing if it had occurred.

[22] Very briefly with respect to the evidence of J.B., I want to say that my impression was that she gave her evidence in a very fair and measured manner. She was clearly attempting to give complete and truthful evidence to the best of her recollection and ability. Of course, the scope of what she could testify to was limited to a relatively narrow band of issues.

R.B.

[23] I want to move on to address the evidence of the central witness in the trial, R.B. She was 19 years old at the time of trial. The time frame in the Indictment

dates back to when she would have been 10 years of age and the two years following. I will offer some comments later about weighing the evidence of persons testifying about events in their childhood.

[24] She indicated that her family was made up as follows: She lived primarily with her mother, J.B., stepfather, John B. and a younger brother.

[25] Her biological father, A.B., currently lives in Alberta and has done so since she was approximately three or four. There was a time when she had a strained relationship with her father. She indicated this relationship has become much better recently.

[26] R.B.'s paternal grandmother lives in Bible Hill and her long-time partner is the accused, J.P. He was a stepfather to A.B. and stood in the place of a grandfather to R.B.

[27] In her evidence R.B. described under what circumstances she would be at her grandmother and J.P.'s home in 2010, 2011 and 2012. She indicated that she would go there and spend time in the summers, largely revolving around baseball. She said her mother and stepfather would drop her off there sometimes for baseball or when they'd go to Yarmouth and she didn't want to

go. She estimated this would occur once or twice a week. She would spend overnights from time to time. She estimated this could be:

> three, four times a month maybe

On these occasions she would sleep in what she called the spare bedroom.

[28] During her direct evidence she testified that on one of the 2010 visits, she believed it would have been in the summer, she went to bed one night and recounts waking up and feeling someone touching her. She said that person was J. P. and he:

> touched me in the lower region

When asked to expand she said:

> my vagina with his fingers

And when pressed further for location details she said:

> …inside…

And when asked about other locations she said:

> around my thigh

[29] She was questioned about the lighting conditions and said:

> the night light…it was always on…I could see his face from the reflection of the light.

[30] She was asked for how long the touching went on. She responded:

> A: Maybe five…maybe 10 minutes.
>
> Q: Okay.
>
> A: It wasn't that long.
>
> Q: How long were you awake or cognizant or like conscious of what was happening? How long did it go on for before it stopped?
>
> A: It didn't go on that long. It was like a minute after I woke up.

[31] She was asked what happened after and she said she rolled over and he was backing away. She testified that he said he was checking on her and then he left.

[32] In later questioning she was asked whether she said anything to J.P. at that time and she indicated she said:

> What are you doing?

[33] R.B. was asked various questions to draw out her account of the mechanics of the touching. She explained that she was in two-piece pajamas with a goodnight pull up as she had an overactive bladder. She said the pants were still on but they and the pull up were pulled forward somewhat.

[34] She said she subsequently laid there for a little while and went back to sleep.

[35] When asked what, if any, other incidents occurred, she replied:

2011

[36] When asked to expand, she recounted an essentially identical incident in largely the same terms. In an effort to flesh out the account she was asked further details by Crown counsel:

> Q: …And who was there that night before you went to bed?
>
> A: I believe there was just him.
>
> Q: Okay. What about your grandmother?
>
> A: She might…I don't remember if she was there…she might have been there.

[37] Sometime later, and still discussing 2011, she was asked again about who was in the home:

> Q: Okay. Who, if anyone, else was with you staying over that night?
>
> A: My brother.
>
> Q: Your brother. Your brother's name?
>
> A: A_____.
>
> Q: Thank you. Where did A_____ sleep that night?
>
> A: On the couch.

[38] With respect to the third incident, she described this as occurring in 2012. She had gone to sleep and later on in the night awoke to J.P. thrusting into her vagina with his penis. She stated she was lying on her stomach and he had her face in the pillow. She indicated this lasted for about five minutes. She

described her pajama bottoms and pull up as being down between her kneecaps and her mid upper thigh.

[39] She was asked about what, if anything, J. P. was doing with his hands during this and she stated:

> He was holding my head…like the back from my hair…pushing it, my head down….

[40] She said she didn't know why it stopped, and when asked to describe how it felt while it was happening, she said it felt like a sharp pain.

[41] When asked whether anything was said by either of them when it was happening, she said:

> Nothing

And with respect to anything said following she replied:

> I don't think anything was…not that I remember

[42] R. B. was also presented with copies of text exchanges with J.P. which dated to a number of years after the period covered in the Indictment. She was questioned and cross examined with respect to those. I intend to return to these and reference their role in this matter later in these reasons.

[43] R.B. was cross examined by defence counsel. While it was not an aggressive cross examination, defence counsel would submit that it yielded much in the way of altered recollection and material inconsistencies.

[44] I will review these as they have been highlighted by the Defence. I will have some comments later with respect to how a court ought to be cautious in evaluating differing recollection and inconsistency, a degree of which may not be unusual in recalling events of years past, especially for a youthful witness.

[45] Among items which could be pointed to as lesser inconsistencies would be such matters as:

- R.B. gave inconsistent testimony at trial versus the preliminary inquiry as to whether, in 2010 – 2012, she categorized herself as a light sleeper or not.
- She had a different recollection at the trial versus the preliminary as to what year she stopped using a pull up.
- She was uncertain where the nightlight was located. She identified it as being in the bedroom but under questioning acknowledged she was unsure if it was in the hall.

[46] More materially, in recounting the events of the first allegation (2010) she testified at trial that he used only his hand, but in the police statement she was initially unsure if it was a hand or "if she was raped".

- At trial she testified in the first allegation that the touching was on the "outside" of the vagina. In her police statement she indicated she was digitally penetrated.

- Further with respect to the second allegation she was challenged with her police statement which gave a materially different account than the one given in trial testimony on direct. In the police statement she referenced kicking and waking up and "pretty much my mouth was covered so I couldn't scream…". Defence counsel questioned her as follows:

> Q: Now you'd agree with me that that version of events is very different from what you testified to in Court?
>
> A: Yeah.
>
> Q: And that version is also different from what you said at the preliminary inquiry, as well?
>
> A: Yeah.

- And later Counsel asked:

> Q: Okay. So, you'd agree with me that your memory is not the same as when you were providing these statements?
>
> A: I believe it's the same on some consistencies, but I do have the faults in it yeah.
>
> Q: Sorry, you have a what?
>
> A: That I do have faults on remembering some things from my statements, yes.

[47] Continuing with examples of inconsistencies that defence counsel would point to:

- With respect to the third allegation, R.B. in her police statement had a specific recollection of a plan the day following her overnight stay to go to the airport and pick up her father. She also stated her grandmother was out at her uncle and aunt's. At trial, she did not recall this and believed the pick-

up of her father was another occasion and was unsure what the situation was with respect to her grandmother.

- Counsel challenged her that in her police statement she had given an account that included her calling her mother to come pick her up, which she did not relate in her direct evidence. At the preliminary inquiry she testified that she stayed overnight and the next day she and J.P. went to the airport to pick up her father. Counsel put to her:

> Q: So, that's just what you testified to at the preliminary inquiry?
>
> A: That's just what I remembered at the moment.
>
> Q: And that…so, that's not accurate, what you said at the preliminary inquiry?
>
> A: No…like…I

- With respect to the third allegation, the defence would point to another inconsistency being her account of her pajama pants. In her police statement she describes herself as having no pants on when she woke up and became aware of what was happening. In trial testimony she described them as being down between her knees and mid thighs. Her description of this included standing up and giving a physical indication with her hand indicating where they were said to be down to.

- She was further challenged as to the accounts of where J.P.'s hands were during the third allegation. Counsel went through various accounts and then put to her as follows:

> Q: So, you agree with me that those are different versions of events?
>
> A: Yes.
>
> Q: So, you have three different recollections as to how this occurred?
>
> A: I have three different recollections of where his hands were…

- When asked in direct how long the first incident went on for, she said "Maybe five…maybe ten minutes". But in follow up she states that it went on for only a minute after she woke up. It's difficult to understand that answer, but allowing for nervousness and potential confusion about what

was being asked of her, it may be safer not to read too much into this exchange.

- When asked at the Preliminary Inquiry whether she was certain it was J.P. who committed these acts, she answered eight or nine on a scale of zero to ten. This issue was followed up at the trial where in direct she said she was certain and, when questioned in cross examination on this point, the exchange went as follows:

> Q: Okay. Now I just want you to go to the preliminary inquiry on page 33. So, when you say you are certain, does it mean a hundred percent?
>
> A: Yeah, about…
>
> Q: So, if…you're absolutely certain?
>
> A: Like 95 maybe…I don't…

[48] She was redirected to the preliminary transcript again and then this exchange took place:

> Q: So, you agree with me at the preliminary inquiry you were not absolutely certain…
>
> A: …yes…
>
> Q: …that in fact it was Mr. P_____ at that time?
>
> A: I was certain it was him.
>
> Q: But you are saying here that you were not absolutely certain.
>
> A: I was certain, but I was not absolutely certain.

And then, after a further exchange, counsel again puts the suggestion:

> Q: Okay. So, you're not 100 percent certain then?
>
> A: I…I guess, yeah.

[49] It is important to keep in mind, however, that her evidence at the trial is her evidence.

[50] With respect to all these exchanges dealing with “8 or 9 out of 10”, or “certain” or “95 percent certain”. I want to say the following: these are unusual answers. This is not a stranger identification case. She obviously knows who her step-grandfather is. So, one is tempted to wonder what is really being asked and answered here? What do her responses mean? Crown counsel makes the point that when courts discuss proof beyond a reasonable doubt, it is always acknowledged that such proof does not mean proof to an absolute certainty. This recitation is familiar to anyone who has heard courts weighing evidence and rendering verdicts. But it’s hard to imagine that R. B. was considering the niceties of the proof beyond a reasonable doubt analysis when she was answering this question.

[51] Ultimately, it is hard to know exactly what she thought she was answering or what she was attempting to convey. I will say this. In a case with otherwise compelling and consistent evidence which did not suffer from issues of reliability, this exchange would not necessarily be fatal. It could perhaps be seen as the product of a youthful, nervous or non-assertive witness who was not

comfortable in court and wanted it to be over. The issue, however, is whether the balance of the evidence otherwise rises to the necessary standard.

[52] The defence also points to some inconsistencies between the evidence of the complainant and her mother, J.B.:

- R.B. testified that she didn't believe she stayed at her grandparents' house overnight alone after 2012. Her mother had a different recollection as was summarized earlier.
- The other issue raised would be that referred to earlier – this being whether, with respect to the third allegation, R.B. stayed overnight at her grandparents' home before going to the airport to pick up her father. In one of her accounts, R.B. had a different recollection than her mother.

Text Messages

[53] R.B. was also questioned in cross examination about the text messages referred to previously. Specifically, defence counsel elicited evidence with respect to other messages located in the text chain but not covered in direct evidence or other messages in or about the same time frame.

[54] I have considered all these text messages for purposes of narrative, providing context for how the complaint came to be made with the police. The texts did not contain any admission with respect to the offences before the

Court and to accept them as evidence of bad character or as uncharged bad acts would be improper.

[55] It is unnecessary to set out here in much detail the case law prohibiting the consideration of allegations of uncharged bad acts or bad character. The risks of moral prejudice reasoning are real. The following quote from Justice Fichaud in ***R. v. C.J***., 2011 NCSA 77 may suffice:

> [37] The point of the exclusionary rule is that an accused be judged on the evidence for the event in the charge. He is not to be convicted because evidence related to his prior "sick" conduct on "this type of thing" is "typical of someone who committed this offence".

[56] The charges before the court are those of sexual assault contrary to section 271 and sexual touching contrary to section 153(1). It is not necessary for purposes of this analysis to work through the individual elements of offences, as it would be in some instances. As was said by the Supreme Court of Canada in ***R. v. S. (J.H.)***, 2008 SCC 30, at paragraph 6:

> The real issue in this case is whether the alleged events ever took place. It is for the crown counsel to prove beyond a reasonable doubt that the events alleged in fact occurred. It is not for [the accused] to prove that these events never happened. If you have a reasonable doubt whether the events alleged ever took place, you must find him not guilty.

[57] The Defendant in this case did not call evidence. However, as we know, an accused does not have to give testimony to deny allegations in order to assert his innocence. He is presumed innocent until that presumption is displaced by proof beyond a reasonable doubt.

[58] Case law is clear that the Court will assess all the evidence presented at trial under what has come to be known as the "***W.(D.)***" analysis (see: ***R. v. W.(D.)*** (1991), 3 C.R. (4th) 302 (S.C.C.), as modified by necessity to account for the fact the accused did not testify. I adopt the recent restatement of ***W.(D.)*** as given by the Nova Scotia Court of Appeal in ***R. v. N.M.,*** 2019 NSCA 4.

[59] Aspects of the evidence proffered in the Crown's case, as challenged by the Defence, will be assessed against the principles established in ***R. v. W.(D.)***.

[60] As was said by the Ontario Court of Appeal in ***R. v. D.(B.)***, 2011 ONCA 51:

> 114 What I take from a review of all of these authorities is that the principles underlying *W. (D.)* are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if - viewed in the context of all of the evidence - the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt: see **R v. *Challice***. In that event, they must acquit. (emphasis added)

[61] The Defence has argued that the accumulation of all the issues canvassed above, large and small, in totality must raise a reasonable doubt with respect to reliability and otherwise render this an instance where it would be unsafe to register a conviction.

[62] The Court must never lose sight of the fact that the accused is to be regarded as innocent until proven guilty on a criminal standard. It is well established, that while the Crown always has the burden of proving the essential elements of the offence(s) to a criminal standard, it is not required to prove every single piece of the evidence beyond a reasonable doubt. See***: R. v. J.E.W.***, 2013 NSCA 19.

[63] The Court of Appeal in ***R. v. Mah***, 2002 NSCA 99, stated:

> ...the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[64] The ***Mah*** case makes it clear that it is not the function of the Court on a criminal trial to "solve the mystery" as tempting as that appears to the Court. To go down that road would be to fundamentally misapprehend the Court's role. While doing so might be more satisfying at some level, it would be an error. The reason it would be an error is that it would remove the burden on the

Crown and create an onus on the Defence which does not exist in law. The Court's proper function is limited to deciding whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt.

[65] To be clear, I do not discount the complainant's credibility because she delayed complaint or because she did not cry out or search out help from her grandmother or other family members. I do not take anything from the fact she had contact, or even initiated contact in some instances, with J.P. after the time of the alleged events. To judge her credibility against discredited myths of what we think would be appropriate behaviour for a sexual assault complainant is not helpful. The supposed expected behaviour of the usual victim would not give me useful means of assessing this particular complainant.

[66] With respect to her memory issues, it would not be unusual for a witness, especially a youthful witness, to experience difficulty recalling details from a number of years previous. Case law and common-sense cautions that when assessing such evidence, the loss of peripheral details and matters of marginal relevance, and even a degree of inconstant recollection about matters, will not be fatal to the assessment of credibility and reliability. It is also important to assess the difference between a true inconstancy and the mere adding of further

detail between different accounts: see for instance some discussion in ***R. v. O.B.***, 1995 NSCA 220.

[67] In this case, however, it is submitted that the nature and degree of the shifting recollection and inconsistent narrative goes well beyond the level contemplated in that case law. The Defence suggests this is one of those cases where the evidence is such that it would be unsafe to convict.

Conclusion and Disposition

[68] Any trial involving the possible sexual abuse of a child is a difficult and serious one. The comment of Galligan, J.A. of the Ontario Court of Appeal in ***R. v. J. (F.E.)*** (1990), 53 C.C.C. (3d) 64 (Ont. C.A.) is an apt one in these circumstances: (pg. 67)

> Sexual abuse of children is a despicable crime. It is not easy to detect and because it invariably happens in private, it can be difficult to prove. Usually it comes down to the word of the child against that of an adult. It is easy therefore to be sympathetic with the efforts of those who try to discover these crimes and prosecute their perpetrators. While there is no scale upon which the conflicting evils can be weighed, it should be remembered that revolting as child sexual abuse is, it would be horrible for an innocent party to be convicted for it.

[69] I have concluded that the depth and degree of the unreliable recollection here is well outside the sort of expected or understandable inconsistency which

may always be present in a case with an historic aspect. I accept the concerns expressed by the Defence.

[70] Ultimately, and in light of all the issues referenced above and the obvious reliability concerns, I have concluded that it would be unsafe to register a conviction against the accused in this matter. Suspicions and even likelihoods cannot displace the powerful presumption to which the Defendant is entitled.

[71] Accordingly, please stand up Mr. P_____.

[72] I enter findings of not guilty and dismiss the Indictment before the Court. Your undertaking is discharged, and you are free to go.

J.