SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Hughes*, 2020 NSSC 143

Date: 20200626
Docket: Hfx No. 468574
Registry: Halifax

Between:

Her Majesty the Queen

v.

Trueman Roland Hughes

Restriction on Publication: Sections 486.4 and 486.5 of the *Criminal Code*

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	March 11 and 12, 2020, in Halifax, Nova Scotia
Counsel:	Matthew Kennedy, for the Crown Raymond Kuszelewski, for the Defence

Introduction

[1] The accused, Trueman Roland "Rollie" Hughes is charged with four offences allegedly committed against the complainant, D.B., between December 2003 and December 2013. D.B. was between two and twelve years old during the relevant time periods. Mr. Hughes was and is a chronologically mature adult man who was entrusted with the care of D.B. at various times. The charges against the accused are as follows:

> 1. That he between the 20th day of December, 2003 and the 21st day of December, 2013 at, or near Dartmouth, in the County of Halifax, and at or near Plymouth, in the Province of Nova Scotia, did unlawfully utter a threat to D.B. to cause bodily harm or death to the said D.B., contrary to Section 264.1(1)(a) of the *Criminal Code*.
>
> 2. And further, that he at the same time and place aforesaid, did unlawfully commit a sexual assault on D.B., contrary to Section 271 of the *Criminal Code*.
>
> 3. And further, that he at the same time and place aforesaid, did for a sexual purpose touch D.B., a person under the age of sixteen years directly with a part of his body, contrary to Section 151 of the *Criminal Code.*
>
> 4. And further, that he at the same time and place aforesaid, for a sexual purpose, invite D.B., a person under the age of sixteen years, to touch directly a part of his body, the body of D.B., contrary to Section 152 of the *Criminal Code.*

[2] At the conclusion of trial, the Crown conceded that no evidence was elicited regarding an alleged threat and asked the court to dismiss Count One.

[3] Additionally, part way through his trial, counsel agreed that the indictment should be amended to say "and at or near Plymouth."

[4] The Crown called two witnesses at trial, D.B. and C.G. Mr. Hughes elected not to call any evidence. An agreed statement of facts, dated March 11, 2020, was submitted pursuant to s. 655 of the *Criminal Code*, stipulating the following:

> 1. The complainant, D.B., was born on in December 2001.
>
> 2. On 1 January 2016, Cst Ashley Levy was a member of the RCMP stationed in Middleton, NS. On that date, Cst Levy and John Bower – a social worker then employed by the Department of Community Services – conducted a joint interview with D.B. The video disclosed to the Crown and to counsel for Mr Hughes is a complete and accurate record of that interview.
>
> 3. Jurisdiction is admitted.

4. Identity is admitted.

D.B.'s evidence

[5] At the time of trial D.B. was 18 years old. His demeanor in court was younger than his chronological age. He testified that he has Attention Deficit Hyperactivity Disorder.

[6] D.B. says he has nine siblings. He described an unstable childhood. He recollected growing up initially with C.G., and C.G.'s mother, L.G., in Yarmouth. C.G. took D.B. into her care when he was an infant, and eventually became his guardian. C.G. later took D.B.'s younger sister into her care as well. D.B. lived with C.G. and L.G. until he was twelve years old, in Grade Six, when he went into foster care, as C.G. was no longer physically able to care for him. D.B. has lived with several families since then.

[7] The accused, Mr. Hughes, was a friend of C.G., who introduced him to D.B. Eventually D.B. referred to Mr. Hughes as "Rollie" or "Grandpa", although they were not related. He similarly came to call Mr. Hughes' partner at the time, Martha Burgoyne, "Grandma" although he was not related to her either.

[8] D.B. could not recall how old he was when he met Mr. Hughes. He said Mr. Hughes was living in an apartment in Dartmouth, and D.B. was living in the Yarmouth area. Mr. Hughes would visit C.G. during the summer. When Mr. Hughes visited he would sleep in L.G.'s bedroom. C.G. and D.B. would stay at Mr. Hughes' apartment in Dartmouth when they were shopping for back-to-school clothes in the summer. On those occasions D.B. would sleep with C.G. on a pull-out bed in the living room.

[9] D.B. eventually started staying at Mr. Hughes' apartment by himself, sometimes for entire summers. This happened four times. C.G. would drive him to Mr. Hughes' apartment and, for about half of the time, at the end of the summer Mr. Hughes would drive him home. He testified that the last summer he spent there was when he was eleven years old. D.B. had no family or close friends living in Dartmouth at the time. D.B. testified that Mr. Hughes' apartment had two bedrooms, a kitchen, a bathroom, and a living room, where the pull-out couch was located. In addition to Mr. Hughes and his partner, Mr. Hughes' son, David, also lived there for two summers while D.B. was there.

[10] D.B. could not recall the dates of any of the incidents that are the focus of this trial. He said that he had a better recollection of some incidents than others.

[11] The first incident D.B. recalled involved going four-wheeling with Mr. Hughes at a gravel pit just behind C.G.'s house, in the Yarmouth area. D.B. was not sure when this occurred. Mr. Hughes was driving the four-wheeler and D.B. was sitting immediately behind him on the back. After driving in a gravel pit, Mr. Hughes drove D.B. to a pond, where they went fishing. At the pond, D.B. said, Mr. Hughes told him to stand up on a rock, and Mr. Hughes then pulled down D.B.'s pants and put his hand and lips on D.B.'s penis for about two minutes. He did not recall if his penis was erect or if Mr. Hughes touched any other parts of his body. After this they continued four-wheeling.

[12] The next incident described by D.B. occurred in L.G.'s bedroom around the same time. He cannot recall when this took place or the time of day. D.B. was wearing pajamas. D.B. could not accurately recollect what occurred before and after this incident. He recalled that he and Mr. Hughes were watching television and while they were both lying down on the bed Mr. Hughes pulled D.B.'s pajamas down and put his penis in his mouth. Mr. Hughes also instructed D.B. to rub his hand up and down his penis under his clothes. D.B. says this went on for about five minutes and Mr. Hughes did not ejaculate.

[13] D.B. said that he went to Dartmouth when school concluded at the end of June. He described being at Mr. Hughes' apartment watching a Pittsburgh Penguins hockey game. He and Mr. Hughes were lying on Mr. Hughes' bed. Initially, they were both wearing pajamas. Then Mr. Hughes removed his own pajamas and pulled down D.B.'s pajama pants. He put his mouth and hand on D.B.'s penis and performed oral sex. Mr. Hughes did not ejaculate. Mr. Hughes then directed D.B. to play with his penis, put his hand and mouth on his penis, and perform oral sex on him. The incident lasted about ten minutes. When asked on cross-examination how he could be watching a hockey game in July, D.B. struggled with an answer, said that the incident did not occur in July and was adamant that they were watching hockey at the time. D.B. then said they went to visit Mr. Hughes at times other than the summer:

> Q. Now the third incident that you mentioned happened, you say, in Dartmouth. Now, whenever you went to Dartmouth is it fair to assume that it was always the summer school vacation?
>
> A. Yes.

Q. And is it fair to say that school for you ended at the end of June?

A. Yes.

Q. So you would have gone from school within a day or so to see Rollie?

A. Yes.

Q. Now on this occasion you said that something occurred in Dartmouth, you were TV with Rollie? Do you recall this now? You said you were watching Pittsburgh hockey.

A. Oh yeah. Yes.

Q. Do you recall that?

A. Yes.

Q. Now school ended in June, this was now July. I'm going to suggest to you there is no hockey on TV in July.

A. Right, now that was at the beginning of the year, you're trying to screw me over.

Q. I'm sorry?

A. You're trying to mess with my wording.

Q. I'm sorry, well please clear it, clarify that. You said it happened in Dartmouth. I asked you whether that happened in the summer. You said yes. You said the summer starts after school in June. Yes. You said you were watching hockey, but it was July, and I'm asking you how could you watch hockey in July?

A. Because he also had a, it wasn't in July, it would have been…

Q. Alright, can you tell us when it was?

A. I don't remember when it was, but I know we were watching hockey.

Q. Okay.

A. In that instance.

Q. So, is it on a visit not in the summer, is that fair to say?

A. Yes, cause we have gone on visits when it wasn't in the summer.

[14] D.B. said that although they did a lot of activities, on some days Mr. Hughes could not go out due to arthritis in his back. On one occasion they were playing a search and find computer game in Mr. Hughes' apartment. Mr. Hughes pulled down his own pants and told D.B. to go under the computer desk, get between his legs, and put his mouth on his penis. He eventually told D.B. to stop. When he came out from under the desk, D.B. saw a flash of a naked man and woman on the

screen. In court he referred to this as pornography. D.B. said this occurred during a summer visit, and that Ms. Burgoyne was at work.

[15] According to D.B., the Ramada Hotel, where Ms. Burgoyne worked, had an L-shaped swimming pool with a water slide. D.B. said that to the best of his knowledge, Mr. Hughes did not know how to swim. The hotel restaurant overlooked the pool with a panoramic window. D.B. said that Mr. Hughes was six feet tall and the water in the deep end was not over his head. He said the water slide and a small rectangular garden partially blocked the view of the pool from the window. On one occasion, in the summer, Mr. Hughes was in the deep end hanging on the edge of the pool, pulled his swimsuit down, and had D.B. go underwater and put his mouth on his penis to perform oral sex. D.B. said he had difficulty breathing so he would go up for air and then go back underwater to do it again. Mr. Hughes then said, "it's my turn", and had D.B. sit on the corner of the pool and pull down his swimsuit. Mr. Hughes then put his mouth on D.B.'s penis. D.B. said this incident lasted for about six minutes. When it was over they went back to swimming and playing in the pool.

[16] D.B. described another occasion in the summer at the hotel. D.B. was sitting on one of the top benches in the sauna and Mr. Hughes was on one of the lower benches. Mr. Hughes pulled down D.B.'s bathing suit and performed oral sex on him. Mr. Hughes then pulled his own swim suit down and directed D.B. to perform oral sex on him.

[17] On another occasion Mr. Hughes took D.B. on a trail around a lake near the Ramada to go fishing. He put D.B. up on a rock, pulled down D.B.'s pants and put his lips on D.B.'s penis for a couple of minutes. D.B. could not recall much of what else went on before, during, or after the incident. He remembered seeing someone working with a chain saw in the area.

[18] On a further occasion, Mr. Hughes drove D.B. to Dollar Lake, near the airport, to go swimming. There was a wooden bridge near a playground. When they finished swimming, Mr. Hughes directed D.B. to sit on the bridge, allowing his legs to dangle. He then pulled D.B.'s pants down and put his lips on D.B.'s penis. D.B. said Mr. Hughes later let him drive on a road leading in and out of the parking lot of the Dollar Lake swim area. D.B. was too short to see over the steering wheel, so Mr. Hughes had him in a booster seat. While D.B. was driving, Mr. Hughes put his lips on his penis. On cross-examination, D.B. said:

Q. You told us about an incident where you were touched, you were driving the car?

A. Yes.

Q. And you mentioned that Rollie allowed you to…

A. Yes.

Q. … drive the car once in a while? You were driving in the lot?

A. No.

Q. No.

A. No, not driving it in the lot.

Q. Where were you driving?

A. We were driving on the, when you go in to it there's that where the highway goes and it goes to, when you go in you go off the highway and it has a strip before you get to the lot.

Q. So it was a road leading to the lot?

A. Yes.

Q. And you were driving?

A. Yes.

Q. And you mentioned that if you sat in the driver's seat you couldn't see over the windscreen, so Rollie put in a booster seat?

A. Yes.

Q. Was it like a child's booster seat?

A. No, not a child.

Q. What kind of booster seat was it?

A. There's just a, probably one for one that's just too, it was just, it was just a car seat, it was one of the ones that has no back on it, just has the two sides, there was the two handles.

Q. And he had one of those in his vehicle?

A. Yes because I was too, too, I still needed a car seat at that point.

Q. And he let you drive?

A. Yes.

Q. And you said that at that point he slides over, puts his lips on your penis while you're driving?

A. Yeah.

> Q. I'm going to suggest to you that letting you drive and doing that he wouldn't have been a very good co-driver. Wouldn't he be looking out the window? I'm going to suggest to you he was looking out the window to make sure you didn't drive off the road.
>
> A. No, he's not looking because it wasn't my first time driving.
>
> Q. And you were able to drive throughout this?
>
> A. Yes.

[19] On another occasion, D.B. said, he and Mr. Hughes were watching television on Mr. Hughes' bed, without clothing. Mr. Hughes had D.B. put his mouth on his penis. He then rolled D.B. onto his side and tried to anally penetrate him, but could not fit his penis into D.B.'s anus. Mr. Hughes then put his mouth on D.B.'s penis.

[20] One night when D.B. was naked in Mr. Hughes' bed, Mr. Hughes directed D.B. to anally penetrate him. Mr. Hughes was lying on his side, pulled D.B. toward him and pushed and pulled D.B. toward and away from him repeatedly while he was being anally penetrated for about five minutes.

[21] D.B. said Mr. Hughes would shower with him every second day. On one occasion when Mr. Hughes directed him to put his mouth on his penis, D.B. expressed some reluctance. In response, Mr. Hughes squirted shampoo into D.B.'s eyes. D.B. said this hurt, burned his eyes, and made him cry.

[22] On one occasion when Mr. Hughes came to visit D.B. in Yarmouth they went four-wheeling. Mr. Hughes took D.B. to a field and touched D.B.'s penis with his hands and mouth. On the way back to C.G.'s, Mr. Hughes drove off a ledge and cracked his ribs.

[23] On another occasion, Mr. Hughes and D.B. were walking on a trail near Mr. Hughes' home, not far from a Tim Horton's and a school. Mr. Hughes pulled D.B.'s pants down, put his mouth on his penis and started playing with D.B.'s backside.

[24] D.B. said he once told Mr. Hughes that his father had abused him and he was considering reporting it to the police. Mr. Hughes reacted strongly and told him not to make a complaint because it would get him (Mr. Hughes) in trouble. On direct examination D.B. said:

Q. Now, in between these trips to Rollie's during the summers, did you ever tell anybody about the touching that happened?

A. No, not during, no.

Q. Okay. Who was the first person that you talked to about this?

A. Would be B.W..

Q. Okay. And what was his relationship to you?

A. He was foster parent, my first foster parent.

Q. Okay, and when did you talk to Mr. W. about it?

A. I don't remember how old I was, but I know I was living with B.W.

Q. And, D.B., why did you wait until then to tell somebody?

A. Uh, because I was scared and I didn't know what to do.

Q. Why were you scared?

A. Because I didn't know how he would react.

Q. You didn't know how who would react?

A. Rollie would react.

Q. Okay. Is there anything else you can say about your feelings about telling anybody?

A. I was happy to get it off my chest.

...

Q. Was there ever another time, D.B., that you felt scared?

A. Um. Yeah, yeah.

Q. And when was that and why?

A. I told him that my father has touched me.

Q. Okay, I'm going to, I'll stop you…

A. Okay.

Q. Stop you there, D.B., okay, we're not going to talk about, we're not going to talk about your father today.

A. No, I'm not talking about my father…

Q. Okay.

A. I'm just telling you that I'm not, I'm just saying that I told him that and he over react and he said don't because that will get me in trouble.

Q. Okay. We're not going to pursue that any further, D.B.

A. Okay.

[25] D.B. said he had no contact with Mr. Hughes since he was eleven years old, when he spent his last summer with him. D.B. said that he had not spoken to Mr. Hughes since then.

[26] D.B. testified that when he stayed at Mr. Hughes' apartment with C.G., he and C.G. would sleep on the pull-out couch in the living room. When he stayed at the apartment without C.G., although he was supposed to sleep on the pull-out couch, he actually slept between Mr. Hughes and Ms. Burgoyne in their bed. D.B. said he and Mr. Hughes would stay up until 1:00 AM in bed watching "Family Guy" on television each night during one of the summers he stayed with him, but could not recall which summer. Ms. Burgoyne would turn over and go to sleep while they watched television. D.B. initially wore pajamas, but eventually began sleeping without clothes. Mr. Hughes also slept without clothes. Ms. Burgoyne wore pajamas. D.B. said that the only time he and Mr. Hughes wore pajamas was when C.G. visited. On re-direct examination, D.B. stated:

> Q. Okay. Thank you. And D.B. you had said when Mr. Kuszelewski was asking you questions.
>
> A. Yes.
>
> Q. You had said you didn't usually wear pajamas at Rollie's apartment.
>
> A. Yes.
>
> Q. But you did when C.G. was there.
>
> A. Yes.
>
> Q. Why did you wear pajamas when C.G. was there?
>
> A. Because he didn't want, because he didn't want C.G. to know I didn't sleep with pajamas on.
>
> Q. And by he you mean?
>
> A. Rollie.
>
> Q. Do you recall any conversation about that that took place?
>
> A. Uh, I remember him saying there, I remember him saying that we can't let C.G. see that you're not wearing pajamas.

[27] Mr. Hughes did not work. D.B. said that each morning, Mr. Hughes would drive Ms. Burgoyne to work at the Ramada and return home with breakfast, which was a hot chocolate and four Tim Bits. They would watch television or play video games on Mr. Hughes' Wii and Play Station, or go out to do an activity such as playing baseball, swimming, fishing, window shopping, or visiting the Halifax

waterfront. They also went to Prince Edward Island for a vacation. Mr. Hughes bought D.B. gifts, such as a remote control Hummer, a scooter, a bicycle, a Pittsburgh Penguins jersey, and a ring. He also bought D.B. a suit for his Grade Six graduation, which Mr. Hughes attended.

[28] D.B. said that when he returned home during the school year, Mr. Hughes would call him almost every night to talk and listen while D.B. played video games. Mr. Hughes also came to visit a couple of times during the school year.

[29] C.G. eventually became ill and could no longer care for D.B. D.B. moved in with foster parents and stopped visiting Mr. Hughes. He eventually told a foster parent, B.W., what happened with Mr. Hughes, in 2014. He said that prior to the change in his living arrangement he was afraid to tell anyone about what had occurred with Mr. Hughes, and did not know what to do about it. He made a police complaint in 2016.

[30] On cross-examination, Mr. Kuszelewski suggested to D.B. that he had made new allegations at trial that were not previously disclosed. However, he did not ask D.B. about this directly, and did not specifically identify any new allegations.

[31] D.B. agreed that he attempted suicide while he was living with C.G. He denied that C.G. asked him if Mr. Hughes had touched him inappropriately at that time. He did not remember C.G. asking him whether Mr. Hughes had anything to do with the suicide attempt, or if Mr. Hughes had touched him inappropriately.

C.G.'s evidence

[32] C.G. was approximately 56 years old when she testified. She said she was diagnosed with encephalitis, which she described as "a virus of the brain", which she said had affected her memory. She believed that her short-term memory was more affected than her long-term memory. In observing her testimony it appeared that C.G. had some cognitive difficulties, in particular recollecting dates and time frames. She was able to articulate details of events, but sometimes seemed confused. I believe that she was attempting to be truthful, however, her reliability was problematic.

[33] C.G. said she was friends with D.B.'s biological mother. D.B. came to live with her shortly after his birth, as his mother was unable to care for him. C.G. testified that she and Mr. Hughes had been friends for some 36 years. She had not spoken with him since the charges were laid.

[34] While D.B. said he left C.G.'s care at the age of twelve, C.G. said that D.B. stopped living with her around age seven or eight. She said D.B.'s younger sister had lived with her since birth and was ten years old at the time of the trial, and that D.B. had never lived at her house with his sister. D.B. was never asked whether his sister lived with him while he was living with C.G. He was eighteen at the time of trial. Therefore, according to C.G.'s account, D.B. must have left her home and gone into foster care at age eight.

[35] C.G. said that when school ended in June, Mr. Hughes would sometimes pick up D.B. and take him to his apartment in Dartmouth. She said she drove D.B. to Mr. Hughes' apartment on a couple of occasions. She said D.B. would stay with Mr. Hughes until a couple of weeks before school started in September. He would also spend holidays there, including Easter and Christmas. C.G. herself also stayed at Mr. Hughes' apartment, sometimes as long as a week. According to C.G., this annual arrangement started when D.B. was four or six years old, but she was not sure for how many summers it went on.

[36] C.G. said Mr. Hughes became a father figure to D.B. at around age three. D.B. called him "Grandpa" from the beginning. He bought D.B. gifts on the holidays and took him out for Halloween. Mr. Hughes bought him clothes, shoes and toys.

[37] C.G said Mr. Hughes stayed at their house once, and on another occasion he slept at a neighbour's home. When he visited, Mr. Hughes and D.B. would go out four-wheeling in a gravel pit behind her house. Mr. Hughes would drive, and she recalled that D.B. would be seated in front of him.

[38] C.G. said she would call Mr. Hughes daily in the summers when D.B. was visiting, but often D.B would not want to speak to her because he was busy. During the winter, D.B. and Mr. Hughes would talk a lot on the phone. C.G. said she visited Mr. Hughes' apartment a couple of times in the summers. She noted that Ms. Burgoyne was often at work. When D.B. and Mr. Hughes did not go out to do something like skateboarding or a movie (which they often did), they were together in Mr. Hughes' bedroom watching television.

[39] C.G. said that although Mr. Hughes was supposed to get D.B. his own single bed, and she mentioned this to Mr. Hughes and Ms. Burgoyne several times, this never happened. C.G. said that when she visited, she slept on a pull-out couch in the living room, but D.B. would sleep with Mr. Hughes and Ms. Burgoyne in their bedroom. C.G. said that at her home D.B. always had his own bed and bedroom.

When she visited Mr. Hughes' apartment, she asked D.B. to sleep with her, but he would refuse, as he and Mr. Hughes stayed up late watching cartoons and movies.

[40] C.G. said Mr. Hughes and D.B. often spent time in Mr. Hughes' bed under the covers. On one occasion, she wanted D.B. to come out and sleep on the couch because neither Mr. Hughes, nor D.B., had any clothes on. C.G. thought this occurred after supper. She wanted D.B. to get dressed. He came out and put pajamas on, but he then spent the night in Mr. Hughes' room.

[41] C.G. testified on direct examination about seeing D.B. and Mr. Hughes in bed together, undressed:

> Q. And did you ever see in Rollie's bedroom?
>
> A. I've seen Rollie's bedroom, yes.
>
> Q. What else, what else do you remember about their being in the bedroom?
>
> A. Always him and D.B.
>
> Q. Do you remember anything about the layout or the furniture in the bedroom?
>
> A. They were always laying in bed, covered up sometimes, most of the time, but one time when I went in I wanted him to come out and sleep on the couch cause neither one of them had anything on.
>
> Q. When did that happen C.G.?
>
> A. Oh my, I wouldn't be able to give you a date.
>
> Q. Okay. What time of day was it?
>
> A. After supper I'd say.
>
> Q. Okay. And what happened after you said that you wanted D.B. to come out and sleep with you?
>
> A. I wanted him out to get dressed.
>
> Q. Okay. What happened next?
>
> A. He did come out and get dressed.
>
> Q. Okay. What did, what did he put on?
>
> A. Um, I believe pajamas.
>
> Q. And do you remember where he slept that night?
>
> A. Rollie's room.

[42] On cross-examination C.G. confirmed and expanded on that aspect of her evidence:

Q. When D.B. lived with you, is it, where did D.B. sleep at night?

A. In her, in his own bed.

Q. And when did that start, prior to the time that he actually had his own bed where did he sleep?

A. I believe we always had the bedroom there.

Q. And isn't it true that when you were with D.B. at Rollie's place, you and D.B. slept together?

A. No.

Q. In the same bed.

A. I always told him to come out on the couch. Him and, him and Rollie would stay up quite late watching cartoons, movies and I would lay on the couch and watch TV and I would tell D.B. to come to the couch when he was ready for bed and when I woke up he was never in bed.

Q. So you did want him to come and sleep…

A. Yes.

Q. … on the couch with you, and whether he did or didn't he always ended up with Rollie?

A. Yes.

Q. And is it fair to say that that was D.B.'s choice?

A. Yes.

Q. As was it D.B.'s choice to continue to go to visit Rollie?

A. The last visit he didn't want to go.

Q. The last visit.

A. Yes.

Q. Okay. All the visits up until the last visit it was his choice to go?

A. Yep.

…

Q. You mentioned a time that you walked in on D.B. and Rollie in the bedroom, and you say that they were laying in bed under the covers. Is it possible that you are mistaken about that?

A. No.

Q. Is it true in your memory that Rollie was often lying on the bed because of his back?

A. He has a bad back.

Q. He has a bad back, and did you ever see him just lying on the bed on his back?

A. He spent most of his time in his bedroom.

Q. Okay, and is it fair to say that that time was spent on his back?

A. He went out with D.B. for the whole day, he had no where to lay down then.

Q. Correct, so, if I suggest to you that when he gets home his back is bad and he goes and he lays down on the bed, is that something that you would agree with?

A. Yes. He would watch TV sometimes with us, not long, but he did watch TV with us.

Q. Okay, now on this particular day you're saying that D.B. and he were both under the covers?

A. Yes.

Q. And you're sure of that?

A. Yes. D.B.'s pajamas were on the top of the bed, what he put on, and I believe I asked him to take the cover off and I seen that he had nothing on.

…

Q. Just want to return to that incident with the bedroom where both Rollie and D.B. were under the covers. Take you back to that thought. Did you speak to Rollie about that at the time?

A. Um, I believe I just asked D.B. what they had on, and I believe the blanket was pulled down and neither one of them had anything on.

Q. Did you speak to either of them about the incident?

A. Rollie was always to wear no underwear. That's the kind of guy he was. He didn't wear underwear.

Q. Okay, and that was a given.

A. Pardon?

Q. Everybody knew that.

A. I'd say so, yes.

Q. Okay, and after that incident isn't it true that D.B. continued to sleep in the bed with Martha and John?

A. I think we went, I believe we went home.

Q. You went home after that incident?

A. Yes.

Q. And, to the best of your knowledge, after D.B. returned the following summer do you know whether or not he continued to sleep in the bed with Martha and…

A. No.

Q. You don't know or no?

A. No.

Q. The answer's no.

A. Answer's no.

Q. The answer is no he didn't.

A. No he didn't.

Q. Okay. Thank you. I have no further questions.

[43] C.G. testified that prior to the last visit D.B. did not want to go to Mr. Hughes' place, answering in the affirmative that for, "All the visits up until the last visits it was his choice to go?". She said that after the age of six or seven D.B. did not go to Mr. Hughes' apartment. She described an occasion where D.B. came to her and L.G. crying, and when asked what was wrong, said he was not allowed to tell. They encouraged him to explain and she says he eventually told them that Mr. Hughes had "played with him" and did things to him, "dirty stuff." He did not provide specifics.

[44] C.G. said that she sent D.B. to live in foster care to get help because he was talking a lot about killing himself. He talked about walking onto the road to kill himself. One day C.G. sent him to his room because he was misbehaving and they later found him trying to hang himself:

Q. We're speaking about the incident of the hanging.

A. Yes.

Q. And I'm asking how old D.B. was at that time?

A. I would say, I would say six or seven. I know he was going to school, but I believe he had just started.

Q. And we know that D.B. continued to go to visit Rollie every summer thereafter, is that correct?

A. After that?

Q. Yes.

A. No he didn't.

Q. You say he didn't go anymore…

A. No.

Q. … after six or seven? …

[45] C.G. became ill with encephalitis in her mid-40s. She was 55 when she testified. C.G. asked Community Services for help. She said on direct examination she could not remember how long after she contracted encephalitis that D.B. left her home for foster care:

> Q. Okay, so what did you do next with D.B. then?
>
> A. Um, I believe when I sent him, we went there a looked at a place and they were going to take him and I ended up very sick.
>
> Q. Okay. You ended up very sick, very sick with what?
>
> A. Encephalitis.
>
> Q. And how old were you when that came on?
>
> A. In my forties, I can't exactly remember, my middle forties.
>
> Q. And how old are you today?
>
> A. Fifty-five. I'll be fifty-six this month.
>
> Q. And you became very sick, and then how did that effect your relationship with D.B., if at all? What happened next?
>
> A. My mother looked after him.
>
> Q. Okay, and how long did she do that to your knowledge?
>
> A. Until I got home.
>
> Q. Okay, and then after you got home from, were you in the hospital? Yep. What happened after you got home from hospital?
>
> A. We dealt with him, like, you know, good, but um, yeah, we treated him good.
>
> Q. You treated him good. And then, what I'm trying to figure out then is how long after that did he stop living with you?
>
> A. D.B.?
>
> Q. Yes.
>
> A. No, he wasn't good.
>
> Q. Pardon?
>
> A. He wasn't good.
>
> Q. Okay. Ms. C.G. I'm just trying to figure out, um, you said you got sick, you were in hospital, you came home, and then at some point D.B. stopped living with you, right?
>
> A. Pardon?
>
> Q. D.B. stopped living with you? He was no longer living at your home?

A. Well, I had him put to get help…

Q. Yep.

A. … through family services.

Q. Um hmm.

A. And the man called me back and asked if I wanted D.B. back, and I asked if he got any help, and he said no, and I said until he gets help, no. He needs help.

Q. Um hmm.

A. Like, I told him what he was doing. He wanted to commit suicide. He wanted to walk out on to the road and kill himself, and…

Q. And so was it at that point that he no longer lived with you?

A. No, well, it was quite a bit after because, uh, I'm trying to think. It went on with Rollie then I believe. That I found out what was being done.

Q. So Ms. C.G., I have no further questions. The other lawyer may have questions for you.

[46] C.G. agreed that D.B. stopped living with her and L.G. when he was twelve years old, and she sent him away to get help. On cross-examination, she said that around age three or four D.B. starting talking about committing suicide:

Q. Now, um, I want to talk to you about D.B.'s behaviour. I want you to go back to when he was two years old. Were you having difficulty with D.B.'s behaviour at that time?

A. No.

Q. I'm sorry, no?

A. No.

Q. When do you recall having difficulty dealing with D.B.?

A. I would say four.

Q. Four.

A. Three. Four.

Q. And when I ask you about difficulties, can you describe what you mean when you say you had difficulties with it?

A. Just talking about committing suicide and stuff like that.

Q. And that was as early as four?

A. Pardon?

Q. And that was as early as four?

A. I believe, yes.

[47] C.G. also testified that D.B. said the suicide attempt related to Mr. Hughes. On cross-examination, she could not recall exactly how old D.B. was when this occurred, but she thought he had just started school and was six or seven years old:

Q. And how old was he at that time?

A. Eight, uh, when he started what?

Q. When that hanging incident took place.

A. He was young, like, um, uh, he was going to school then, so, I don't know, six or seven.

Q. Could it have been younger?

A. Pardon?

Q. Could it have been younger?

A. What was your question?

Q. At what age did that incident take place?

Court: What, can you, can you just clarify what incident instead of, just be more specific at this stage.

Q. Thank you.

Court: Thank you.

Q. We're speaking about the incident of the hanging.

A. Yes.

Q. And I'm asking how old D.B. was at that time?

A. I would say, I would say six or seven. I know he was going to school, but I believe he had just started.

Law

Governing principles

[48] There are certain basic legal principles that impact a criminal trial. Section 11(d) of the *Canadian Charter of Rights and Freedoms* states that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal..." Mr. Hughes is presumed innocent of these allegations.

[49] In order to obtain a conviction, the Crown must prove each essential element of each offence beyond a reasonable doubt. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, Cory J., for the majority, described the relationship of reasonable doubt and the presumption of innocence:

> 27 First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titanic and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.

[50] While he was discussing reasonable doubt in the context of jury instructions, Cory J.'s comments are equally applicable to a judge sitting alone. Justice Cory summarized the principles governing the reasonable doubt standard in *Lifchus*, at para. 36:

> · the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
>
> · the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
>
> · a reasonable doubt is not a doubt based upon sympathy or prejudice;
>
> · rather, it is based upon reason and common sense;
>
> · it is logically connected to the evidence or absence of evidence;
>
> · it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
>
> · more is required than proof that the accused is probably guilty a jury which concludes only that the accused is probably guilty must acquit.

[51] In discussing reasonable doubt, Iacobucci J., said the following for the court in *R. v. Starr*, 2000 SCC 40, [2000] 2 SCR 144:

> 242. In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much more closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these

> alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the standard appropriately between these two reasonable doubt standards. The additional instructions to the jury set out in *Lifchus* as to the meaning and appropriate manner of determining the existence of a serve to define the space between ab reasonable doubt solute certainty and proof beyond a reasonable doubt. In this regard, I am in agreement with Twaddle J.A. in the court below, when he said at p. 177:
>
> > If standards of proof were marked on a measure, proof "beyond reasonable doubt " would lie much closer to "absolute certainty" than to "a balance of probabilities". Just as a judge has a duty to instruct the jury that absolute certainty is not required, he or she has a duty, in my view, to instruct the jury that the criminal standard is more than a probability. The words he or she uses to convey this idea are of no significance, but the idea itself must be conveyed …

[52] Only two witnesses testified at the trial, D.B. and C.G., both called by the Crown. Some of their evidence conflicted. Although Mr. Hughes did not testify, nor was any statement of his placed into evidence, the test as outlined in *R. v. W.(D).* [1991] 1 S.C.R. 742, is still instructive because of the conflicting evidence. As Saunders J.A. stated in *R. v. J.M.M.*, 2012 NSCA 70:

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

[53] Therefore, the test for assessing credibility as detailed in *W.(D).* should be applied in this case. That test was explained by Cory J.:

> 27 In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.
>
> 28 Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
>
> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[54] It is not for a trier of fact to simply choose which version of the events to believe, if any. The trier of fact must consider all of the evidence. I must decide whether I am satisfied beyond a reasonable doubt that Mr. Hughes committed the various offences alleged, or any of them. Probability is not sufficient. The standard in a criminal matter is that the Crown must prove the guilt of an accused person, in this case Trueman Roland Hughes, beyond a reasonable doubt - which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

Credibility and reliability

[55] In *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152, the majority of the British Columbia Court of Appeal discussed the credibility of witnesses. O'Halloran J.A. said:

> 11 The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

[56] In *Baker v. Aboud*, 2017 NSSC 42, Forgeron J. gave guidance on the principles governing assessment of credibility:

> 13 Guidelines applicable to credibility assessment were canvassed by this court in paras. 18 to 21 of *Baker-Warren v. Denault*, 2009 NSSC 59, as approved in *Hurst v. Gill*, 2011 NSCA 100, which guidelines include the following:
>
> * Credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (S.C.C.), para.20. ... "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.)*, 2008 SCC 51 (S.C.C.), para. 49.
>
> * There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: *Novak Estate, Re*, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence, *Novak Estate, Re, supra*.
>
> * Demeanor is not a good indicator of credibility: *R. v. Norman*(1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55.
>
> * Questions which should be addressed when assessing credibility include:
>
>> a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the documentary evidence, and the testimony of other witnesses: *Novak Estate, Re, supra*;
>>
>> b)Did the witness have an interest in the outcome or were they personally connected to either party;
>>
>> c)Did the witness have a motive to deceive;

> d)Did the witness have the ability to observe the factual matters about which they testified;
>
> e)Did the witness have a sufficient power of recollection to provide the court with an accurate account;
>
> f)Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.);
>
> g)Was there an internal consistency and logical flow to the evidence;
>
> h)Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant or biased; and
>
> i)Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[57] Although demeanor should be given little weight in determining the overall credibility and reliability of witnesses, the court in *Lifchus* articulated some of the issues facing a trier of fact when assessing a witness' credibility:

> 29 Nonetheless there is still another problem with this definition. It is that certain doubts, although reasonable, are simply incapable of articulation. For instance, there may be something about a person's demeanor in the witness box which will lead a juror to conclude that the witness is not credible. It may be that the juror is unable to point to the precise aspect of the witness's demeanor which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of a witness's demeanor cannot be taken into consideration in the assessment of credibility.

[58] Care must be taken in differentiating credibility from reliability. In *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, [1995] O.J. No. 639 (Ont. C.A.), Doherty J.A. said, for the court:

> 33. Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be

> unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross- examination.

[59] Justice Doherty pointed out that the passage of time can affect the reliability of a witness' testimony.

[60] In *R. v. H.C.*, 2009 ONCA 56, Watt J.A. discussed the difference between credibility and reliability. He stated, for the court:

> [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
>
> i. observe;
>
> ii. recall; and
>
> iii. recount
>
> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence...
>
> [42] This case required the trial judge to assess the credibility of two mature adults, T.F. and the appellant, as well as of a child of ten, K.F. Credibility requires a careful assessment, against a standard of proof that is common to young and old alike. But the standard of the "reasonable adult" is not necessarily apt for assessing the credibility of young children. Flaws, such as contradictions, in the testimony of a child may not toll so heavily against credibility and reliability as equivalent flaws in the testimony of an adult... [Citations omitted.]

[61] In *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183, Cory J., for the court, discussed a child's reliability in the context of a sexual assault complaint:

> 19 It will be self-evident to every observant parent and to all who have worked closely with young people that children, even more than adults, will have a better recollection of events shortly after they occurred than they will some weeks, months or years later. The younger the child, the more pronounced will this be. Indeed to state this simply expresses the observations of most Canadians. It is a common experience that anyone, and particularly children, will have a better recollection of events closer to their occurrence than he or she will later on... It follows that the videotape which is made within a reasonable time after the alleged offence and which describes the act will almost inevitably reflect a more accurate recollection of events than will testimony given later at trial. Thus the section enhances the ability of a court to find the truth by preserving a very recent recollection of the event in question.

> 20 There is another aspect of the section that cannot be ignored. Any kind of assault on a child may be traumatic. Assaults of a sexual nature are still more likely to have a serious deleterious effect. This traumatic effect will be greater still when the perpetrator is a parent, guardian or person in authority. Recalling the events will be extremely difficult for every child and the more sensitive the young person, the greater will be the difficulty experienced. It follows that anything that can be done to ease the traumatic effect upon a child should be encouraged. Thus a record of events made in more informal and less forbidding surroundings than a courtroom will serve to reduce the likelihood of inflicting further injury upon the child witness. [Citation omitted.]

[62] Justice Cory went on to say:

> [47] … In *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at p. 55, Wilson J. stated that
>
> > a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. ... While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.
>
> [48] She concluded that, although each witness' credibility must be assessed, the standard which would be applied to an adult's evidence is not always appropriate in assessing the credibility of young children. This approach to the evidence of children was reiterated in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at pp. 132-34. There McLachlin J. acknowledged that the peculiar perspectives of children can affect their recollection of events and that the presence of inconsistencies, especially those related to peripheral matters, should be assessed in context. A skilful cross-examination is almost certain to confuse a child, even if she is telling the truth. That confusion can lead to inconsistencies in her testimony. Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to the weight which should be attached to the videotape and not to its admissibility.

[63] As Arbour J. said for the majority in *R. v. A.G.*, [2000] 1 S.C.R. 439, while the integrity of the presumption of innocence must be maintained, delayed disclosure of uncorroborated allegations of sexual abuse does not bar the possibility of a conviction:

> [30] …I appreciate Finlayson J.A.'s unease in the face of what the trial judge termed the "well known difficulties" associated with the features of these types of cases, with which he was also very familiar. Having been exposed, like many in the criminal courts, to several such cases, the trial judge was aware of the need for caution in preserving the integrity of the presumption of innocence. He was entitled to believe the uncorroborated evidence of the complainant in this case as

> in any other case, and he did. If it were unreasonable for him to do so, it would be impossible to convict in the many similar cases where there is a long delay in the disclosure of the uncorroborated allegations of a complainant in a sexual assault case. This is not the law.

[64] D.B. was eighteen years old when he testified. His testimony related to events that he said occurred when he was somewhere between the ages of four and twelve. In discussing how to assess the testimony of an adult testifying about events that occurred when they were a child, McLachlin J. (as she then was) stated, for the court, in *R. v. R.W.*, [1992] 2 S.C.R. 122, that the court must take a common sense approach:

> 24. The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, at pp. 54-55, when, in referring to submissions regarding the court of appeal judge's treatment of the evidence of the complainant, she said that
>
> > ... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.
>
> 25. As Wilson J. emphasized in *B. (G.)*, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in

> criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.
>
> 26. It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[65] The court cautioned against conflating the level of scrutiny to be applied to a witness' testimony when discussing historical events in *J.M.M.* In that case, the indictment period covered ten years, from when the complainant was six to 16. Saunders J.A. said:

> [46] ... While some of the offences alleged to have occurred would have happened when J.M. said she was six, and then eight to ten years of age; the two rapes occurred when J.M. was a teenager, and the last groping of her breasts was on her 16th birthday. Thus, different considerations would apply when gauging the reliability of the complainant's testimony, depending upon the age she said she was when these events occurred. Appearing as a complainant in a criminal case at age 27, and testifying to things alleged to have happened when she was a mature teenager, attracts an evaluation of reliability and credibility based on age appropriate criteria which are very different than those applied to testimony describing something said to have occurred when one was six years of age.
>
> [47] The variety and significance of the conflicts in the evidence in this case obliged the judge to subject the complainant's testimony to a very critical eye, using criteria appropriate to her circumstances. In my respectful view, that was not done. *R. v. D.D.S.*,2006 NSCA 34.

[66] D.B. was unsure about the dates and times of the events he described. Considering his age at the time of those events, and the frequency with which they occurred, his inability to testify accurately about the chronological issues is peripheral to the more pertinent aspects of the alleged sexual assaults.

[67] Some of D.B.'s and C.G.'s evidence conflicted, including D.B.'s age at various points, i.e. when C.G. became ill, when he attempted suicide, when he was placed into foster care, when he disclosed alleged abuse by his father, when he disclosed the abuse by Mr. Hughes and when he went in to foster care.

[68] C.G. was not a completely reliable witness, as she appeared to have some cognitive difficulties arising from her encephalitis. Where her evidence conflicts with D.B.'s, I find his evidence to be reliable and her evidence to be unreliable.

Circumstantial Evidence

[69] C.G. said that she frequently saw Mr. Hughes and D.B. in bed together, as that was the sleeping arrangement at Mr. Hughes' apartment. She also said that on one occasion she saw the two of them naked under the covers. In discussing the use of circumstantial evidence, in *R. v. Villaroman*, 2016 SCC 33, the court stated:

> [29] An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence... This is the danger to which Baron Alderson directed his comments. And the danger he identified so long ago — the risk that the jury will "fill in the blanks" or "jump to conclusions" — has more recently been confirmed by social science research... This Court on occasion has noted this cautionary purpose of a circumstantial evidence instruction...
>
> [30] It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. It may be helpful to illustrate the concern about jumping to conclusions with an example. If we look out the window and see that the road is wet, we may jump to the conclusion that it has been raining. But we may then notice that the sidewalks are dry or that there is a loud noise coming from the distance that could be street-cleaning equipment, and re-evaluate our premature conclusion. The observation that the road is wet, on its own, does not exclude other reasonable explanations than that it has been

> raining. The inferences that may be drawn from this observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. [Citations omitted.]

[70] The court went on to discuss exculpatory inferences and reasonable doubt:

> [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point, [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
>
> [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 [Emphasis in original]. A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
>
> [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd, [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. [Emphasis in original.]

[71] The court in *Villaroman* went on, at para. 40, to cite the Australian decision in *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375, where the court said:

> In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis in original]

[72] The court in *Villaroman* continued:

> [41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.
>
> [42] The second is from *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

[73] The court went on to cite *R. v. Dipnarine*, 2014 ABCA 328, for the principles that "'[c]ircumstantial evidence does not have to totally exclude other conceivable inferences'; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible" (para. 42).

[74] In *R. v. Calnen*, 2019 SCC 6, Martin J., dissenting, but not on this point, discussed circumstantial evidence, in the form of after-the-fact conduct evidence, and said:

> [111] After-the-fact conduct is circumstantial evidence. Like other forms of circumstantial evidence, after-the-fact conduct allows a fact finder to draw particular inferences based on a person's words or actions... This process of inductive reasoning is a cornerstone of the law of evidence, and is used frequently to draw inferences from circumstantial evidence, as well as to assess credibility and to determine the relevance and probative value of evidence...
>
> [112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may be drawn from after-the-fact conduct evidence. The inferences that may be drawn "must be reasonable according to the measuring stick of human experience" and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence...

> That there may be a range of potential inferences does not render the after-the-fact conduct null... In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. "It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct"... [Citations omitted.]

[75] While C.G.'s evidence was unreliable as to details of dates and times, her evidence about seeing D.B. naked in bed with Mr. Hughes was corroborated by D.B.'s evidence. It was the type of incident that C.G., as D.B.'s primary caregiver, would have been likely to recall. It is circumstantial evidence that can be given limited weight in assessing all of the evidence in this trial.

Consent

[76] The accused is charged with offences under ss. 151 (sexual interference), 152 (invitation to sexual touching), or 271 (sexual assault) of the *Criminal Code*. Section 151 makes it an offence to "for a sexual purpose, [touch], directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years..." Section 152 makes it an offence to "for a sexual purpose, [invite, counsel or incite] a person under the age of 16 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 16 years..." Prior to May 1, 2008, the relevant age under both ss. 151 and 152 was fourteen years.

[77] Section 265 of the *Criminal Code* defines the offence of assault:

> 265. (1) A person commits an assault when
>
> > (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
> >
> > (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
> >
> > (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

[78] Section 271 sets out the offence of sexual assault.

[79] Section 150.1 provides, *inter alia*, that where an accused is charged under ss. 151, 152, or 271 "in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter

of the charge." Prior to November 1, 2005, the relevant age was fourteen years. (Sections 273.1 and 273.2 expand on the meaning of consent, and the availability of consent as a defence.) These offences are alleged to have occurred between December 20, 2003 and December 21, 2013. At all material times D.B. was between two and twelve years old. Therefore he could not have consented to any sexual activity with Mr. Hughes, pursuant to s. 150.1.

Elements of the offences

[80] The Crown must prove each essential element of the offences beyond a reasonable doubt. In *R. v. Barton*, 2019 SCC 33, Moldaver J., for the majority, reviewed the essential elements of sexual assault:

> [87] A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the *actus reus* and had the necessary *mens rea*. A person commits the *actus reus* of sexual assault "if he touches another person in a sexual way without her consent" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). The *mens rea* consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched" (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 42).

[87] The *actus reus* of sexual assault was described in more detail by Major J. in *Ewanchuk*:

> 25 The *actus reus* of sexual assault is established by the proof of three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the Crown to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively; the Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour...

[88] As to *mens rea*, Major J. said, "Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement..." More recently, in *R. v. Mawanga*, 2020 ONSC 2350, the court explained, "The *mens rea* for sexual assault requires the Crown to prove beyond a reasonable doubt that the accused intended to touch the complainant in a sexual manner and knew or was reckless or willfully blind to the complainant's lack of consent" (para. 102).

[89] The elements of a charge under section 151 were summarized by the Court of Appeal in *R. v J.D.C.*, 2018 NSCA 5: "that the complainant was less than 16 years old at the time; that the appellant intentionally touched the complainant either directly or indirectly...; and that the touching was for a sexual purpose" (para. 32).

[90] As for section 152, the elements were summarized by Strathy C.J.O., for the majority, in *R. v. R.V.*, 2019 ONCA 664: "(i) the complainant was under 16 years

old at the time; (ii) the appellant invited the complainant to touch his body; and (iii) the touching he invited was for a sexual purpose" (para. 20).

[91] Through the agreed statement of facts, Mr. Hughes admitted identity, jurisdiction, and D.B.'s date of birth. The legislation has removed consent as an issue. The remaining issues are whether Mr. Hughes touched D.B. in a sexual manner (s. 271) or for a sexual purpose (s. 151) and whether Mr. Hughes invited D.B. to touch him for a sexual purpose (s. 152).

[92] D.B. describes numerous incidents where Mr. Hughes asked him to perform oral sex on him or to put his lips on Mr. Hughes' penis. He also described numerous incidents where Mr. Hughes put his lips on D.B.'s penis or performed oral sex on him. Additionally, D.B. described one incident where Mr. Hughes attempted anal sex on him and one incident where Mr. Hughes asked him to perform anal intercourse on him, which he did. If the Crown has proven that those incidents occurred beyond a reasonable doubt then Mr. Hughes is guilty of the three offences with which he is charged, as the touching was clearly done in a sexual manner and for a sexual purpose; there was at least one incident of "inviting"; and no consent was possible; and Mr. Hughes was aware of D.B.'s age. The issue of D.B.'s credibility and the issue of his reliability are central to this determination.

Further considerations

[93] There were several areas of the evidence that required additional scrutiny.

[94] D.B. described incidents of sexual contact between himself and Mr. Hughes when, by his own account, he was between ages eight and twelve. According to C.G, however, he was between four and eight years old when he was spending summers in Mr. Hughes' apartment. There is a substantial difference between those two age ranges. Nonetheless, D.B. did not waiver on the details of the incidents, and was not shown to be internally inconsistent regarding the allegations.

[95] D.B. testified that he attempted suicide at the age of twelve, and also said that this was around the time C.G. became unable to care for him due to her illness. He went into foster care, eventually disclosed the alleged abuse to a foster parent, and made a complaint to the police when he was sixteen. C.G. testified that D.B. was talking about suicide by the age of three or four years, and that he attempted suicide at the age of six or seven. She said that she put him into foster care at that

time. She also contradicted herself, stating that she contracted encephalitis when D.B. was eight years old, and put him into foster care at that time.

[96] D.B. testified that he drove Mr. Hughes' vehicle while sitting in a booster seat, while Mr. Hughes performed oral sex on him. On direct examination D.B. said that he could reach the gas pedal and brake, but needed a booster seat to see properly. He was not questioned about the details of the mechanics of this incident, such as whether he could reach the pedals while in the booster seat or whether Mr. Hughes was required to help control the vehicle in any way while D.B. was driving. D.B. remained consistent in his testimony about this incident.

[97] When questioned about the details of the incident that allegedly occurred in the Ramada pool, D.B. did not waiver in his account, and nothing was put to him that made me question whether or not this could have occurred as he described.

[98] D.B. said that one incident occurred when he was in Mr. Hughes' bed watching the Pittsburgh Penguins playing hockey on television. He initially testified that this occurred in the summer. When questioned as to how he was watching a hockey game in the summer, D.B. had no explanation, but said he visited Mr. Hughes at times other than the summer. C.G. also testified that D.B. visited Mr. Hughes at times other than the summer, including Christmas and Easter. D.B. was less than twelve years old when this occurred. His recollection of where and how the incident occurred was clear. His recollection of the timing may have been accurate if the hockey game was a replay, or he may have been mistaken in his recollection of it occurring in the summer, given the possibility that it could have occurred at Christmas or Easter.

[99] D.B. was imprecise about when most of the incidents with Mr. Hughes occurred. He was precise regarding where and how each incident he described took place. His evidence was internally consistent. He was also externally consistent with aspects of C.G.'s evidence. I find both D.B. and C.G. to be credible witnesses. I am mindful in assessing their reliability of D.B.'s age at the time of the events in question, and the passage of time, and of the impact of C.G.'s health issue on her ability to recount the events. C.G. was not a reliable witness in relation to certain aspects of her evidence, in particular, dates and time frames. D.B. was a reliable witness, and I accept his evidence that the events he describes took place. I am mindful of the *W.(D.)* principles, but am not left with a reasonable doubt by the evidence of the Crown witnesses, whether on direct or cross-examination.

[100] I conclude that the elements of the offences of sexual assault, sexual interference, and invitation to sexual touching have been proven beyond a reasonable doubt.

Amending the Section 152 charge

[101] As it appears in the indictment, the section 152 charge alleges that Mr. Hughes invited D.B. "to touch directly a part of his body, the body of D.B..." This is not coherent, and does not reflect the language of section 152. The correct wording should be "to touch directly with a part of his body, the body of Trueman Roland Hughes..."

[102] There was no application by the Crown to amend the count, and no application by the defence to quash it. I am satisfied that the accused was not misled by the clumsy wording of the indictment, and that he had full notice of the particulars of the charge. I am satisfied that this is an appropriate circumstance to amend the indictment due to a defect in form: see s. 601 of the *Criminal Code*, and *R. v. Soucy*, 2009 NBQB 100, at paras. 22-29.

Conclusion

[103] I conclude that the Crown has proven Trueman Roland Hughes guilty beyond a reasonable doubt of the counts under ss. 151, 152, and 271. Any *Kienapple* issue will be dealt with on sentencing.

Arnold, J.