SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. C.F.Y.*, 2018 NSSC 348

Date: 20181010
Docket: *Halifax*, No. 473969
Registry: Halifax

Between:

Her Majesty the Queen

v.

C.F.Y.

Restriction on Publication: s. 486.4, 486.5, 539(1)
DECISION
VOIR DIRE #1 – SIMILAR FACT EVIDENCE

Judge:	The Honourable Justice Christa M. Brothers
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated **June 24, 2019**
Heard:	October 9, 10, 18, 22, 2018, in Halifax, Nova Scotia
Oral Decision:	October 10, 2018, in Halifax, Nova Scotia
Written Decision:	June 14, 2019, in Halifax, Nova Scotia
Counsel:	Emma Woodburn, Crown Counsel Terrance Sheppard and Allison Reid, Defence Counsel

Overview

[1] During the course of this trial, the Crown sought to adduce similar fact evidence in relation to the accused's previous convictions under s. 151 of the *Criminal Code* in relation to two other young girls. I provided my bottom-line

decision so as to continue with the trial as scheduled. I denied the Crown's application. I advised I would provide written reasons. These are those reasons.

Background

[2] I allowed an amended Indictment on October 9, 2018. The amended Indictment reads as follows:

> [C.F.Y]is charged:
>
> 1. that he between the 30th day of September, 2011 and the 1st day of April, 2013, at, or near Hatchet Lake, in the County of Halifax, in the Province of Nova Scotia, did unlawfully commit a sexual assault on N.S., contrary to Section 271 of the *Criminal Code*.
>
> 2. AND FURTHER that he at the same time and place aforesaid, for a sexual purpose touch N.S., a person under the age of sixteen years directly with a part of his body, to wit:, "his hands", contrary to Section 151 of the *Criminal Code*.
>
> 3. AND FURTHER that he between the 28th day of February, 2013 and the 22nd day of August, 2014 at or near Dartmouth, did unlawfully commit a sexual assault on N.S., contrary to Section 271 of the *Criminal Code.*
>
> 4. AND FURTHER that he at the same time and place aforesaid, for a sexual purpose touch N.S., a person under the age of sixteen years directly with a part of his body, to wit., "his hands", contrary to Section 151 of the *Criminal Code.*

[3] Previously, the accused pleaded guilty and was sentenced for acts of sexual touching committed in relation to two young girls, one being his older step-daughter, Z.S., and the second being, Z.S.'s friend K.N.

[4] The Crown seeks admission of similar fact evidence, specifically the previous plea of guilty and sentence. The Crown argues that the proposed similar fact evidence is admissible as it helps to establish the *modus operandi* of the offence and does not only go to show that the accused is the type of person likely to have committed the offences as charged. The Crown suggests the risk of moral and propensity reasoning is greatly reduced because this is a judge-alone trial.

[5] The Crown argues that the proposed evidence it is relevant to the following issues:

- *Modus Operandi*;
- Proof of commission of the *actus reus*;
- Establishing a lack of consent;

- Bolstering the credibility of the complainant; and,
- Negating innocent explanation.

[6] The Crown argues that the evidence helps to show a distinct pattern to utilize the accused's position of trust to facilitate the commission of offences. Accordingly, Crown argues the evidence is not admitted merely for disposition or propensity but has real probative value.

Preliminary Issues
Recalling the Complainant

[7] The Defence failed to ask relevant questions it intended to ask on the issue of collusion when the complainant was on the stand before this *voir dire* was argued. The Defence intended to argue that there was an air of reality to collusion and the Crown had not dispensed with it, and consequently the evidence should not be allowed.

[8] The Defence sought to recall the complainant to complete the cross-examination and pose necessary questions to support its opposition to the similar fact application. Initially, the Crown intended to bring a motion under s. 715.1 of the *Criminal Code* to have the complainant adopt her videotaped statement. At the commencement of trial, the Crown abandoned this application. The Defence was left to adjust its strategy and reassess what evidence needed to be elicited through cross- examination. The Defence argues that this resulted in a failure to adjust to the new reality.

[9] While unfortunate and certainly less than ideal, I allowed the complainant to be recalled, to ensure the accused had the ability to make full answer and defence.

Forensic Sexual Behavior Presentence Assessment

[10] The Crown attached to its brief on this motion a Forensic Sexual Behaviour Presentence Assessment ("FSBPA"), for the ostensible purpose of providing information about the offences in relation to K.N. and Z.S. I had concern about the inclusion of this report and questioned counsel about this. After submissions from counsel, it was agreed that the only portion of the assessment which could be properly considered is the information contained at pages 22 to 23, paragraph three, of the FSBPA. I have not considered any other portion of the assessment in reaching a decision on this application.

The Proposed Similar Facts
Z.S.

[11] On August 2014, J.S., the mother of Z.S. and N.S. disclosed to police that Z.S., her older daughter, alleged that the accused touched her inappropriately. The police investigated and did not press charges. Later, the accused sent a text message to J.S. admitting to touching Z.S. when she was in Grade 4 or 5.

[12] As contained in the FSBPA, the accused described watching a movie alone with Z.S. He recounted lying on the couch tickling Z.S.'s sides, with Z.S. sitting on top of him. He said he put his hand under her pajama top and "realized she had started puberty". He became aroused and ejaculated in his underwear while she was sitting on top of him. Four to six weeks later, the accused saw Z.S. in the shower and became aroused. Thereafter, for one to two weeks, he would tuck Z.S. into bed and utilized these opportunities to tickle her and touch her breasts. If Z.S. was sitting on her bed he would rub her back under her pajamas. These occurrences happened several times.

K.N.

[13] When the accused admitted to the sexual touching of Z.S., he also admitted to touching K.N. at Conrad's beach. K.N. was a friend of Z.S. The accused admitted that when K.N. went swimming with the family, he would pick her up and his hands would be on the inside of her thighs. At one point, his hands were holding her inside the bottom of her shorts and his fingers were on the inside of her bathing suit bottoms.

[14] The accused acknowledged that on one occasion the threw K.N. in the water and her bathing suit top came undone. The accused wanted to fix the suit top for her. K.N. said no. He asked if she wanted a knot or a bow in the top. K.N. felt him do something "weird" with his hands on her back. He threw her in the water again. Her bathing suit top went up and when she came up from the water her top was undone again.

Evidence of N.S.

[15] The above evidence must be contextualized with regards to the allegations testified to by N.S. In brief summary, N.S. has testified that the accused took opportunities to touch her buttocks, inner thigh, and breasts, over her clothing while they watched television and engaged in horseplay. N.S. was between the ages of 7

and 10 when these alleged touches occurred. N.S. also said the accused would watch her in the shower and make excuses for being in the bathroom while she showered behind a transparent shower curtain.

Defence Argument

[16] The Defence submits that the Court must embark upon a three-step analysis to determine admissibility:

1. Assessment of the probative value of the purposed similar fact;
2. Assessment of the resulting prejudice; and,
3. Appreciation of the probative value versus the prejudice.

[17] The Defence argues the allegations need to be more than very similar, they need to be strikingly similar. There needs to be a degree of distinctiveness consistent with a "calling card". (*R. v. Handy*, 2002 SCC 56, at para. 91)

[18] The Defence argues that the fact this is a judge-alone trial does not affect the test to be applied. The weighing of prejudice is the same.

[19] The Defence says the proposed similar fact evidence is not very similar in that the areas of the girls' bodies touched are not similar to the allegations by N.S. She alleges being touched on her back, buttocks and breasts. There were no admissions by the accused that he touched K.N and Z.S. other than in their breast area. There was no admission of touching their buttocks or inner thigh.

[20] In relation to Z.S. and N.S., the circumstances are similar in so far as they are both stepdaughters. However, the circumstances relating to K.N. are not similar in that respect. K.N. was not a stepdaughter. The Defence describes the circumstances relating to K.N. as a crime of opportunity.

Law and Analysis

[21] Similar fact evidence is presumptively inadmissible. The Crown bears the burden, on a balance of probabilities, to prove the evidence should be admitted (*R. v. Grant*, 2015 SCC 9). In order for this court to admit the similar fact evidence, the similar facts must be so similar to the conduct charged that it defies coincidence or innocent explanation. Its admission must also be supported by reasons other than mere disposition. The majority confirmed in *R. v. B(C.R.)* , [1990] 1 S.C.R. 717,

1990 CarswellAlta 35, that disposition or propensity evidence is exceptionally admissible in certain circumstances.

> 63…In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. The judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception.

[22] Propensity reasoning based solely on general bad character demonstrated by evidence of discredible conduct is prohibited.

[23] In determining admissibility, I must weigh the probative value of the proposed evidence and the prejudicial effect, in light of the purpose for which the evidence is offered.

[24] As stated in *R. v. Handy, supra*, at para 73:

> The requirement to identify the material issue "in question" (i.e., the purpose for which the similar fact evidence is proffered) does not detract from the probative value/ prejudicial balance, but in fact is essential to it. Probative value cannot be assessed in the abstract. The utility of the evidence lies precisely in its ability to advance or refute a live issue pending before the trier of fact.

[25] First, I must identify the purpose for which the similar fact is sought to be admitted. In light of that, I must then weigh the value of the evidence and any prejudice caused by the evidence.

[26] In *R. v. Handy, supra*, the court stated:

> 76 The principal driver of probative value in a case such as this is the connectedness (or nexus) that is established between the similar fact evidence and the offences alleged, particularly where the connections reveal a "degree of distinctiveness or uniqueness" *(B. (C.R.)*, supra, at p. 735). As stated by Cory J. in *Arp*, at para. 48:
>
> > ... where similar fact evidence is adduced to prove a fact in issue, in order to be admissible, the trial judge should evaluate the degree of similarity of the alleged acts and decide whether the objective improbability of coincidence has been established. Only then will the evidence have sufficient probative value to be admitted.

> 77 Thus in *Arp*, where the issue was identification, Cory J. cited at para. 43 *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.), where Martin J.A. observed that evidence of propensity on the issue of identification is not admissible "unless the propensity is so highly distinctive or unique as to constitute a signature" (p. 496). Martin J.A. made the propensity point again in his lecture on "Similar Fact Evidence" published in [1984] Spec. Lect. L.S.U.C. 1, at pp. 9-10, in speaking of the Moors Murderer case (*R. v. Straffen*, [1952] 2 Q.B. 911 (Eng. Q.B.)):
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> > Although evidence is not admissible to show a propensity to commit crimes, or even crimes of a peculiar class, evidence of a propensity to commit a particular crime in a *particular and distinctive way* was admissible and sufficient to identify [*Straffen*] as the killer of the deceased. [Emphasis added.]
>
> 78 The issue in the present case is not identification but the *actus reus* of the offence. The point is not that the degree of similarity in such a case must be higher or lower than in an identification case. The point is that the issue is different, and the drivers of cogency in relation to the desired inferences will therefore not be the same. As Grange J.A. correctly pointed out 20 years ago *in R. v. Carpenter* (1982), 142 D.L.R. (3d) 237 (Ont. C.A.), at p. 244:
>
> > The degree of similarity required will depend upon the issues in the particular case, the purpose for which the evidence is sought to be introduced and the other evidence.

[27] The Court in *R. v. Handy*, *supra*, reviewed the non-exhaustive list of factors to be assessed (depending on the subject matter of the case) which can connect similar facts to the circumstances as set forth in a charge:

> 82. The trial judge was called on to consider the cogency of the proffered similar fact evidence in relation to the inferences sought to be drawn, as well as the strength of the proof of the similar facts themselves. Factors connecting the similar facts to the circumstances set out in the charge include:
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> > (1) proximity in time of the similar acts…;
> >
> > (2) extent to which the other acts are similar in detail to the charged conduct:…;
> >
> > (3) number of occurrences of the similar acts:…;
> >
> > (4) circumstances surrounding or relating to the similar acts…;
> >
> > (5) any distinctive feature(s) unifying the incidents:…;
> >
> > (6) intervening events:…; and,
> >
> > (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[28] The Crown argues that the similar fact evidence is probative of whether the touching alleged by N.S. took place and to support inferences that the accused, in touching N.S., did so intentionally and for a sexual purpose.

[29] The Crown claims the accused took advantage of family activities and of his position as step-father (*in loco parentis*) as a way to gain a sexual touch that he desired. The Crown argues that the evidence is similar in that all three young girls, Z.S., K.N., and N.S were touched in the same areas of their body: thigh, back, buttocks, and breasts. The Crown submits that all three complainants alleged similar touching of the breasts, back and upper thighs during horseplay. In addition, the Crown alleges that the accused stared at the girls in the shower. The Crown argues that these were all very specific interactions with the children within a family situation.

[30] Z.S. alleges this took place between August 2009 to July 2014, when she was between 9 and 14 years of age. N.S. has alleged the touching took place from 2011 to 2014, when she was 7 to 10 years of age.

[31] The Crown submits, in relation to the alleged offences with N.S., that the accused engineered opportunities for physical touches using his position of trust

[32] The Crown seeks admission of this evidence to establish a *modus operandi* to prove the circumstances of the *actus reus*, to bolster the credibility of the complainant, and to negate innocent explanation.

Similarities and Dissimilarities Between the Facts Charged and the Similar Fact

[33] The evidence in relation to K.N. is that it was a one time occurrence a particular day, August 4, 2014. While the event overlaps with the third and fourth counts of the Indictment, it is definitely towards the end of the time frame in the Indictment.

[34] Furthermore, the accused was not in a position of step-father to K.N. There was no allegation of repeated conduct and no allegation of staring while K.N. was in the shower. There was an allegation of touching of her inner thigh and buttocks, and manipulation of a bathing suit top during a trip to a lake. This is not alleged in relation to N.S.

[35] There are very few similarities in relation to the evidence of K.N. and N.S.

[36] The evidence in relation to Z.S. is more proximate in time to that charged. But the frequency and the nature of the touches are not so similar.

Potential Collusion

[37] The Crown has the burden to prove on a balance of probabilities that the evidence is not tainted by collusion.

[38] Potential collusion is an important element of the probative weight analysis (*R. v. Handy, supra*). Similar fact evidence can not be admitted if there is an air of reality to the issue of collusion. When conducting the balancing exercise, the Court must determine if the evidence is so highly relevant and cogent that its probative value in search of truth outweighs its misuse.

[39] It must be acknowledged that similar fact evidence will always, to some extent, have a prejudicial effect. (*R. v. D.(L.E.)*, [1989] 2 S.C.R. 111)

Timing of Disclosure as evidence of Collusion or collaboration

[40] The Defence argues that the fact that N.S. did not disclose when she was interviewed in 2014, but in 2017, supports the inference that she is falsifying her disclosure. When considering the issue of collusion, I refer to *R. v. D.D.*, 2000 SCC 43, at paras. 59-63:

> 59 Distilling the probative elements of Dr. Marshall's testimony from its superfluous and prejudicial elements, one bald statement of principle emerges. In diagnosing cases of child sexual abuse, the timing of the disclosure, standing alone, signifies nothing. Not all victims of child sexual abuse will disclose the abuse immediately. It depends upon the circumstances of the particular victim. I find surprising the suggestion that a Canadian jury or judge alone would be incapable of understanding this simple fact. I cannot identify any technical quality to this evidence that necessitates expert opinion.
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> B. The Law in Relation to Timing of Disclosure
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> 60 In medieval times, the opinion expressed in Dr. Marshall's evidence was contrary to our law. Authorities from as early as the 13th century reveal that the common law once contained an absolute requirement that victims of sexual abuse raise an immediate "hue and cry" in order for their appeal to be heard. An example is provided by the following archaic passage cited in *Wigmore on Evidence* (2nd ed. 1923), vol. III, at p. 764:

> When therefore a virgin has been so deflowered and overpowered, against the peace of the lord the king, forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress; and so she ought to go to the provost of the hundred and to the serjeant of the lord the king and to the coroners and to the viscount and make her appeal at the first county court.

By the end of the 1700s, this formal requirement had evolved into a factual presumption. See, e.g., *Hawkins' Pleas of the Crown*, where the author states: "It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact" (cited by Hawkins J. in *R. v. Lillyman*, [1896] 2 Q.B. 167, at pp. 170-71).

61 Owing to the inflexibility of the common law, the notion of hue and cry persisted throughout most of the 20th century. See *Kribs v. The Queen*, 1960 CanLII 7 (SCC), [1960] S.C.R. 400, *per* Fauteux J., at p. 405:

> The principle is one of necessity. It is founded on factual presumptions which, in the normal course of events, naturally attach to the subsequent conduct of the prosecutrix shortly after the occurrence of the alleged acts of violence. One of these presumptions is that she is expected to complain upon the first reasonable opportunity, and the other, consequential thereto, is that if she fails to do so, her silence may naturally be taken as a virtual self-contradiction of her story.

…

The significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse:…

[41] The Defence argues collusion can be unconscious.

[42] The Defence submits that N.S. overheard information as set forth in her statement to police in August 2014. N.S. admits she discussed the court process with Z.S. but, she was clear that she did not speak to N.S. about the allegations. The Defence did not argue that N.S. knew what happened with Z.S. and K.N. but she knew generally that Z.S. and K.N. were sexually touched.

[43] As discussed in *R. v. Ryder* 1994, I must be satisfied that there is no real possibility of concoction or unconscious influence.

[44] Having heard from N.S. and considering her testimony, I find her reliable. I find the Crown has discharged its burden on a balance of probabilities that the

evidence of N.S. is not tainted by collusion. It is clear that while N.S. knew generally that Z.S. and K.N. had been "assaulted" by the accused, she did not have the specifics of the allegations. She was largely shielded by this information from her family.

Probative Value

[45] Additionally, the issue of credibility generally is too broad in scope for an issue in question and risks allowing general disposition evidence to bolster the complainant's credibility. In *R. v. Handy, supra*, the similar fact evidence sought to be admitted would only gain credibility if "the jury could legitimately infer sexual intransigence in closely comparable circumstances from the respondent's past behaviour and refusal to take his wife's no for an answer" (para. 120). There is nothing distinct in the current allegations to link the two alleged offences that would be comparable to sexual intransigence and/or refusal to take no for an answer. Therefore, the general issue of bolstering credibility should be seen by the Court as too broad to allow similar fact evidence in for this purpose.

[46] When assessing the probative value of the evidence as against the remaining issues in question proposed by the Crown, there are a number of factors to consider as set out in *R. v. Handy, supra.* Although these factors are not exhaustive, they are the factors most commonly referred to throughout the jurisprudence:

i. Proximity in time of the similar acts

[47] The allegations in relation to N.S. are dated between September 2010 and April 1, 2012. Those relating to Z.S. were dated August 31, 2009, to July 6, 2014, and that relating to K.N. was dated August 4, 2014. Although the Informations relating to Z.S. and N.S. are very broad in scope, the Defences acknowledges that there was some proximity in time to the other allegations.

ii. Extent to which the similar acts are alike or dissimilar

[48] When determining the degree of similarity between the acts, the analysis must not be too general and the differences must be considered as well. As stated in *R. v. Handy, supra*, the search for similarities is a question of degree. This degree of similarities has been addressed in a number of different cases and has been described as a "degree of distinctiveness or uniqueness", "so highly distinctive or unique as to constitute a signature", a "calling card", or "fingerprints".

[49] There are a number of distinctions between the acts underlying the accused's previous guilty pleas and the current allegations made by N.S. The Crown has stated

that the accused's alleged exploitation of a position of trust demonstrates a similarity, as does the timing of the actions being during playtime. Respectfully, these two "similarities" provide for an incredibly broad scope. If this were to be accepted, any person convicted of assaulting or interfering with a child they were in a position of trust with would have those facts admitted in any other case in which assaults were alleged by another complainant in their care. There is nothing distinct or unique so as to create a signature in this situation – they are situations of pure circumstance.

[50] Additionally, K.N. was not the stepdaughter of the accused. Although, the accused was arguably in a position of authority or trust at the time due to bringing children on an outing, it does not provide the same familial relationship on which the Crown is relying on for similarities.

[51] There are also quite a few distinctions between the types of acts that occurred with the earlier complainants compared to the allegations made by N.S. N.S.'s allegations continue to include instances where the accused touched or grabbed her buttocks. She also says the accused placed his hand up her shirt and touched her breasts over her sports bra.

[52] The charges relating to K.N. do not include those allegations. They include the accused insisting on doing up her bathing suit while "doing something weird" on her back and having his fingers under the side of her bathing suit while throwing her into the water.

[53] The charges relating to Z.S. include touching the side of her breast while tucking her into bed and tickling her. In addition, the circumstances include her sitting on the accused's lap while watching television during which the accused experienced an orgasm. There is no such allegation by Z.S.

[54] The girls involved were also fairly different ages while these incidents occurred. At one point, N.S. describes the incidents starting when she was six and eight years old. Z.S. and K.N. were between the ages of 10 and 13.

[55] These charges all have differences. There is nothing common between all three allegations that would be "so highly distinctive or unique as to constitute a signature" or leave any metaphorical "fingerprints".

iii. Number of occurrences of similar acts

[56] There is not enough evidence to support a pattern of conduct by the accused as was present in *R. v. Shearing*, 2002 SCC 58.

[57] The Crown has used the fact that the accused was in a position of trust with both Z.S. and K.N. to try to establish similar circumstances surrounding the allegations made by N.S. However, if the Crown's position is that the accused was "grooming" his stepdaughters to allow these assaults to occur, the circumstances surrounding the offences against K.N. do not line up. The offence against K.N. was a one time event as opposed to an alleged series of years where these sorts of offences were occurring with other complainants.

v. Distinctive features unifying the similar facts

[58] There are no distinctive features unifying the similar facts. These are allegations of acts that arose as a result of the accused playing with or participating in activities with his stepchildren. This is contrary to a distinctive situation such as in *R.v. Snow*, (2004), 190 C.C.C. (3d) 317, [2004] O.J. No. 4309 (Ont. C.A.), where the Ontario Court of Appeal assigned some weight to the way in which the accused would break into houses and tie up victims by their wrists and feet and sexually assault them. This is a very specific and distinct set of actions that could then be attributed and comparted to another distinct set of actions. In the accused's case, there is no such distinctive action that links these alleged similar facts.

vi. Events intervening the similar acts

[59] There are no intervening acts to interfere with the alleged similar acts, the standard for similarities is not met in this case.

[60] Two of the "issues in question" noted by the Crown were mentioned in *R. v. Handy, supra*, with a caution to the court about allowing these issues to categorize the purposes of use for similar fact evidence. At paragraphs 116 – 117, Binnie, J. states:

> Anything that blackened the character of an accused may, as a by-product, enhance the credibility of a complainant. Identification of credibility as the "issue in question" may, unless circumscribed, risk the admission of evidence of nothing more than general disposition ("bad personhood").
>
> Moreover, broadly speaking, the non-consent of the ex-wife on the different occasions described in her evidence is of no relevance to whether the complainant here consented or not: *Clermont, supra,* at p. 135. Because complainant A refused consent in 1992 scarcely establishes that complainant B refused consent in 1996.

[61] Furthermore, given the age of N.S. at the time of the alleged events, the issue of consent is irrelevant.

Prejudicial Effect

[62] After determining the probative value of the evidence proffered by the Crown, the court must then turn to the prejudice of admitting the evidence. There are two types of general prejudice mentioned throughout caselaw: moral prejudice and reasoning prejudice.

[63] Moral prejudice refers to the likelihood of the court or jury to infer that the accused's general disposition that is exhibited though the similar fact evidence could affect their logical reasoning on guilt. In *R. v. Handy*, *supra*, for example, the court found that the inflammatory nature of the ex-wife's evidence of past domestic sexual abuse would likely be more appalling to a jury than the charges at hand.

[64] In the case at bar, the similar fact evidence of the accused's previous conviction in relation to incidents with Z.S. includes the accused having an orgasm after tickling his stepdaughter. This could prove to be more inflammatory than the nature of events that he is being accused of in relation to N.S. As such, the admittance of this evidence has serious potential for moral prejudice.

[65] Reasoning prejudice relates to the distraction of the court from its focus on the charge itself and instead focuses on multiple past charges and spending time on these other circumstances. The court's focus on these past allegations to which the accused entered a guilty plea will stray from the current allegations to which the accused vehemently denies.

Balancing

[66] The prejudice to the accused by the presentation of the facts from his previous convictions as similar fact evidence greatly outweighs any probative value of the evidence proffered by the Crown. As laid out above, the probative value of the evidence is greatly diminished by the lack of distinct similarities, the existence of differences, and the lack of connection to relevant issues.

[67] As noted throughout the jurisprudence, this evidence is presumptively inadmissible for good reason. The extreme prejudice an accused can suffer, even in a judge-alone trial, as a result of the evidence of past convictions being admitted should only be outweighed by extremely probative evidence. The evidence sought

to be admitted in this trial does not meet this standard and as such, should not be admitted.

Brothers, J.

SUPREME COURT OF NOVA SCOTIA
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Date: 20181010
Docket: *Halifax*, No. 473969
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v.

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ERRATUM

Judge:	The Honourable Justice Christa M. Brothers
Erratum:	June 24, 2019
Heard:	October 9, 10, 18, 22, 2018, in Halifax, Nova Scotia
Oral Decision:	October 10, 2018, in Halifax, Nova Scotia
Written Decision:	June 14, 2019, in Halifax, Nova Scotia
Counsel:	Emma Woodburn, Crown Counsel Terrance Sheppard and Allison Reid, Defence Counsel

Erratum

1. The citation has been revised to 2018 NSSC 348.

2. In paragraph 2, the name of the defendant has been replaced with the initials "C.F.Y."