SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. G. S.*, 2021 NSSC 133

Date: 20210419
Docket: *Antigonish*, No. 485417
Registry: Halifax

Between:

Her Majesty the Queen

v.

G. S.

Decision
Restriction on Publication: Ss. 486(1) and 486.4

Judge:	The Honourable Justice Christa M. Brothers
Heard:	March 22, 2021, in Antigonish, Nova Scotia
Counsel:	Jonathan Gavel, for the Crown Raymond Walter Kuszelewski, for the Defendant

By the Court:

[1] The accused, G. S. is charged with two counts of sexual interference in relation to one complainant concerning alleged events which are said to have occurred between 17 and 19 years ago, while the complainant was between seven and nine years old. The accused was, at the time of the alleged events, and is a mature adult man.

[2] I allowed an amendment to the Indictment on March 22, 2021, to allow for the dates of the alleged offences to reflect the evidence of the complainant. The amended Indictment charges the accused as follows:

> Between the 1st day of January A.D. 2002, and the 20th day of August A.D., 2004, at or near [redacted], Nova Scotia, did for a sexual purpose touch R.A.M. a person under the age of fourteen years directly with a part of his body, to wit his hand contrary to Section 151 of the Criminal Code.
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> AND FURTHERMORE during the same date, time and place did for a sexual purpose touch R.A.M., a person under the age of fourteen years directly with a party of his body, to wit his groin area contrary to Section 151 of the *Criminal Code.*

[3] For the accused to be found guilty of the offences pursuant to s. 151 of the *Criminal Code* (as it then read), offences known as sexual interference, the Crown must prove each of the essential elements beyond a reasonable doubt, that:

- The complainant was under the age of 14 at the time;
- The accused touched the complainant — accidental touching is not enough; and,
- The touching was for a sexual purpose.

[4] The Crown must prove the accused's actions meet the requirements of the elements of the offence charged, (see *R. v Peterson*, 2015 ABPC 241, *R. v. G.B.*, 2009 BCCA 88, and *R. v. Morrisey*, 2011 ABCA 150).

[5] If I am not satisfied beyond a reasonable doubt of all of these essential elements, then I must find the accused not guilty of the offences as charged.

The Presumption of Innocence

[6] The Crown has the burden throughout to prove beyond a reasonable doubt that the accused is guilty of the offences charged. There is absolutely no burden on the accused to prove his innocence.

[7] The accused begins the proceedings presumed to be innocent of all the charges. That presumption remains with him throughout the case unless the Crown proves his guilt beyond a reasonable doubt.

[8] Reasonable doubt is based on reason and common sense arising from the evidence or absence of evidence. Reasonable doubt is closer to absolute certainty than to a probability. Thinking the accused is probably guilty or likely guilty is not enough.

[9] Justice Cory summarized the principles governing the reasonable doubt standard in *R. v. Lifchus*, [1997] 3 S.C.R. 320 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;
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> · the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
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> · a reasonable doubt is not a doubt based upon sympathy or prejudice;
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> · rather, it is based upon reason and common sense;
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> · it is logically connected to the evidence or absence of evidence;
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> · 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
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> · more is required than proof that the accused is probably guilty a jury which concludes only that the accused is probably guilty must acquit.

[10] The Crown must prove each element of the offence beyond a reasonable doubt. On those charges, this includes proving that the alleged touching was for a sexual purpose.

[11] There was conflicting evidence provided at trial by the complainant and the accused. I am guided by the decision of the Supreme Court of Canada in *R. v. W. (D.)*, [1991] 1 S.C.R. 742. The instruction in considering evidence in such cases is:

(a) If the evidence of the accused is believed, he must be acquitted;

(b) If the evidence of the accused is not believed, but the evidence still raises or leaves a reasonable doubt, he must be acquitted; and,

(c) Even if the evidence of the accused does not raise a reasonable doubt, he must be acquitted if a reasonable doubt is raised by other evidence that is accepted. In order to convict, the evidence that the court does accept must prove his guilt beyond a reasonable doubt.

[12] To a large extent the Crown's case rests on the testimony of the complainant. The only evidence of the alleged events is the conflicting evidence of the complainant and the accused. The decision in this case, as argued by counsel, hinges on credibility and reliability. It is not a matter of who I believe, it is a matter of whether, based on all the evidence or absence of evidence, the Crown has proven its case beyond a reasonable doubt. 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.

[13] In considering the evidence, if I find the complainant credible it does not in any way shift any onus to the accused (*R. v. C.L.Y.*, 2008 SCC 2). All of the evidence needs to be considered (*R. v. E.M.W.*, 2009 NSPC 33, affirmed at 2011 SCC 31. As Campbell, J (as he then was) stated in *E.M.W.*, at para 47:

> …It is not only appropriate, but necessary for judges to consider all the sources of reasonable doubt. The sources may include the doubt left by the complainant's evidence, the doubt created by the evidence of the accused, the doubt found in any other evidence or the doubt arising from the combination of those sources.

EVIDENCE

[14] I will review the evidence. Although I may not mention all of the evidence, I have carefully considered all of the evidence.

[15] Both the complainant and accused testified. The complainant’s mother also testified on a specific point relating to opportunity to commit the offences as charged.

[16] The complainant's evidence was heard first and therefore I will review it first. While there may be comments respecting the credibility, reliability, or consistency of aspects of the evidence, I will draw no conclusions on credibility and reliability until all the evidence has been considered.

[17] At the time of trial, the complainant was 27 years of age. The complainant testified that she was familiar with the accused because he dated her mother. They started dating about 21 years earlier, when the complainant was between three and six years old. Additionally, the accused is the complainant's godfather. The complainant said she has not had any relationship with the accused since she was taken into foster care around the age of ten.

[18] The complainant testified that as a child she had a good relationship with the accused, but this changed. She described two incidents giving rise to these charges, one I will refer to as the bedroom incident and the other, an incident at a trailer.

First Incident – Bedroom

[19] The first incident is alleged to have occurred in a duplex at [redacted], where the complainant lived with three younger siblings and her mother. The complainant is the oldest of the children. The complainant and her siblings shared the same mother but have different fathers. The accused was the father of one of the complainant's siblings, her sister, M.H., who was born in 2000.

[20] The complainant described the home, its layout and number of bedrooms. She also described the colour of the bedroom, which she described as being pink. There was no real challenge to these descriptions, except a suggestion that her description of things as pink was unbelievable.

[21] The complainant said the first incident occurred in her sister M.H.'s, bedroom on the top floor of the duplex, when the complainant was seven or eight. The complainant described the bedroom as small, with stickers on the wall. She described the position of the bed. She said she got into the left side of the bed for bedtime reading. The accused was in the middle and her sister M.H., who was two, was on the other side of the accused. She said the accused's arm was around her waist and a blanket was over them. She testified his hand was under the blanket, and he moved her nightdress up her legs and started touching her while he was reading a book.

[22] The complainant described her nightdress as soft, white, and pink. It went to her knees. She had underwear on under the nightdress. She recalled her sister was wearing "probably a pink night dress".

[23] The complainant said she could not recall anything about the book that the accused was reading at the time. She testified he was holding the book with one

hand and touching her with the other. He touched her with his fingers under her underwear. He moved his hand up and down on her vagina area, making an up-and-down rubbing motion. She said he did not penetrate her vagina, and that he did not say anything while he was doing this.

[24] The complainant testified she did not say anything to the accused while he did this, and she said the touching lasted until the story was over, which she estimated took a few minutes at most. When the story ended, she said, she left and went to her own bedroom.

[25] The complainant testified that as far as she could remember, this was the only event of this kind at the duplex.

[26] On cross-examination, the complainant testified that during the incident with the book, the accused had the book in his left hand, and his right arm was around her waist under the blanket. She testified that MH was helping turn the pages. The defence suggested that what the complainant described, that is, the accused with his hand around her waist, under her night dress and her underwear while holding and reading a book with his left hand, was a physical impossibility. She rejected this suggestion, replying "it's not". She also said she recalled the colour of her nightdress, her sister's nightdress and the bedroom, but could not recall what book the accused was reading.

Second Incident – Trailer

[27] The complainant testified to a second incident at the accused's mother's trailer. While the complainant could not say when this occurred, she testified it was in the summer, not very long after the incident at the duplex; she said it was during the same season, that is, spring coming into the summer.

[28] The complainant testified that the accused, his mother, and his brother lived at the trailer.

[29] The complainant described the lay-out of the trailer. To the right of the entry was the kitchen and living room area. Down the hall was the accused's brother's room, the accused's room, a bathroom, and, at the end, his mother's bedroom.

[30] On the day of the incident, the accused was working on his van, and the complainant was handing him tools. They were inside the van and she had gotten dirty while helping him. He told her to change her pants and shirt. She changed her

shirt in the van. She could see him watching her through the van's front rear-view mirror. She said she thought she changed her shirt. She hesitated when answering the question and took some time to consider this. She later explained she was not sure whose shirt it was but that it was oversized. They then went into the trailer to the accused's bedroom, and he closed and locked the door. The complainant said the accused's mother was in her bedroom sleeping.

[31] The complainant said the accused gave her a pair of his old jeans to change into, and he sat down on the bed. She changed. He had his pants off as well. She did not know whether he had underwear on or not. He tried to have her look at his thigh, saying he had a bruise there he wanted her to look at. She said she did not look at it because she was uncomfortable and did not think he really wanted her to look at a bruise on his thigh.

[32] The complainant testified that the accused then showed her pornographic magazines. At one point in her evidence the complainant testified she was beside the bed while the accused was sitting on the bed. During her evidence, she also said he had his arms around her waist and she was on the bed. It was unclear initially if she was initially standing and then sat down. This aspect of her evidence was not questioned or challenged but as she testified the sequence of events became clear. She described the contents of the magazines. People were depicted performing sexual acts on one another, including naked women and women in underwear. She recalled some women on their knees in front of a man and other pictures showing men on top of women. The accused asked her what she thought the people in the pictures were doing, and if it looked fun. She responded, no. She testified that she was scared at this point.

[33] The complainant went on to testify that she was beside the bed while the accused was sitting on it. She said the accused put the magazines away, put his arms around her waist, pulled her down on the bed, started to tickle her, and tried to pull down the zipper on her pants. She kept saying no, over and over again, becoming louder, until the accused stopped.

[34] The complainant recalled that the accused had a shirt on but could not recall what else he was wearing. She was wearing a shirt and pants, but they were not the ones she had been wearing when she arrived at the trailer.

[35] The complainant said on direct examination that she was pretty sure she was between seven and eight years of age at the time of these incidents. She believed she was finishing grade four.

[36] The complainant said on cross-examination that the accused drove her to the trailer in his van, which they then worked on. She said it was a working van. She testified she helped by handing him tools for a few hours and in the process got her shirt and pants dirty. The complainant testified she got grease on her from the tools and dirt on her from the ground. She said the accused instructed her to change her clothes. She was to change her shirt first and change into the accused's pants in the trailer. There was a shirt in the back of the van. The complainant did not recall if it was hers or his. She said she did not bring any clothes with her and believed it would have been his shirt.

[37] The complainant said the accused was bigger, that is, overweight, when the incidents happened than at trial. She estimated him as weighing 300 lbs at the time.

[38] The complainant said that when she changed her shirt, she was kneeling in the back of the van. There were no seats in the back of the van. The shirt she changed into was oversized. She said the accused was watching her from the front seat through the rear-view mirror.

[39] The complainant said it was the accused's idea to leave the van and go into the trailer. She said on cross-examination that he told her his mother was asleep. She was asked on cross-examination how she could put the accused's pants on, since they were so oversized. She said, she used a belt he gave her, which cinched the pants up enough to tighten around her waist.

[40] The complainant said she was at the foot of the bed and the accused wanted her to look at a bruise on his thigh. He was sitting on the foot of the bed, on her left. She said she never looked, and so she did not know if there was actually a bruise there.

[41] With respect to the pornographic magazine she said the accused showed her, the complainant described it being on a shelf right in front of the bed. On cross-examination, she described the accused holding a pornographic magazine and flipping the pages. She said she had not seen such magazines before and could not recall the title. She did not know how long they sat there with the magazines and did not know how they got from the magazines to his arm being around her and them lying on the bed.

[42] In response to further questioning on cross-examination, the complainant described the accused pulling her down onto the bed with him, keeping his arm around her, and moving his hand down to her zipper area. She said the pants were

tight around her waist and were cinched around her and "jammed" up in front. She said the accused was searching for the pant zipper in the fold of clothing and trying to pull it down. She kept telling him no. When he stopped, she got up and went into the hallway. She said she had nowhere to go. She did not go outside or to the accused's mother's room, but stayed in the hallway, until the accused came out of his bedroom. She said he took her in the van to the [redacted] for ice cream. They then went home. She was asked if she told anyone. She testified she did not. I place no weight upon the specific evidence that there was no immediate complaint by the complainant (*R. v. A.R.D.*, 2017 ABCA 237 aff'd 2018 SCC 6)

Inconsistencies and Challenges to Testimony

[43] On cross-examination, the complainant agreed that some of her memory about events was not good. She said her recall of details was pretty good but "not everything". She could not specify her exact age when these events happened. She testified that she was ten when she went into foster care, and she believed she was in foster care 18 months after these events. The complainant said she was not 100% certain of her age at the time of these alleged events. On cross-examination, the complainant said she was between the ages of eight and nine years old at the time of the alleged incidents. This was different from her evidence on direct examination when she said she was between seven and eight years old. She said she was almost five feet tall and that she was thin at the time of these incidents.

[44] The complainant said she was aware that her mother NJH, and the accused were going through a family dispute and had broken up. She said she was not aware of a court order requiring the accused to not be in the duplex and requiring that his access to his biological daughter was only outside the home.

[45] The complainant knew the accused had been outside the country from 1999 until May 2002.

[46] Throughout the testimony, the complainant said she had trouble distinguishing her left from her right.

[47] The complainant recalled being in court when the same charges were first raised in 2006, but she did not give evidence at that time. It was put to her that she did not recall the incidents at that time. She clarified, saying she was not ready at that time to recall the incidents. On cross-examination she agreed that in 2019, she spoke of the two incidents and her recollection of her age was not specific. She recalled being between certain ages. No other context for this was elicited. It was

unclear if this was a prior statement or preliminary inquiry evidence. The defence did not provide any context.

[48] No prior statements or preliminary transcripts were put to the complainant on cross-examination. She was asked if she had been asked questions about these events on a prior occasion and she said she did not recall the events at that time. On redirect, the complainant said that on that prior occasion she did not want to say anything, and that she was not ready to talk about the incidents then. The complainant testified that she did remember the incidents at that time but was not yet ready to talk about them.

Defence Evidence

[49] The accused testified in his own defence. He confirmed that he is the complainant's godfather. He confirmed that NJH is both the complainant's and MH's mother. The accused confirmed he and NJH were living in the same home for a period of time.

[50] The accused testified that he was out of the country in school in Pittsburgh from September 1999 until May 2002. He was studying Special effects/Industrial Design. When he returned, he said he was living with another woman in a trailer on [redacted] not with NJH. The accused described his relationship with NJH as fine and amicable. He said she was dating other people while he was gone.

[51] After social services became involved, he was advised he had to see MH, his biological child, outside the home, and could not see her inside. He testified child services was involved after 2003 with NJH and her other partner, but not with him.

[52] He testified that there was a court order, and he was not allowed to see any of the other children, including the complainant. However, the timing and content of this order was not clear. The accused said the order lasted until August 2004 when the children were placed into care. He said he had supervised visits with MH after August 2004 but could not see the other children.

[53] The accused denied the allegation about the incident in the house, and further maintained that it could not have happened. He testified that no one was allowed in the bedrooms. He said visiting with the children had to be done in the kitchen and living room and the complainant was not allowed in his presence.

[54] The accused also denied the incident at the trailer. He testified on direct examination that from 2003 on, the van was laid up and was being repaired. It was located at his mother's trailer. He used it to store personal items he had moved from the United States, and it was neither operable nor moveable at the time. He said he could not afford to fix it.

[55] The accused testified that the complainant never went to the trailer to work on the van. He maintained that the complainant did not accurately describe the van because the back of the van was packed with his belongings, as it still is to this day. The accused's evidence in short was it was impossible for the complainant to have been in the back of his van and to have changed clothes there.

[56] The accused testified that he did have a small bedroom in the trailer and described it as being big enough for a mouse to turn around in. He had a single bed, a bureau, and a closet. He denied that there was shelf space as described by the complainant, with magazines on it. He denied owning pornographic magazines. He agreed that his mother lived at the trailer.

[57] The accused testified he weighed approximately 315 lbs at the time of these alleged events. He showed the court a belt which he was wearing with 19 holes in it, saying he had added holes as he got thinner. He said he wore size 42 pants in 2002-2004 and wore a double XL shirt.

[58] The accused denied the complainant ever changed into his pants or shirt. He says if she was ever in the trailer, it would only have been to the front door. He maintained that she was never inside the trailer and never in his bedroom.

[59] On cross-examination, the accused said that when he returned to [redacted] from studying in the United States he lived in the trailer. He also referenced that when he returned home from the United States he lived with another woman. It was unclear when he lived with that woman and when he lived in the trailer with his mother. He was no longer in a relationship with NJH. He maintained that he was never inside the home when he returned from the United States. His access to M.H. was exclusively outside the home. NJH would drop her off or he would pick her up from the duplex. The accused testified that he did not spend any time with the complainant between May 2002 and August 2004. He testified he was not allowed to because of the court order. However, he also testified that the order did not relate to the complainant. The accused said that prior to 2003, there was no court order restricting his access to the duplex, but NJH was living with someone else and he intimated that he would not have been around because of this fact.

[60] The accused described the trailer as having three bedrooms. On entry there was a porch area, and then the living room and kitchen. The dining area was off to the right, then the bathroom, his brother's room, and then his mother's room. This is partly consistent with the complainant's description.

[61] The accused said the van stopped working in the Spring of 2003. He said he had been able to drive it from the United States, and that he did work on it after arriving from the United States when he said it was laid up.

Rebuttal Evidence

[62] The Crown sought permission to call rebuttal evidence on a narrow point. Counsel argued that they could not have reasonably anticipated that the defence would advance the assertion that the accused had no opportunity to commit the offences given that he was not in the home at any time, despite his biological daughter living at the residence. As noted earlier, the accused testified that he was not in the home because NJH was dating another man and testified that there was a court order preventing him from accessing his daughter in that residence. He said that he had never been in the duplex after he returned from Pittsburgh. The Crown argued that this issue could not have been foreseen in advance and sought to call NJH for this limited purpose. I allowed this evidence on this narrow issue.

[63] NJH testified that when the accused returned from Pittsburgh, their child together, MH, was two or three years old.

[64] NJH confirmed that she had four children of whom the complainant was the oldest. She said the children went into foster care in September 2004.

[65] NJH testified that the accused stayed with her all the time when he came back from Pittsburgh. She said that he would see the complainant and be with her on his own.

[66] NJH testified that the accused would be in the house when he returned from Pittsburgh and when the children were taken into care. She said he had supervised access in the house as well. Although the complainant was pushed on cross-examination, she was not challenged on the evidence that he was inside the house during the relevant time, and she was not challenged on the evidence that he had contact with her mother.

[67] On cross-examination, NJH confirmed that she no longer had contact with the accused, and that there was some animosity in the relationship in the end. On cross-examination, it was put to her that the accused could only visit MH outside of the home. She denied this and testified that the order said he could only visit his daughter at the home. NJH testified that the accused was allowed at her house and denied that he was required to see MDH outside the home. She agreed that she was not good about dates. She said that as far as she could recall, there were no restrictions with regards to the other children. She agreed she had not looked at the orders since 2005, and admitted that her memory may not be complete, but she said it was accurate.

Crown Position

[68] The Crown argues it has proven both counts of the charge of sexual interference against the accused, submitting that jurisdiction, identity, time and place have been established.

[69] As to identity, the accused is well-known to the complainant, who has known him since she was two or three years old. The evidence as to time is not as clear. The incidents are said to have occurred in the summer when the complainant was around the ages of eight or nine years old, between January 1, 2002, and August 20, 2004. But having regard to the totality of the evidence, the Crown says the charges have been proven beyond a reasonable doubt.

[70] The Crown submits all elements of the offence have been proven beyond a reasonable doubt. The Crown says it must prove the following:

- The complainant was under the age of 14 years.
- The accused touched the complainant indirectly or directly with a part of his body or an object. Accidental touching is not enough.
- The touching was for a sexual purpose.

[71] Based on the complainant's testimony concerning her age and what level of school she had completed; the Crown says the evidence proves she was between eight and nine years old. The Crown says there is sufficient proof the accused touched her on the first occasion with his hands on her vagina for a sexual purpose which was demonstrated by the area touched and the nature of the touching, a

rubbing motion. In relation to the second occasion, the Crown argues, the accused touched her with his body more generally, holding her and trying to undo her pants. He had his hands around her waist near her belt area. The nature of the conduct and the circumstances, including showing the complainant a pornographic magazine, all objectively demonstrate he was touching her for a sexual purpose, according to the Crown. He touched her vagina on the first occasion, and on the second occasion, around her waist and belt line area.

[72] The Crown says it can be inferred from the nature of the touching that the first occasion was for a sexual purpose. On the second occasion the Crown notes, he asked her to change her clothes in front of him, showed her pornographic content, and tried to undo her clothing. This is objectively for a sexual purpose, the Crown submits.

[73] The Crown says credibility is at the heart of the case. The Crown says the complainant's evidence is internally consistent. While she could not recall the name of the book the accused was reading to her, she did recall the colour of the room, the pajamas, and other details. These were part of her lived experiences in this house. The Crown says her inability to recall the book is not a basis on which to impugn her credibility. This detail would be less likely to stand out to her on that occasion, counsel submits.

[74] The accused says he did not set foot in the house where his daughter lived for more than two and a half years. The complainant described the inside of the accused's mother's house. Her description was generally consistent with the description given by the accused, even though he says that if she was at the trailer, she was never beyond the door.

[75] The Crown argues that the accused's testimony should be rejected outright.

[76] The Crown submits that because the charges cover the same date range, the court could only enter a conviction on one count. However, the Crown did not indicate how the court should determine on which count to convict and why. The Crown could have amended the indictment to one count if they chose. They did not. The counts were in relation to different locations and different types of alleged touching. The Crown could not answer my questions about how I would do what counsel was asking me to do if I accepted, after an assessment of all the evidence and the application of *R. v. WD,* that both counts had been proven.

Defence Position

[77] The defence agrees that this matter turns on credibility. The defence argues the complainant's evidence in relation to the first count does not demonstrate an "air of reality". The defence says that the claim that the accused was reading a book makes the allegation unbelievable, given the suggestion that he did not stop reading or lose sight of the book, but instead kept his arm around the complainant's waist, under her nightshirt and under her underwear. Counsel says this is physically impossible.

[78] The defence further argues that the reference to the pink night gown and room is unbelievable. Counsel says the colour description is an embellishment of the facts.

[79] The defence says the complainant's allegations are just a story and did not happen. The accused says there was animosity between him and NJH, and NJH was in a relationship with another man. Because of that relationship child protection was called. There were court orders. The accused was subject to provisions for access under conditions. He says he could not go into the house but had to take his own daughter away from the house from 9 am to 5 pm. NJH says there was supervised access. The defence says that if there was supervised access, that would mean that the accused was never alone in the bedroom with the complainant.

[80] The defence says the evidence is unclear and contradictory and favours the accused's position that this event could not have happened. NJH and the accused agree that there was some form of supervision order in place. Therefore, the defence submits the accused would not have been alone with the complainant.

[81] In relation to the second incident, the defence says there is a conflict in the issues of the state of the accused's van and whether it was being worked on. The defence also says the complainant's evidence about putting on the accused's clothing does not make sense, claiming this would be unlikely and unrealistic. The defence says this series of events is impossible. She could not have worn his pants; she could not have cinched them up; and then they could not have gone, with her dressed that way, for ice-cream. The defence says there is no air of reality to this narrative.

[82] The defence also points to the accused's evidence that his van was loaded with his personal belongings and there was no room for the complainant to change in it, and to his evidence that there was no magazine rack in his bedroom.

[83] In short, the defence says the complainant's account of being dressed in oversized pants and shirt, and the accused's pants removed, and then him showing her a magazine, does not provide a natural flow of events and is not plausible.

Legal Framework and Analysis

Credibility and Reliability

[84] In reviewing the evidence and considering the issues of reliability and credibility, I start with the comments of Judge Tax in *R. v. Jacquot*, 2010 NSPC 13:

> 40 There are many tools for assessing the credibility and reliability of testimony. First, there is the ability to consider inconsistencies with previous statements or testimony at trial and with independent evidence which has been accepted by me. Second, I can assess the partiality of witnesses due to kinship, hostility or self-interest. Where an accused person testifies this factor must be disregarded insofar as his or her testimony is concerned, as it affects every accused in an obvious way, and may have the effect of reversing the onus of proof. Third, I can consider the capacity of the witness to relate their testimony, that is, their ability to observe, remember and communicate the details of their testimony. Fourth, I can consider the contradictory evidence as well as the overall sense of the evidence and when common sense is applied to the testimony, whether it suggests that the evidence is impossible or highly improbable.
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> 41 Considering the evidence adduced at trial, I may believe and accept all, some or none of the evidence of a witness or accept parts of the witness's testimony and reject other parts.

[85] Further in *R. v. D.F.M.*, 2008 NSSC 312, Murphy, J. stated:

> 9. Assessing evidence is not a credibility contest. It is not a matter of which witness is believed, and who is disbelieved. The Court is able to accept some or all of a witness' evidence. Those principles are highlighted by the Supreme Court of Canada in *R. v. S.* (J.H.), 2008 SCC 30 (S.C.C.). I also refer to *R. v. F.* (S.), 2007 PESCAD 17 (P.E.I. C.A.) and in particular, para. 31 where the Court said as follows with respect to the credibility issue:
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> > A conviction can only come about if the Crown evidence is so reliable, so consistent and so believable that it proves beyond a reasonable doubt the guilt of the accused. There must be no other reasonable conclusion from the evidence. If there is any reasonable doubt remaining after you hear the evidence of the Crown, either because of inconsistencies, unreliability, a lack of credibility or anything else, the Court must acquit — no matter what you thought of the accused's evidence.

[86] I also note the well-known statements on credibility in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

[87] The following are helpful considerations when assessing the credibility of witnesses: the attitude and demeanor of witnesses, prior inconsistent statements, external consistency, internal consistency, motive to mislead, ability to record events in memory, and application of common sense to the evidence to consider whether it suggests the evidence is impossible, improbable, or unlikely. (See *R. v. Ross*, 2006 NSPC 20 and *R. v. D.F.M., supra).*

[88] In *R. v. M.G.* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), the majority commented on the means of assessing credibility as follows:

> [27] Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness-box and what the witness said on other occasions, whether on oath or not. Inconsistencies on minor matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness. This is particularly true in cases of young persons. But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely upon the testimony of a witness who has demonstrated carelessness with the truth.
>
> [28] The effect of inconsistencies upon the credibility of a crucial witness was recently described by Rowles J.A. speaking for the British Columbia Court of Appeal in *R. v. B. (R.W.)* (1993), 40 W.A.C. 1:
>
> > Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.
> >
> > In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

[89] (See also, *R. v. H.C.*, 2009 ONCA 56, and *R. v. DLC*, [2001] NSJ No. 554 (Prov. Ct.)

[90] As I consider the evidence and whether the Crown has proven the charges beyond a reasonable doubt, I refer to *R. v. Mah*, 2002 NSCA 99, where Cromwell J.A. (as he then was), writing for the Court said:

> 41 The *W. (D.)* principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, *W. (D.)* describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. *W. (D.)* reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt: … As Binnie, J. put it in *Sheppard*, the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.
>
> …
>
> 46 The *W. (D.)* analysis requires consideration of whether all the evidence leaves the judge with a reasonable doubt. Looking at all of these passages in the context of the reasons as a whole, I am persuaded that the judge did not approach the evidence in this way. The decision read as a whole reflects a chain of reasoning from credibility to guilt without recognition that the ultimate issue is not credibility but reasonable doubt.

[91] I turn now to my assessment of the evidence. The accused denied all of the allegations. He testified that what was being alleged was impossible, claiming that there was no opportunity for him to be alone with the complainant in the duplex and that she was never in the trailer. He further testified that she could not have been in the van, as it was packed full of his personal items. Further, he said, his room was too small for the incident described, with no shelving for magazines, and his clothing could never have been worn by the complainant because he was overweight at the time of the alleged events and she would not have been able to wear his much larger clothing.

[92] In weighing the evidence and applying the rubric in *R. v. W.(D.)*, *supra*, and specifically, the question of whether I believe the accused, there are many aspects of the accused's testimony which I do not believe.

[93] First, I will comment on the evidence respecting the court order and the alleged lack of opportunity to be alone with the complainant. The accused testified that when he returned from Pittsburgh, he did not live with NJH because she was with another partner. He further testified that as a result of interventions in the home, a court order did not permit him to access his daughter MH at the duplex. He said the court order did not permit his entry in the home. While NJH thought the court order did not prevent the accused from coming into the home, she could not say she read the order recently. She was adamant, however, that the accused did access her home and see his daughter at the duplex.

[94] NJH testified in a forthright manner. She was only called by the Crown to speak to this one narrow point raised by the defence when the accused testified. She did not testify with any evident animosity towards the accused. She did admit that she and the accused had experienced acrimony in their relationship. She had not been in the courtroom for any of the trial up until her testimony and did not hear the evidence. She testified that her daughter, the complainant, had not spoken to her about the allegations. I am satisfied that she did not have an opportunity to tailor her evidence.

[95] Given the testimony of the complainant which was not shaken on this point, and the testimony of NJH, I reject the accused's evidence that he had no opportunity to be alone with the complainant in the duplex.

[96] As to his denial that the complainant was ever in his mother's trailer, I reject this evidence as well. The complainant testified to the layout of the trailer on direct. Her description was remarkably similar to the accused's evidence on cross-examination. While she may have had some of the rooms out of order as compared to the accused's testimony, she did speak of the living room and kitchen being close to the door with a hallway where the bedrooms and bathrooms were. She was able to say how many bedrooms there were. The complainant, testifying to an event that allegedly occurred when she was a child, was sufficiently accurate in her description of the trailer to allow me to conclude that she had been inside it. In the circumstances and given her ability to describe the trailer, I reject the accused's claim that she was never inside. I have no reasonable doubt on this point.

[97] The accused also denied that his van was accessible to the complainant, so that she could have changed her clothes in the back, as she alleged. He said all his personal items were in the van at the time. However, on cross-examination he agreed that the van was operable for a period and that he would work on it from time to

time, although he denied doing so with the complainant present. Given the change in the accused's evidence on this point, I reject his claim that the van was continuously so full of his effects as to make room for the complainant in the back an impossibility. In view of his admission that he did in fact work on the van during a period, I reject his evidence that it was continuously inoperable.

[98] The accused not only denied the allegations but testified that it was impossible for these events to have happened. On cross-examination, however, a number of these assertions were undermined, such as his claim that the van was inoperable. Others are simply implausible, such as the accused's claim that his room in the trailer was too small to accommodate a shelf that would hold a magazine. Finally, his claim that a court order regulating his contact with MH could have prevented the alleged improper touching of the complainant is simply not convincing on any level, leaving aside that fact that there was no coherent evidence that would allow a determination of the terms of the alleged court order. In short, I do not find the accused's evidence credible or reliable. That does not, of course, end the analysis.

[99] The sum total of the inconsistencies in the accused's evidence and his refusal to make admissions, results in my finding that his evidence is on the whole, unreliable and not credible, and I do not accept his evidence on certain specific points, as described above.

[100] Having found the accused not credible and rejected his evidence on certain significant points, I must assess whether the evidence I believe or any of his evidence raises a reasonable doubt. The evidence of the accused was an unequivocal denial that any of the alleged inappropriate touching had taken place. It stands in stark contradiction to the evidence of his goddaughter, the complainant. I have tested his evidence against that of the complainant and all the other evidence. When tested that way, it cannot be accepted as raising a reasonable doubt. It is not merely a matter of finding her version of events to be the more believable. Neither is it a matter of not accepting it, or simply not believing his evidence when it contradicts the complainant's. Her evidence, the manner in which she gave the evidence, and her consistency have given me such confidence in the reliability of her evidence that, even in light of the accused's denial, her evidence displaces any reasonable doubt.

[101] I conclude that there has not been a reasonable doubt raised by the accused's evidence. I do that given the inconsistencies in his evidence and the contradictions that are seen on the evidence as a whole. That does not end the analysis, of course.

The question is whether I am left with a reasonable doubt by any of the other evidence.

[102] In providing context for my continued assessment of the evidence I refer to *R. v. M. (R.E.)*, [2008] S.C.J. No. 52, [2008] 3 S.C.R. 3 (S.C.C.), where the court assessed the reasons of a trial judge for rejecting the plausible denial of an accused in a sexual assault matter:

> Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that, in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged". It followed of necessity that he rejected the accused's evidence where it conflicted with the evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt. (Para.66)

[103] As I assess the complainant's evidence, I must subject her testimony to the appropriate amount of scrutiny (*R. v. S. (D.D)*, 2006 NSCA 34. There are some inconsistencies and recall issues which arise in her evidence which I have referred to. First, she was unsure of the precise timing of these alleged events. That is, did the events happen when she was between 7 and 8 years old or 8 and 9 years old? Because of this lack of certainty, the Crown moved to amend the indictment with respect to the time these events were alleged to have occurred. I allowed this amendment. One must remember that the complainant is testifying as a 27-year-old about events she says occurs when she was seven to nine years old. It is not surprising that her recall about dates will not be consistent and she will have some difficulty with precision. This is accepted in the case law.

[104] There was some confusion in the complainant's evidence as to whether she was on the left- or right-hand side of the accused during the alleged incident in the bedroom in the duplex. As noted earlier, the complainant explained that she had difficulty discerning left from right and had to think about this aspect deeply to be able to testify with some certainty. Again, the allegations are not dependent on what side of the accused the complainant was on. Furthermore, the complainant explained her difficulty with the concept of distinguishing her left from her right. She remained

consistent in her description of the event once she thought about this. I am not troubled by her difficulty on this point, which was explained.

[105] The complainant was not sure whose shirt she was asked to put on in the van. Was it the accused's or another person's? She was not sure, but she did say the shirt was oversized. This uncertainty does not go to the core allegation and is a peripheral detail that does not raise a reasonable doubt.

[106] The complainant also explained why she had not spoken about these events before. She said she was not ready on an earlier occasion. I accept this explanation in the circumstances of her age at the time. She would have been about 11 or 12 years of age. She explained in her evidence that she was not ready to speak about these events until more recently.

[107] Furthermore, the fact she could not remember a book title is a peripheral detail in the circumstances of the case which does not raise a reasonable doubt that these offences took place.

[108] Nothing raised in this trial undermined the reliability or credibility of the complainant's evidence on the core allegations. She was not impeached, and no inconsistencies were unearthed or appeared concerning the core of the allegations.

[109] As a matter of human experience, it is not surprising that a witness describing an alleged traumatic event would be uncertain on some peripheral details. The impact of time on the complainant's memory is of importance to analyze. Courts have acknowledged that peripheral details may be vague, forgotten, or difficult to accurately recall, while the core of the allegations are recalled and described with consistency.

[110] I must keep in mind the warning articulated by McLachlin, J. (as she then was) in *R. v. W. (R.),* [1992] 2 S.C.R. 122. After discussing the changes in the law respecting the assessment of children's evidence, such as the removal of corroboration requirements and acceptance that tests of credibility applicable to adults may not be appropriate for children, she concluded:

> 26 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.
>
> 27 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.

[111] Additionally, Judge Derrick (as she then was) in *R. v. A.W.H.*, 2017 NSPC 19, spoke of the fact that in cases involving child complainants the standard, proof beyond a reasonable doubt, does not get lowered but given children may experience the world differently then adults, concepts such as time and place may be missing.

[112] Here, the whole of the Crown's case rests upon the complainant, with some evidence as to opportunity being elicited though another Crown witness. It is essential that the credibility and reliability of the complainant's evidence be tested considering the other evidence presented.

[113] I must search the evidence for inconsistencies and determine if those found are minor alone or together or alone or taken together are significant, diminishing the credibility or reliability of the complainant. As stated in *R. v. R.W.B.,* [1993] B.C.J. No. 758 (C.A.):

> 29 In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence

> is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here.

[114] I have considered the external and internal consistency of the evidence. The complainant's evidence was internally consistent. Aside from her age range broadening on cross-examination, her evidence remained consistent. The inconsistencies I have addressed above were not sufficiently material alone or taken as a whole to impact my view of her credibility or reliability.

[115] As noted earlier, I do not believe the accused's evidence on these allegations nor does his evidence raise a reasonable doubt. Taken as a whole, I am convinced that these touches happened to the complainant. She was by and large consistent in her evidence. Her narrative did not change. Because of this, and her consistency on the core of her allegations, I find her evidence credible and reliable. None of the inconsistencies in the complainant's testimony were significant enough to impact my decision on the credibility and reliability of her evidence. Given the complainant's evidence that she was not ready to speak about these events on an earlier occasion, and the clear lack of scripted response, I find the complainant to be credible. I can find no reasonable doubt in her evidence.

[116] Touching is done for (has) a sexual purpose if it is done for the accused's sexual gratification, or to violate the complainant's sexual integrity, including any act meant to degrade or demean the complainant in a sexual way.

[117] To determine the purpose of the touching, I must consider all of the circumstances. I must consider what was said and what was done. I must take into account the part(s) of the body that were touched and the nature of the contact. Relevant too are any words or gestures that accompanied the touching.

[118] The complainant's evidence that she was touched by the accused under her underwear on her vagina, with him moving his hand up and down in a rubbing motion proves the touching was done for a sexual purpose, taking into account the area of the complainant's body. The evidence that the accused pulled her onto the bed in the trailer after showing her pornographic material and his attempts to unzip her zipper taken as a whole likewise proves the touching was done for a sexual purpose.

[119] I am satisfied that even considering the accused's denial, the complainant's evidence displaces any reasonable doubt. I rely on *R. v. Jaura,* 2006 O.N.C.J. 385 which speaks of the ability of a complainant's evidence to do this. In *R. v. Jaura*, ,

Judge B.W. Duncan found the complainant to be entirely believable. The evidence of the accused, however, could not be rejected as untrue without having regard to the evidence of the complainant.

[120] This conclusion is reached after considering the accused's evidence, the complainant's evidence, and all other evidence at trial.

Conclusion

[121] In summary, it is my view that the case law establishes that, in a "she said/he said" case, a trial judge can reject the evidence of an accused and convict solely on the basis of the acceptance of the evidence of the complainant, provided that the evidence of the defendant is given a fair assessment and allows for the possibility of being left in doubt, notwithstanding her acceptance of the complainant's evidence.

[122] Given my findings that the accused's evidence lacks credibility while the complainant's evidence is credible, I conclude that when the accused's evidence contradicts the complainant's, it cannot be accepted as raising a reasonable doubt. That level of confidence was not reached upon hearing the complainant's evidence alone but only after considering her evidence in light of all of the other evidence at the trial, including that of the accused.

[123] I am satisfied that all the evidence in this case has been searched for reasonable doubt. I have found none.

[124] In conclusion, the Crown has proven beyond a reasonable doubt the accused's guilt of these two counts of sexual interference contrary to s. 151 of the *Criminal Code*.

Brothers, J.