

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. T.K.B.*, 2021 NSSC 221

**Date:** 20210707

**Docket:** Hfx CR No. 481789

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

T.K.B.

**DECISION ON TRIAL**

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

**Judge:** The Honourable Justice Scott C. Norton

**Heard:** June 15, 16, 17, 2021, in Halifax, Nova Scotia

**Decision:** July 7, 2021

**Counsel:** Josie McKinney and Stephanie Morton, for the Crown  
Drew Rogers, for T.K.B.

**By the Court:**

**Background**

- [1] This case concerns allegations of sexual assault and sexual touching that occurred in the fall of 2017 when the complainant was 14 years old. At the time of the trial the complainant was 18 years old. She alleges that after her mother's boyfriend moved into their house he touched her for a sexual purpose on a number of separate occasions.
- [2] The accused, TKB, is charged with one count of sexual touching contrary to s. 151 and one count of sexual assault contrary to s. 271 of the *Criminal Code*.
- [3] The accused conceded the issues of date, time, jurisdiction, identification and the age of the complainant. A videotape of a police interview of the complainant, E, conducted on December 21, 2017 was admitted into evidence.
- [4] The additional evidence advanced by the Crown was comprised of witness testimony, including from the complainant E; her friend; her mother and her stepmother. Mr. B testified in his defence.
- [5] The evidence of E is that after Mr. B moved into her mother's home in [...], Nova Scotia, between September and the end of December, 2017 there were seven separate incidents of unwanted contact by the accused. Five of these (Incidents #'s 1, 2, 3, 4 and 5) were described on the December 21, 2017 video statement. The other two incidents were testified to at the trial. With the exception of one incident, there are no witnesses to the events complained of.
- [6] At the relevant time, E lived in [...] with her mother, A, her 16-year-old brother, C, and her 4-year-old sister, L. Her mother rented the house. Her mother and father, S, have been separated since 2005. She had access visits with her father and stepmother every Wednesday evening and every second weekend. In late 2017, the owner of the house sold it and, as a result, her mother had to move. E was unhappy about having to move away from the house where she grew up. When her mother did move at the end of December, 2017, E went to live with her father and stepmother.

[7] Mr. B is 58 years old. In the fall of 2017 he was employed doing restoration work with A+ Quality Cleaners. He met E's mother at Tim Horton's where she worked. They began dating in the summer of 2017. He believes that he moved in to her house in July or August 2017.

#### Incident #1

[8] E testified that the first incident occurred in October, 2017, not long after Mr. B moved into her mother's house. E had only met him once, a week before, when she learned that her mother and he were dating. She was in the kitchen with her friend [M]. They were baking a cake. Her mother was not home. She says that Mr. B "slapped her butt". She described his demeanor as "kind of joking around". She did not tell her mother about this incident that day. E said that the incident made her feel uncomfortable.

[9] M turned 15 years old in November 2017 and was 18 years old at the time of the trial. M was E's best friend and in the fall of 2017 they would have been together almost daily. She recalls being at E's house on a Wednesday night when Mr. B arrived. He introduced himself as A's boyfriend. Before her mother arrived home, E and M decided to bake a cake. While in the kitchen, she observed Mr. B grab E's buttock and saw E jerk away. She cannot recall if it was the left or right buttock. She recalls Mr. B making a comment before grabbing the buttock but cannot recall what he said.

[10] Mr. B recalls the day. E and M were in the kitchen making a cake. He wanted to pass by E to do the dishes. He denies touching her buttock. He put his hands on her waist ("above the love handles") as he moved behind her. When asked why he had to touch her at all, he replied "it's as common as shaking someone's hand" and that his only intent was to get her to move.

#### Incident #2

[11] E says that the second incident occurred a couple days after the first incident. She walked past Mr. B when he was sitting on the couch in the living room of her house. As she passed by him he slapped her butt. She says she have him a weird look and he said: "Don't give me that look". Her mother was not at home at the time.

[12] Mr. B denied this ever occurred.

Incident #3

[13] E says that she was in her room getting ready to go out with the family when Mr. B came into her room and with his hand “snapped” the back strap of her bra in the area of her spine once and the front of her bra in the area at the top of her abdomen once. She was in her room. No one else was present.

[14] In cross-examination E agreed that when he snapped her bra his hand did not make contact with her body. She repeated that on this occasion he snapped the back strap of her bra first and then snapped the front of her bra.

[15] Mr. B denied this incident occurred.

Incident #4

[16] The fourth incident involves two separate allegations. The first is that Mr. B pinched E’s buttock when she was in the kitchen making pancakes with her friend M.

[17] A short time later , when she went to her room to change, she forgot to push her door shut. It would not completely close because of flooring materials stacked in her room as part of a home renovation. She heard Mr. B coming up the stairs. She grabbed a blanket off her bed to cover herself. Mr. B came into her room and told her he wanted to give her a hug. She told him she did not want a hug and was not wearing anything underneath the blanket. He responded “let me see”. As he tried to tug the blanket away she held it with her hands and twisted her body back and forth to try and keep him from pulling the blanket away. This went on for 10 to 20 seconds. When he said “let me see” he sounded like he was joking. She knocked over the flooring for renovations that was being stored in her room to cause a noise to draw attention because she was concerned that yelling would not be loud enough for others to hear.

[18] E’s mother recalled an occasion when she and Mr. B arrived home and E was wrapped in a blanket. She told E to go upstairs and dress properly. E had been making food in the kitchen with M. E went upstairs. A remained downstairs doing chores. She is not sure where Mr. B was.

She recalls hearing a loud noise. She was not sure what it was. It came from upstairs. She did not go upstairs. She did not figure out what the noise was. There were renovations being done to the house. She recalls there was flooring stacked in one of the bedrooms.

[19] M testified that on an occasion, before her birthday in November, she was at E's house. E stated she was going to take a shower. M was in the living room with Mr. B and A. M heard the water running in the pipes. Mr. B went upstairs and a few minutes later she heard a loud noise. She and A both ran upstairs and found E standing in her room and Mr. B standing outside E's door with a smirk on his face.

[20] M did not recall what E was wearing when she was downstairs and did not recall A telling E to go upstairs to change into warmer clothes instead of wearing a blanket. She acknowledged that E sometimes wrapped herself in a blanket because the house was cold. She recalls Mr. B saying he had to use the bathroom before he went upstairs. She said the house was not very sound proof. She did not hear E and Mr. B speaking to each other after he went upstairs. When she went upstairs to investigate the loud noise she did not see any physical contact between E and Mr. B .

[21] Mr. B denied that these incidents occurred.

#### Incident #5

[22] E says that in early November she was in the living room sitting on the couch. Her mom was at work. Her sister [L] was in the chair across from her looking at her iPad. Her brother [C] was in his room upstairs. E had left a bowl beside the couch after eating some food. Mr. B entered the room and asked her why the bowl was beside the couch and she told him she forgot to take it back. He grabbed her wrists and pinned her back against the wooden back of the couch. He was standing right in front of her. He was saying things about why she had not returned the bowl. He sounded angry. The wood back of the couch was digging into her back but did not leave any marks. The incident lasted about 45 seconds.

[23] In cross-examination E said that, prior to this, Mr. B had never played a parenting role. She does not know why he was so upset about the bowl that day. The cushions were not on the couch because she and L had been

planning to build a fort with them earlier. If the cushions had been on the couch being pressed back would not have been as uncomfortable.

[24] Mr. B denied that this incident occurred. In cross-examination he said that the house was a mess. There were clothes and dishes left all over the place and the house was infested with mice. He said A was in over her head with E and all the kids. He said that his rotator cuffs are destroyed and he cannot put his hands above his head. He said that due to his shoulder problems, he could not pin E to the couch as she alleged.

#### Incident #6

[25] E testified that there was an incident when Mr. B pinned her wrists to the wall and licked her face and neck. She was seated at the computer in her living room. She was seated on a folding metal chair with a plastic fabric back and seat. He entered the living room from the kitchen and came over to where she was seated. He called her his "kitten". He set a drink down on the coffee table. He grabbed her wrists and pinned them at her ear level against the wall next to the chair she was sitting in. She remained seated. He licked her left cheek two or three times and then licked the left side of her neck. She cannot say how many times he licked her neck. The incident lasted about 30 seconds. She tried to fight him off her and push him away. He finally let go of her wrists, stepped back and stood in front of her. He said he had to clean his kitten.

[26] She believes this happened in late October. She was asked why she had not mentioned this incident in her video statement to police. She replied that it did not cross her mind at that time.

[27] In cross-examination she was asked more questions about not telling the police about this incident. She said she did not like it, did not want to think about it and so it did not cross her mind when asked if there were any other incidents. She agreed she was given time to think before answering that question during the interview.

[28] She placed the occurrence of this event in the middle of the time line of all the events, maybe after the blanket incident but around that same time.

[29] She stated that Mr. B had never previously referred to her as his “kitten”.

[30] She agreed that where this incident occurred was an open sight line from the front hall. It was approximately seven or eight o’clock in the evening. She does not recall where her mother was. She believes her brother was upstairs in his room. She agreed that the incident could easily have been discovered by anyone who was home at that time.

[31] E agreed that Mr. B did not touch her in a private area and did not try to remove any of her clothing. She said her hands were being pinned with a force of six or seven out of ten and she found it very difficult to resist.

[32] E’s mother testified that she raised this incident with Mr. B . He told her that he had just “nuzzled” E.

[33] Mr. B denies that this incident occurred.

#### Incident #7

[34] In E’s direct examination, after she described the bra snap incident (#3 above) she stated that “another time” she was in her room and her mother was present examining a scratch or something on her back. Mr. B entered the room and snapped the back of her bra with his hand in the area of her spine. She does not recall if he said anything to her or if she said anything to him. Her mother was present in the room.

[35] In cross-examination she stated that on this occasion he only snapped the back strap of her bra once. She was not sure that her mother observed this. She agreed it was very risky for Mr. B to do this with her mother present in the room.

[36] Mr. B denied this occurred. He acknowledged an occasion when he saw E in her room with her mother when E was wearing only her bra.

#### **Recent Fabrication**

[37] At the conclusion of E’s evidence, Crown counsel raised the concern that the cross-examination of E had suggested recent fabrication. The

questioning of E had suggested that there were motives on the part of E and her father and stepmother for her to fabricate the allegations against Mr. B . The Crown sought a ruling from the Court that it be permitted to call evidence to rebut that suggestion.

[38] The Crown was permitted to elicit evidence from other witnesses of prior consistent statements, not for the proof of their contents, nor to suggest that it is more likely the witness was telling the truth, but solely to rebut the suggestion that the witness fabricated the evidence at a particular point in time. In *R. v. Willis*, 2019 NSCA 64, Wood C.J.N.S., at paras 14 to 18, said that :

15 ... where the witness is alleged to have fabricated their evidence at a particular point in time... In order to rebut such an assertion, it is permissible to prove that the witness gave a consistent version of events on a previous occasion. If accepted by the trier of fact, this would establish that there was no recent fabrication by the witness. It does not, however, prove that the statement is necessarily true. The witness could have been untruthful from the beginning.

16 Where a prior statement is admissible to rebut an allegation of recent fabrication, it can only be used for that limited purpose. The statement is not admissible to prove the truth of its contents. To hold otherwise would suggest that repetition makes a story more credible which is a proposition that has been repeatedly rejected.

[39] I also referred to and relied upon *R. v. O'Connor* (1995), 100 C.C.C. (3d) 285 (Ont. C.A.).

[40] The Crown called evidence from E's mother, M, and E's stepmother of prior consistent statements which rebutted the suggestion of recent fabrication.

### **Browne v Dunn**

[41] Before commencing cross-examination of Mr. B , Crown counsel objected to a number of instances where the testimony of the accused violated the rule in *Browne v Dunn* on the basis that these facts had not been put to E during her testimony. Defence counsel stated that these facts were not intentionally elicited by the questions asked and although the answers did violate the rule, they were not material to the defence and could be ignored by the Court. He asked that the Court simply disregard them.



[42] The specific instances in contravention of the rule cited by the Crown are:

1. That he touched her on the waist above the “love handles” and not on the buttocks.
2. The use of the “C” word.
3. Finding pills.
4. The state of her underwear or the sizing of her bras.
5. An incident where he alleges she asked him to touch her angel wings.

[43] I found that this evidence was material and, given the acknowledgement that this testimony did violate the rule in *Browne v Dunn*, I ruled that I would give no weight to this evidence.

## **Governing Principles**

### The Presumption of Innocence and Reasonable Doubt

[44] It is not Mr. B ’s responsibility to demonstrate, establish, or prove his innocence or to explain away the allegations made against him. He is presumed to be innocent until proven guilty beyond a reasonable doubt. The Crown bears this onus of proof beyond a reasonable doubt throughout the trial and it never shifts. This burden requires the Crown to prove each element of each offence beyond a reasonable doubt (*R. v. Lifchus*, [1997] 3 SCR 320).

### Credibility and Reliability

[45] I have considered the following authority with respect to the issues of credibility and reliability of witnesses: *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152; *Baker v. Aboud*, 2017 NSSC 42; *R. v. Lifchus*, [1997] 3 SCR 320; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, [1995] O.J. No. 639 (Ont. C.A.); *R. v. F.(C.C.)*, [1997] 3 S.C.R. 1183, *R. v. A.G.*, [2000] 1 S.C.R. 439.

[46] The accused led exculpatory evidence leading to a credibility contest between the accused and the complainant. Accordingly, this Court must engage in the analysis set out by the Supreme Court of Canada in *R. v. W.*

(*D.*), [1991] 1 S.C.R. 742 (“*W(D)*”). The three steps of *W(D)* are as follows:

1. If the Court believes the evidence of the accused, the Court must acquit;
2. If the Court does not believe the testimony of the accused but is left in reasonable doubt, the Court must acquit;
3. Even if the Court is not left in doubt by the evidence of the accused, the Court must ask whether, on the basis of the evidence that it does accept, the Court is convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[47] The analysis is to be undertaken on all of the evidence: *R. v REM*, 2008 SCC 51. 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. This Court must decide whether it is satisfied beyond a reasonable doubt that Mr. B committed the 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 Mr. B , beyond a reasonable doubt - which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

### Elements of the Offences

[48] The elements of a charge under s. 151 were summarized by the Nova Scotia 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).

[49] Touching involves intentional physical contact with any party of the complainant’s body and may be direct, for example by the accused’s hand, or indirect, for example by touching with an object. Force is not required but accidental touching is not enough. It does not matter if the complainant agreed to the touching.

[50] In *R. v. Barton*, 2019 SCC 33, Moldaver J., for the majority, reviewed the essential elements of sexual assault:

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).

[51] Because the complainant was under the age of 16 years at the time of the alleged incidents, consent is not an issue: Section 150.1 of the *Criminal Code*.

[52] The Crown must prove beyond a reasonable doubt that the touching was done for a sexual purpose or in a sexual manner. This was described in *Ewanchuk* as being done “in the circumstances of a sexual nature, such that the sexual integrity of the victim is violated” (para 24).

[53] In *R. v. Chase*, [1987] 2 S.C.R. 293 the Court provided further instruction on this question of sexual or carnal context:

11 Applying these principles and the authorities cited, I would make the following observations. Sexual assault is an assault... which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?"... The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant... The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

[Citations removed]

[54] The interaction of charges of sexual interference and sexual assault was recently considered by the Supreme Court of Canada in *R. v. R.V.*, 2021 SCC 10. Justice Moldaver, writing for the majority, was addressing this issue in the context of inconsistent jury verdicts. At paras 51 to 53 he said:

[51] Sections 151, 152 and 271 of the *Criminal Code* use different terms to describe similar acts. Sexual interference under s. 151 requires proof of touching, and invitation to sexual touching under s. 152 requires proof that the accused counselled, invited or incited the complainant to touch. Sexual assault, for its part, is not defined under s. 271. Instead, sexual assault is a s. 265(1) assault made applicable to sexual circumstances by s. 265(2). A person commits a sexual assault by applying force intentionally to another person, directly or indirectly, in circumstances of a sexual nature (*Criminal Code*, s. 265(1) (a); *R. v. Chase*, [1987] 2 S.C.R. 293, at p. 302; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 24).

[52] The word “force” is commonly understood to mean physical strength, “violence, compulsion, or constraint exerted upon or against a person” (*R. v. Barton*, 2017 ABCA 216, 55 Alta. L.R. (6th) 1, at para. 202, aff’d 2019 SCC 33, citing Merriam-Webster Dictionary (online)). However, as a legal term of art, the element of force has been interpreted to include any form of touching (*R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 10; *Ewanchuk*, at paras. 23-25; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). Put simply, although the words “touch” or “touching” and “force” are distinct, in some circumstances, including those that apply here, they mean the same thing in law.

## Analysis

[55] The issue of consent has been removed by legislation. The remaining issues are whether Mr. B touched E in a sexual manner (s. 271) or for a sexual purpose (s. 151).

### W(D)

[56] E testified in court and was observed on video providing her statement to police. In both circumstances she was calm. She was not emotional. She was quick to say when she could not remember a detail of the events she was describing. She did not embellish her story. For example, when

describing being pinned to the couch, she described it as uncomfortable but said it “did not leave a mark” and claimed no injury as a result.

[57] To the extent of her memory she was consistent between her description of the events given to the police and her testimony in court. Her evidence however did not appear scripted and any variance was minor and understandable. Within her police statement and within her testimony she did not contradict her narrative.

[58] She told the police that she had a bad memory. However, I found that in fact she displayed a good memory but said this to police in an apologetic manner because she was unable to provide a specific memory of what if anything the accused said to her at the time of a specific incident. In cross-examination, she testified that the events that she recalled she recalled well, but was not able to say what the accused said to her at the time of the event because she was distracted by the conduct. For example, in recalling the face licking incident, she provided specific details, including the material on the chair on which she was sitting and that when Mr. B entered the room he was carrying a drink and set it down on the table before grabbing her arms. I found her explanation for not remembering Mr. B’s statements to be reasonable. For these reasons I found E to be a credible and reliable witness.

[59] I find E’s mother to be credible but not highly reliable as to the details of the incidents described by E. It is to be recalled that she did not witness them directly but only heard of them from E. She clearly struggled with the details in direct examination and relied heavily on her memory being refreshed by reading prior written statements. Her recall seemed to strengthen when cross-examined. At the time of the events in question she appears to have been more interested in her relationship with Mr. B than in hearing what her daughter was telling her about his conduct. In fairness to her, this may be due to her own history and her condition she described as “submit and attach”. Regardless, to the extent that her evidence did not align with E’s, the Court finds that this is due to her unreliability as a witness and does not diminish the credibility and reliability of E.

[60] E’s mother did tell the Court that she had described the events complained of by E (as she remembered them) to Mr. B and that he had

apologized to her. She also testified that he acknowledged nuzzling E's neck.

[61] E's evidence about the first buttock slap in the kitchen was corroborated by M who said Mr. B grabbed E's buttock and E jerked away. She also corroborated E's evidence about kicking over the pile of flooring material. M's evidence did differ from E as to whether E had taken a shower and whether it was a blanket or a towel she was wrapped in. M was a frequent guest at E's house. She did not witness the interaction between E and Mr. B. She may not have recalled the details correctly. In respect of these minor inconsistencies, I accept the evidence of E as being more reliable.

[62] Mr. B denies all of the incidents complained of. With respect to the first incident (the touching of E' buttock in the kitchen) he says that he put his hands on her waist (in the area above her "love handles"). This was the only incident for which there was a witness other than the complainant. He says that none of the other incidents occurred at all. Mr. B had difficulty directing his answers to the question asked, both in direct examination and in cross-examination. There was considerable deflection and distraction in his answers. Instead of responding directly to the question asked, he often responded with some derogatory comment about other witnesses and E's father as to their intent to seek revenge against him and his view that they had somehow convinced E to assist by fabricating the incidents complained of. In other examples he tried to deflect from the question asked by stating how much he tried to help E's poor mother and family and painted himself as some sort of saviour of their poor circumstances.

[63] Mr. B suggested he would be physically incapable of pinning E's arms on the two occasions alleged because of injury to his shoulder muscles. However, in contradiction to this, he had highlighted the physical nature of his work and his stamina to work long hours of physical labour. He described the restoration work he did as involving painting, drywalling and changing light bulbs. The drywalling included putting it up, taping it, and mudding it. He also waxed floors with a powered machine. His hours of work varied from eight to twelve hours per day. He worked full time hours when he was living with E's mother in [...]. When confronted with this apparent contradiction, he suggested that when he was changing light

bulbs he would not have his hands above his head. I find this explanation to be nonsense.

[64] Mr. B suggested that he had talked to E at the Tim Hortons and told her that if she was uncomfortable with him living there he would move elsewhere. His evidence about this was evasive, inconsistent and contradictory. His exchange with Crown counsel on this and other questions displays the inconsistency of his testimony:

**CROSS EXAMINATION BY: Josie McKinney, for the Crown**

[15:27:00]

MS. MCKINNEY: So let's go back to that conversation you had at Tim Horton's. You said it was at least a month before your birthday. And then you said it was in October for sure, right?

MR. B : I met A there, before I moved in there she brought E over and I just remember the conversation because it concerned W [E's sister L's father] and I said to her that if you feel uncomfortable with me living there, because there hasn't been an older adult living there, then I won't move in. I don't remember the exact hour or the exact day.

MS. MCKINNEY: But you said that E and your relationship was fine until after your birthday. So why would you even be having this...

MR. B : Once these charges started and then when they had to move, I noticed a big change in her demeanour.

MS. MCKINNEY: Which you've said now, you've confirmed, that change in her behaviour happened after your birthday November 23rd but you are having this conversation with E in October.

MR. B : Yep

MS. MCKINNEY: At least a month before, and you've also testified that at that time the relationship with her was good so why were you having a conversation with her about her being uncomfortable with you living there if everything was fine with you and E at that point.

MR. B : It all started with all the incidents with W. It all came about all these different, there was so much turmoil and with everything going on at the time that I said to E if you feel uncomfortable with me living with you and your mother and everything I will not move in. After my birthday, like, I was floored by all this because I didn't see all this coming. Because I was treating her good and to be accused of all this just blew me away.

MS. MCKINNEY: But, did E tell you she was uncomfortable with you living there?

MR. B : No, she told her step mother about all this then her step mother called A.

MS. MCKINNEY: So did E...before you met with E at Tim Horton's, did E ever tell you she was uncomfortable with you living there?

MR. B : Nope.

MS. MCKINNEY: Did A tell you that E was uncomfortable with you living there?

MR. B : She said....she brought up about concerns about me living there and about these accusations that she is making. A said that.

MS. MCKINNEY: Sorry?

MR. B : A said that.

MS. MCKINNEY: A said that, and that was before the conversation at Tim Horton's?

MR. B : Umm hmm.

MS. MCKINNEY: That's right, because it happened before Tim Horton's because that is actually why you were having the conversation with E there was because A had brought up with you, in October, accusations E was making about you that were making E uncomfortable, right?

MR. B : She...like I was floored by all this because I don't know what she was talking about, about all these incidences and all that, I had no idea. I remember the birthday cake incident and I told A, if I make her feel uncomfortable then I will move out, that's all there was to it.

MS. MCKINNEY: That was the incident where you say you touched her hips?

MR. B : Yes.

MS. MCKINNEY: So, A brought it to your attention that you touching E's hips made E uncomfortable?

MR. B : She told her mother she felt uncomfortable.

MS. MCKINNEY: And A told you about that?

MR. B : Yep.

MS. MCKINNEY: And when was that?

MR. B : I don't have the specific date.

MS. MCKINNEY: It was certainly before the Tim Horton's conversation, right?



MR. B : She was saying about W and there was so much turmoil going on in that house and then A telling me personal things about her and her brother which I really didn't want to hear ...

MS. MCKINNEY: Ok, so I don't want you to get into that. So, what my question was, though, did A tell you that E was uncomfortable touching her hips before you had the conversation at Tim Horton's with E?

MR. B : E made accusations, to S and [step mother] and they got a hold of A and A told me and I said I do not know what she is talking about, I know about the birthday cake and this is what happened. But, the other incidences, I have no idea.

MS. MCKINNEY: And you are saying this is....but my question to you was earlier, and you had said earlier, that A first talked to you about this hip incident before the conversation at Tim Horton's, with E.

MR. B : Want to repeat that?

MS. MCKINNEY: You've already said it a couple of times now but I just want you to be clear, so, A brought to your attention the hip touching incident, the birthday cake incident, before you talked to E at Tim Horton's?

MR. B : I can't remember the full date, I don't know the date.

MS. MCKINNEY: I am suggesting to you that's actually the reason why you had that conversation with E at Tim Horton's about her being uncomfortable around you.

MR. B : I was concerned about her being comfortable around me because she hasn't had a man older than C living in the house. I said that if you feel uncomfortable with me living there I will move out because I do not want to make you feel uncomfortable because it was her home.

MS. MCKINNEY: So you talked about E being in improv, and she was this sort of bright personality, I don't think that that was your word, I can't remember, but she was in improv and she was friendly, she was a nice kid. Umm, were there times that...and you talked about times that you and E interacted about improv stuff. Was there ever times that E was dancing around you?

MR. B : She was always joking and carrying around and jumping around.

MS. MCKINNEY: Did you bring those up to A, about her jumping around and dancing around?

MR. B : No, she was just being a kid.

MS. MCKINNEY: But you did bring up concerns about E's clothing to A.

MR. B : Yes.

MS. MCKINNEY: And you did think that E was dressed inappropriately.

MR. B : Yes

MS. MCKINNEY: Did you think M was dressed inappropriately?

MR. B : Definitely.

MS. MCKINNEY: Did you say that M was dressed like a whore?

MR. B : Yes I did.

MS. MCKINNEY: So what is dressed like a whore mean?

MR. B : Well, she was very...she was wearing a top you could basically see through and wearing white Lu Lu Lemon pants and I made a comment to A, I said, how could a mother let her daughter go out in public like this? Because she was definitely not wearing no bra or no underwear. Just wearing that. And I was shocked. And I mentioned it to A and I said you gotta call her mother.

MS. MCKINNEY: So, when you are saying that she is dressed like a whore, I am assuming the word whore means sexually promiscuous?

MR. B : She was. ...

MS. MCKINNEY: So you're basically, your point of view was that...

MR. B : She was dressing inappropriately.

MS. MCKINNEY: Right. And what concern is that of yours?

MR. B : For her welfare. I thought it was appalling that her mother would let her go out like that.

MS. MCKINNEY: Why are you even paying attention to what 14 year old girls are wearing?

MR. B : I was in the kitchen to do the dishes and looked over at her and she came back dressed like that, I don't know if she was looking for attention or what, but, knowing the history of what's going on with M and what happened to that poor girl, what happened to her, I said how could her mother let her dress like that after everything that she went through.

MS. MCKINNEY: So you're sounding like you are feeling sorry for her but at the same time you are calling her a whore, a 14 year old...

MR. B : She was dressed like a whore, I'm not saying she was a whore. Her mother should know better than to let her dress that way.

MS. MCKINNEY: You are saying something about her looking for attention so is that how you are looking at how you are looking at these...

MR. B : It was like she was looking for attention.

MS. MCKINNEY: Did you feel like E was looking for attention?

MR. B : E was just being E, she was friendly but the last going off she was, you know, didn't want to move and was giving her mother a hard time, you know, I know she was under...she didn't want to move.

MS. MCKINNEY: Did you tell A that you thought E was dressed like a whore?

MR. B : Nope.

MS. MCKINNEY: But you did say that her clothing was inappropriate.

MR. B : She didn't have much new clothing, or shoes, or socks, that's why I offered to take her to, like I took her and the little one and A and I went to Walmart to buy clothes when I could buy them clothes. But it was a sin, they never had much. You know, I felt bad for them.

MS. MCKINNEY: When E made her, when these allegations started coming out, whenever they were coming out, because it seems like you don't really remember, but when they were coming out, were you angry at E?

MR. B : I was upset.

MS. MCKINNEY: Did you call her a cunt or a bitch?

MR. B : That conversation was referred to [E's step mother].

MS. MCKINNEY: Right, but did you ever call E those things?

MR. B : No.

MS. MCKINNEY: But you were upset with her?

MR. B : I was upset at the circumstances of [E's step mother] and S doing this because they mentioned to A that I am going to make him suffer for helping you. I am going to punish him in whatever way I can. I am going to call in whatever favours in the law system, through my law firm, and I am going to call my friends at the Halifax Police and punish him for helping A. That is exactly what [E's step mother] said to A.

MS. MCKINNEY: You've talked about this household, like there was a lot going on, a lot of drama going on, why were you sticking around?

...

MS. MCKINNEY: You're saying all this stuff, the point is, why did you continue, you stayed with A after you moved out.

MR. B : I wasn't living there, I wasn't living there, and I don't consider us really dating, I was loaning her my car and I wasn't a part of her life.

MS. MCKINNEY: But you were going back to her even after you were arrested.

MR. B : No, she was coming back to me. It was the other way around. I wasn't pursuing her. I never pursued A.

MS. MCKINNEY: But you took her for drives and stuff.

MR. B : Yeah, of course, she was a nice person. She was going through hell.

MS. MCKINNEY: So, you were choosing to be with her, even after all this drama you say was going on, and even after you were arrested.

MR. B : Yeah, I'm guilty of that. The road to hell was paved with good intentions and I found that out. That's the punishment I get for doing what I can for them.

MS. MCKINNEY: I am going to suggest to you that actually none of this stuff was going on you are just trying to find ways to make it seem like E is making up these allegations because of this drama.

MR. B : None of this happened, other than the hips, that is the only thing that happened.

MS. MCKINNEY: The hips and you seeing her in her bedroom in her bra and underwear.

MR. B : And the comments, the sexual comments and everything that was coming out more and more, that's when the preacher broke A and I up, I said, I kept hearing the voice "run Forest, run", but I helped her. When I was at work, loaned her my car to get, to help her out. She was a mess. Then meeting with her and her doctor and everything else came out, I was floored. That is when we were gradually not seeing each other as much, and then when I went to Cuba, and I didn't hear from her. I said ok, fine, I didn't sign up for this.

MS. MCKINNEY: Those are my questions, My Lord.

[65] His evidence was contradictory. For one example, at one point he testified that he never put his hands on E in any way. At another he said he held her by the waist above her love handles.

[66] Mr. B advanced a number of allegations to explain the allegations being made by E. One was a conspiracy by E's father and stepmother to seek revenge against him but the motive for such a plan was not apparent to the Court. He also alleged E made the allegations up to avoid having to

move out of [...]. Since the owner had sold the house, requiring E's mother to move out, this alleged motivation makes no sense.

R. v. W.(D.) analysis

***First, if you believe the evidence of the accused, obviously you must acquit***

[67] I do not believe T B 's testimony that that the incidents did not occur at all.

***Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit***

[68] Mr. B 's evidence does not leave me with a reasonable doubt regarding the occurrence of each of the incidents as described by E.

***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***

[69] To answer this third question I will return to each of the incidents and the elements of the offences charged.

Incident #1

[70] I am satisfied that the Crown has proved beyond a reasonable doubt that Mr. B slapped E's buttock. I am left with a reasonable doubt that this was done in a sexual manner for a sexual purpose as defined by the authorities. E testified that she thought he did this in a joking manner. In these circumstances the Crown has proved the elements of an assault, but not touching for a sexual purpose and not sexual assault.

Incident #2

[71] I am satisfied that the Crown has proved beyond a reasonable doubt that Mr. B slapped E's buttock. I am left with a reasonable doubt that this was done in a sexual manner or for a sexual purpose. There was no evidence of any comment made by Mr. B at the time of the slap. There is no other evidence that supports the inference that it was sexual in nature

other than the area of the body slapped. In these circumstances, the Crown has proved the elements of an assault, but not touching for a sexual purpose and not sexual assault.

Incidents #3 and #7

[72] As to Incident #3, I am satisfied that the Crown has proved beyond a reasonable doubt that Mr. B snapped E's bra strap in the back and in the front and, viewed in all the circumstances, the sexual context of the touching would be visible to a reasonable observer and the conduct violated E's sexual integrity. Accordingly, I am satisfied that the Crown had proved the offences of sexual touching and sexual assault.

[73] The same analysis establishes that the Crown has proved both sexual touching and sexual assault in respect of the facts outlined as Incident #7.

Incident #4

[74] I am satisfied that the Crown has proved beyond a reasonable doubt that Mr. B pinched E's buttock and that this was done in a sexual context and violated E's sexual integrity. As such, the Crown has proved both sexual touching and sexual assault.

[75] I am further satisfied that the Crown has proved beyond a reasonable doubt that Mr. B attempted to pull a blanket away from E which she was using to cover herself as she was not wearing a shirt. E told Mr. B that she was wearing only a bra and he said to her "let me see" and proceeded to try and remove the blanket. I believe that a reasonable observer would consider that Mr. B's actions violated the sexual integrity of E. As such the Crown has proved both sexual touching and sexual assault.

Incident #5

[76] The Crown has proved beyond a reasonable doubt that Mr. B pinned E to the couch and by doing so committed an assault. The evidence does not suggest that there was any sexual context to this act, nor that it violated E's sexual integrity. Accordingly I find that the Crown has not proved sexual touching or sexual assault.

Incident #6

[77] The Crown has proved beyond a reasonable doubt that Mr. B pinned E's hands to the wall and licked her face and neck and, in the process of doing so, he called E his kitten and said he had to clean his kitten. The context is clearly sexual and a violation of E's sexual integrity. Mr. B asserts that this Court should disregard the face and neck licking incident because E did not report this incident during her video interview by police. This would require me to assume what a 15-year-old young woman would or would not do in that situation, as if it were a fact. I will not embark on inappropriate presumptive reasoning. The evidence clearly and convincingly establishes beyond a reasonable doubt that Mr. B committed the offences of sexual touching and sexual assault.

[78] I conclude that the Crown has proven TK B guilty beyond a reasonable doubt of the offence of sexual touching contrary to Section 151, and the offence of sexual assault contrary to Section 271 of the *Criminal Code*. Any *Kienapple* issue will be dealt with on sentencing.

Norton, J.