SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. G.S.*, 2022 NSSC 173

Date: 20220617
Docket: *Antigonish*, No. 485417
Registry: Halifax

Between:

Her Majesty the Queen

v.

G. S.

DECISION
MOTION TO REOPEN TRIAL

Restriction on Publication: Ss. 486 and 486.5 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Christa M. Brothers
Heard:	June 17, 2022 in Antigonish, Nova Scotia
Counsel:	Jonathan Gavel, for the Crown Alan Stanwick, for the Defendant

Order restricting publication — sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court:

Background

[1] On April 19, 2021, I found the accused, G.S., guilty of two counts of sexual interference pursuant to Section 151 of the *Criminal Code*. The Indictment was filed on October 10, 2019, and G.S. was scheduled to stand trial on October 26, 2020. On that day, the defence brought a motion to have the case dismissed based on a claim of *autre fois acquit* or, alternatively, stayed for abuse of process. I found that the plea of *autre fois acquit* was not available to the accused on the record and evidence, and that no abuse of process was established (*R. v. G.S.*, 2020 NSSC 367).

[2] The trial took place on March 22, 2021. My reasons for conviction are found in *R. v. G.S.*, 2021 NSSC 133. Initially, on the Indictment, the dates of the alleged offences were said to be between January 1, 2004, and August 20, 2004. The Court allowed an amendment to the Indictment to conform with the *viva voce* evidence of the complainant at trial that the dates of the alleged offences were between January 2002, and August 20, 2004. The defence neither opposed this motion nor raised a concern at the time.

[3] The complainant, her mother, and the accused all testified. The Crown called one witness, the complainant, and the defence called one witness, the accused, G.S. The Crown was permitted to call NJH in reply to testify to one narrow issue.

[4] The complainant testified about two incidents, one in a bedroom in her mother's home, and one in a trailer where the accused resided with his mother. The complainant was 27 at the time of this trial. She testified during a preliminary inquiry in 2006 and gave a videotaped statement close to that time. Neither were admitted into evidence nor used in cross examination before me.

[5] This case was all about credibility and reliability of evidence. The analysis prescribed by *R. v. W.(D.)*, [1991] 1 S.C.R. 742, was conducted. The complainant's testimony, and the consistency as to the core of her allegations was important in my analysis.

[6] A sentencing hearing was scheduled for July 15, 2021. A Pre-Sentence Report, Gladue Report, and an assessment through the Forensic Sexual Behaviour Program were ordered.

[7] On July 15, 2021, then defence counsel, Mr. Raymond Kuszelewski, was seeking to be removed as counsel of record. The Gladue report had been received by the Court, wherein G.S. indicated concerns with his representation at trial, telling the report writer that there was "a lot of evidence and information not presented when [he] was found guilty". Mr. Kuszelewski was permitted to withdraw, and the matter was set over to August 16, 2021, for a status update respecting G.S.'s attempts to locate new counsel.

[8] A number of further appearances were scheduled before G.S. was able to secure counsel. I do not say this to suggest he was not diligent in doing so. He was, and Legal Aid was working with him to secure counsel. On October 8, 2021, Mr. Alan Stanwick appeared as defence counsel. A number of subsequent appearances were scheduled while defence determined what, if any, applications they would be making, and what were the appropriate next steps.

[9] On December 9, 2021, defence counsel advised the Court that they intended to apply to reopen the trial. This is the decision on that application.

Evidence

[10] G.S. was called to give evidence on the defence application to reopen the trial. He testified to the following:

- He expected his former counsel would have tendered as an exhibit the Family Court Order dated January 24, 2009.
- He expected his counsel would have utilized the preliminary transcript to cross-examine the complainant.
- He testified that he complied with the Family Court Order exhibited on this motion.
- Initially, G.S. faced charges for offences alleged to have been committed between January 4, 2004 – August 20, 2004. His defence was a denial and lack of opportunity.
- At trial, his counsel did not oppose the Crown motion to amend the Indictment dates to expand significantly the time frame in which the Crown alleged these incidents occurred.
- G.S. did not give instructions about the amendment and had no discussions with his lawyer about it.

Issues

[11] The following are the two issues before this court.

1. Should the trial be reopened to admit further evidence?
2. If this Honourable Court finds that the trial should be reopened, what is the appropriate remedy?

Reopening the Trial and Admitting Additional Evidence

[12] The law is clear. The jurisdiction to reopen a trial should be exercised only in exceptional circumstances (*R. v. MacGregor* (1997), 159 N.S.R. (2d) 391, [1997] N.S.J. No. 128 (N.S.C.A.) at para 10). The test for reopening is set out at paragraph 11 of *R. v. Callender*, 2012 NSSC 176:

- the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial (not to be applied as strictly in a criminal case);
- the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- the evidence must be credible in the sense that it is reasonably capable of belief;
- the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result; and
- the trial judge must consider whether the application to reopen is in reality an attempt to reverse a tactical decision made at trial.

[13] When the test for reopening a trial has been made out, the Court must decide whether to reopen the defence case, or to declare a mistrial; the authority to declare a mistrial should only be exercised in the "clearest of cases" (*Callender*, *supra,* at paras. 48-50). The parties agree on the test to be applied, as stated in *R. v. M.G.T.*, 2017 ONCA 736:

> [47] The test for re-opening the defence case after findings of guilt have been made and convictions recorded is more rigorous than that which governs the same application made prior to an adjudication of guilt. This is so because a more exacting standard is required to protect the integrity of the criminal trial process, including the enhanced interest in finality: *R. v. Kowall* (1996), 108 C.C.C. (3d) 481, (Ont. C.A.), at para. 31.

> [48] The criteria to be met to determine the admissibility of fresh evidence on appeal provide helpful guidance to judges faced with an application to re-open the defence case after an adjudication of guilt has been made. The test is familiar:
>
> > (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
> >
> > (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> >
> > (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
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> See *Palmer*, at p. 775; *Kowall*, at para. 31.
>
> [49] The *Palmer* factors requiring consideration on applications to introduce fresh evidence on appeal, incorporated by reference on post-verdict applications to re-open, may be summarized as:
>
> > i. admissibility;
> >
> > ii. cogency; and
> >
> > iii. due diligence.
>
> See *Truscott (Re)*, 2007 ONCA 575, 225 C.C.C. (3d) 321, at para. 92.
>
> [50] The admissibility and cogency requirements drawn from *Palmer* ensure that evidence proposed for reception on a post-conviction application to re-open:
>
> > i. relates to a decisive or potentially decisive issue at trial;
> >
> > ii. is reasonably capable of belief;
> >
> > iii. is probative of the fact the party seeks to establish by its introduction; and
> >
> > iv. is admissible under the prevailing rules of evidence.

[14] The defence, in its pre-hearing briefs, has posited two grounds for the matter to be re-opened:

1. The complainant's evidence at the preliminary inquiry in 2006 concerning her age when this incident is said to have occurred; and,
2. A Family Court order concerning the restrictions placed on who entered and accessed the complainant's home during a period of time.

[15] I will review both of these issues. I will also address a third issue that was clearly apparent on the face of the defence's application materials before me.

Excerpts from the Preliminary Trial Transcript

[16] The evidence the defence seeks to admit which was not utilized at trial includes a preliminary transcript dated June 29, 2006, and a Family Court order. The defence makes reference to pages 26 - 30 of the transcript, and attaches those pages to the defence brief. The defence also references the Crown submissions at the preliminary inquiry, and attaches pages containing those submissions. The Crown submits that the submissions by Crown counsel are not evidence, and could not be adduced if the trial were reopened. I agree. Submissions by counsel are not evidence. However, I will speak to his later in this decision.

Relevance

[17] The Crown acknowledges that the complainant's 2006 preliminary inquiry testimony is relevant in the sense that it may have some potential bearing on her credibility. Credibility was a decisive issue at trial. The complainant's preliminary inquiry testimony is credible in the sense that it is sworn testimony, delivered closer in time to the alleged offences than the complainant's testimony at trial. In fact, the evidence was given just two years after the date range first stipulated by the Indictment, while the trial testimony was some 15 plus years after the alleged events. It is reasonably capable of belief.

[18] The complainant clearly had difficulty at trial recalling her age at the time of the events she described. She indicated that she was "pretty sure" she was seven or eight years of age (trial transcript, page 23, lines 11-15). She also testified at trial that she was between the ages eight and nine (page 27, line 3). She admitted that she was "not a hundred percent on the ages" (page 27, line 19). However, she also testified at trial that the incidents occurred around the end of her grade four school year or the summer before she began grade five (page 23, line 16, to page 24, line 1).

[19] The complainant's testimony at the 2006 preliminary inquiry was never directly put to her or read into the record. In that testimony, arguably, she was clearly focused on being ten years of age at the time of the alleged events. There was no equivocation at that time. She stated at page 30 of the preliminary inquiry transcript:

Q. Were all of these when you were ten years old?

A. Yes.

[20] The defendant submits that the dates of the alleged offences were material and relevant to the disposition of the offences. Since the charges were laid, the defence knew the time period was alleged to be an eight-month period. The defence was focused on that, as the defence was denial and lack of opportunity.

[21] It was the reasonable expectation of G.S. that the prior statements of the complainant to the police and evidence of the preliminary inquiry transcript would have been put to the complainant on cross-examination to address the issue of the complainant's at the time of the alleged offences.

[22] The complainant gave sworn *viva voce* evidence at the preliminary inquiry. The defence has attached direct examination evidence of the complainant from the preliminary inquiry, as to her age at the time of the offences alleged (pages 26 to 30). The Crown at the time of the preliminary inquiry, Allen Murray made the following submission at the conclusion of the evidence at pages 101 and 102 if the preliminary inquiry:

> The beginning period of time for that, or the beginning date for that period of time is a function of the evidence that R.A.M. gave with respect to her memory of when these alleged events occurred. She said that she was 10 years old, both her viva voce evidence here today, and in the statement that she gave to the police. She would have turned 10 in December of 2003.
>
> In passing in the video statement, if there was a question as to whether the events occurred before or after Christmas, and I believe the answer was after, and I believe that's the reason why the date, January 1st, 2004 was picked as the start date for these alleged events.
>
> So the Crown would submit that both with her viva voce evidence here today and with her evidence that was admitted through Section 715.1, there is evidence of the time of the alleged offence being the first eight months or, or thereabouts of 2004.

[23] While this is clearly not evidence, the Crown has conceded the accuracy of Mr. Murray's recitation of the *viva voce* evidence as well as the evidence of the complainant given by way of videotape, which came in at the preliminary inquiry by operation of s. 715.1 of the *Criminal Code*. The Crown, in light of the complainant's evidence, set the time frame in the Indictment. At the end of the complainant's trial evidence, the Crown asked the following:

MR. GAVEL: No further witnesses for the crown, My Lady. I, ah, I should bring the court's attention that, ah, I would intend to, ah, amend the Indictment to conform with the evidence, simply the, the date range. Ah, the current date range in the infoma…or Indictment rather is, I think, the 1st day of January 2004 and the 20th day of August 2004. Crown will be applying to amend that, ah, that date range to the 1st day of January 2002 to the 20th day of August 2004. Um, there's clearing some uncertainty about the, exact age or exact timing of the incidents described by R.M. had first said that it was around seven or eight, I think, but ah, she later said eight or nine. She's clearly not, ah, precise on dates as could be expected for something so long ago, that happened while she was a child, but, ah, what she, ah, was able to say was that, ah, these, ah…my notes here My Lady, happened between grades 4 and 5, she started school between the ages of, ah, four and five years old. So if she didn't repeat any grades, as she said she didn't, then, ah, likely at the end of grade 4 she would've been nine years old.

THE COURT: Right.

MR. GAVEL: And that matches up so she had indicated that her sister M.M. was born in 2000, um, so that puts, ah, R.M. approximately seven years old. So if M.M., it was M.H. at the time, was around two years old at the time of the incident in the bedroom, that would've placed R.M. at around nine years of age. So that gives us a date range, ah, assuming that 2022 R.M. would have been about, ah, eight years old at the beginning of 2002, eight years old and, ah, would've turned nine at the end of that year.

THE COURT: So you're looking to amend the Indictment so that the date range for…to apply to both counts would be January 1st, 2002 through to August 20th, 2004?

MR. GAVEL: That's correct My Lady.

THE COURT: Does defence have a position on that?

MR. KUSZELEWSKI: I don't believe so, no.

[24] The defence did nothing to oppose this or, attack the complainant's credibility at the time with the preliminary transcript or videotaped evidence. In fact, the response of defence counsel at trial made her age appear to be irrelevant. I accept the defence submission that prior counsel had an opportunity to use this evidence to either have the complainant adopt the prior testimony constraining the time frame of eight months or impeach her on her prior evidence. This was not done. Crown counsel has suggested some of this may have been tactical. We will never know what was in the mind of prior counsel who sadly passed away January 11, 2022. We do know that G.S. had an expectation of the use of this material, which was not met.

Family Court Order

Due Diligence

[25] The defence asserts that the accused reasonably expected that "a representative from the Minister of Community Services – Child Welfare could have provided evidence regarding compliance of the court order." Despite this, there is no affidavit of such a witness to be introduced and subpoenaed. Instead, it seems the defence seeks to admit an Order from the Nova Scotia Family Court dated January 28, 2004, and issued February 10, 2004, which appears to relate to a child protection matter in which G.S. was a respondent. However, in addition, there is the preliminary inquiry transcript where Sean O'Neil's evidence appears. Mr. O'Neil was a social worker for the Department of Community Services.

[26] The defence further submits that it was his reasonable expectation that the court order referred to at the trial, would have been tendered as evidence. Moreover, it was in the reasonable expectation of the defence that a representative from the Minister of Community Services – Child Welfare could have provided evidence regarding compliance of the court order.

Relevance

[27] The defence submits that the Family Court order attached to the defence brief is relevant to the G.S.'s credibility. The Crown agrees that G.S.'s credibility was a decisive issue at trial. The Crown acknowledges that the Order is credible, in the sense that it is a document issued from the Court itself.

[28] It is submitted that the particulars of the order are relevant to the issue of the defendant's opportunity to commit the offences alleged, particularly paragraph 4(b):

> That no adults other than the Respondent, N.J.H. shall live in the residence with the children, nor shall there be other adults congregating or spending time at the residence except with prior approval of the Applicant Agency except for such access as is permitted under the terms of this Order.

[29] Paragraph 4(e) of the order states that G.S., along with one of the other named respondents, "shall have access in accordance with their current private custody orders." This paragraph implies that, at the time of the Order, there was already another order in place that dealt with G.S.'s ability to have access with his daughter. In the absence of the "private Custody Order" referred to in paragraph 4(e), the actual impact of the order on G.S.S's ability to access NJH's home is unclear; however this

is a court order which on its face supports G.S.'s testimony by denying him access to the home at the time originally suggested by the complainant at the preliminary inquiry.

[30] Furthermore, Sean O'Neil's evidence at the preliminary inquiry was to the following effect:

> MR. SMITH: Thank you. So in August … sorry, in January of '04, there was a supervision order in place.
>
> A: That's correct.
>
> Q: Yes, okay, and one of the terms of that order, if you recollect, would you agree with me, was that G.S. not be at the home of N.J.H. on Viewville Street?
>
> A: I think that's correct.
>
> Q.: Right. And that was in effect from January of '04.
>
> A: That's correct.
>
> Q: Right. And throughout, continuously after that.
>
> A: That's correct.
>
> Q: Indeed, up until the time of the separation, sorry, of the apprehension, G.S. had unsupervised access to his own child, is that correct?
>
> A: That's correct.
>
> Q: And the apprehension occurred in August of '04.
>
> A: That's correct.
>
> Q: After that time, did he have supervised of unsupervised access with his own child?
>
> A: It was supervised from then on.
>
> Q: Right, okay. So even to see his own child, he had to be supervised.
>
> A: That's correct.
>
> Q: Prior to that, he had no contact, I am going to suggest to you with R.A. He wasn't allowed near the house from January to August of '04.
>
> A: Oh, okay, I follow you. I think you're correct.

[31] There is some suggestion from the defence this type of evidence was expected and should have been elicited at trial to show compliance with the order, in support of the defence of lack of opportunity to commit the offences.

Analysis

[32] First, I have the authority to reopen a matter between conviction and sentencing if certain criteria are met. The Nova Scotia Court of Appeal said in *R. v. MacDonald*, (1991), 107 N.S.R. (2d) 374, 1991 CarswellNS 265 (C.A.), paras. 10 – 11:

> We refer to the judgment of Chief Justice Bayda in *Bertucci* [Re *Regina and Bertucci* (1984,) 11 C.C.C. (3d) 83] at p. 88:
>
> > I reject the contention that a trial judge lacks jurisdiction to declare a mistrial after an adjudication of guilt before the imposition of sentence. It has been authoritatively decided that the power of a judge to disqualify himself for good and sufficient reason and declare a mistrial is one which exists apart from the express provisions of s. 499 of the *Criminal Code*. [The equivalent section now is 669.2] see *R. v. Buchholz* (1976), 32 C.C.C. (2d) 331. In my opinion, an adjudication of guilt does not foreclose the application of that principle. This approach is consistent with the principle that a trial judge sitting without a jury is not *functus officio* following the finding of guilt until he has imposed sentence or otherwise finally disposed of the case.
>
> Chief Justice Bayda then refers to the decision of the Ontario Court of Appeal in *Regina v. Lessard*. In *Lessard*, Martin, J.A., stated at p. 73:
>
> > A Judge exercising the functions of both judge and jury is not fructus officio following a finding of guilt until he has imposed sentence or otherwise finally disposed of the case

[33] The power to reopen a case is discretionary and should only be done in exceptional circumstances.

[34] In *R v. Callender*, 2012 NSSC 176, Justice Hood commented on the test for reopening a trial:

> [11] Both Crown and defence have cited the test for reopening. It has been referred to by the courts on many occasions and was first set out in *R. v. Palmer* (1979), 50 C.C.C. 2d 193 (S.C.C.). In *R. v. Kowall* [1996] OJ. No. 2715 (Ont. C.A.), the court said in para. 31:
>
> > 31 The test for re-opening the defence case when the application is made prior to conviction has been laid down by this court in *R. v. Hayward* (1993), 86 C.C.C. (3d) 193. However, once the trial judge has convicted the accused a more rigorous test is required to protect the integrity of the process, including the enhanced interest in finality. It seems to have been common ground in this case that the most appropriate test for determining whether or not to permit the fresh evidence to be admitted is the test for i:he [sic]

> admissibility of fresh evidence on appeal laid down in Palmer and Palmer v. The Queen (1979), 50 C.C.C. (2d) 193,Page: 7 at page 205 (S.C.C.) (see: R. v. Mysko (1980), 2 Sask. R. 342 (C.A.)). That test is as follows:
>
> > (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases ...;
> >
> > (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
> >
> > (3) the evidence must be credible in the sense that it is reasonably capable of belief;
> >
> > (4) it must be such that if believed it could reasonably, when take with the other evidence adduced at trial, be expected to have affected the result.
>
> [12] The court in *Kowall, supra*, also set out an additional consideration for a trial judge deciding an application to reopen. It said in para. 32:
>
> > 32 These criteria provide helpful guidance to a trial judge faced with an application to reopen after conviction. In addition to the Palmer criteria, a trial judge must consider whether the application to reopen is in reality an attempt to reverse a tactical decision made at trial. ...

Due Diligence

[35] I must initially consider due diligence. I am cognizant that this is not to be strictly applied in criminal cases, so as not to do any injustice.

[36] In *Callender*, Justice Hood stated at paras. 16 to 19:

> [16] In *Frase*r, Saunders, J.A. said in para. 36:
>
> > 36 The first factor, the so-called due diligence criterion, invites a more detailed examination. After careful review, I am not prepared to say that a strict enforcement of this requirement ought to bar the admission of fresh evidence in this case. First, we know that this general principle will not be applied as strictly in a criminal case as in a civil case. Second, we know that the failure to exercise due diligence is not determinative. Third, we know that the due diligence criterion should not be applied inflexibly and will yield where its application might lead to a miscarriage of justice
>
> [17] Due diligence is not the focus of counsel's arguments in this case. Ineffective assistance of counsel is not alleged before me. Because this was a criminal case, I need not apply the standard strictly. Nor am I to consider it as determinative, nor apply it inflexibly. I must consider whether applying it might result in a miscarriage of justice and, if so, it should not stand in the way.

[18] In *R. v. Drysdale*, 2011 ONSC 5451, Trotter, J. said at para. 19:

> 19 As I have said, the situation was regrettable, made all the more so by the fact that there was no real explanation for what happened (or did not happen). Still, even in a case like this, the application of the diligence criterion in Palmer can be quite tricky. In the related context of applications to adduce fresh evidence on appeal, numerous appellate courts have been prepared to look beyond a lack of diligence in order to do justice. In *R. v. Warsing* (1998), 130 C.C.C. (3d) 259 (S.C.C.), Major J. wrote at p. 284:
>
> > It is desirable that due diligence remains only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission.
>
> Similarly, Carthy J.A. said in *R. v. C. (R)* (1989), 47 C.C.C. (3d) 84 (Ont.C.A.) at p. 87 that a failure to meet the diligence requirement should not 'override accomplishing a just result.' In other words, if I were to conclude that the evidence is relevant in terms of assessing credibility (a crucial issue in this case), then a lack of diligence should not stop me from admitting the evidence and preventing what might turn out to be a miscarriage of justice.

[37] Given this, I move on to the next factor, relevance.

Relevance

[38] It is submitted that the age of the complainant at the time of the alleged offences and the opportunity that the accused had to commit the offences due to the terms of the court order are relevant considerations.

[39] The *viva voce* evidence of the complainant at the preliminary inquiry as to her age at the time of the alleged offences was unequivocal. She stated that she was ten years old. This evidence stands in direct contradiction with her evidence at trial. Indeed, the Court amended the Indictment to conform with her evidence that the offences occurred when she was between seven and eight years old or eight and nine years old. I repeat my remarks from the trial decision:

> 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.

[40] I did not have the preliminary inquiry or the videotaped evidence as context for this testimony at trial.

[41] The court order is relevant to assessing the accused's credibility and his opportunity to commit these alleged acts. The evidence of Sean O'Neil is relevant as to the other evidence given and the issue of whether any complaints of compliance were raised in regard to G.S.

[42] Based upon the foregoing, it is evident that the preliminary inquiry evidence and the court order are relevant.

Credible Evidence

[43] It is submitted that evidence from the preliminary inquiry and the issued Court Order are credible evidence. The Crown has admitted this.

Effect on the Result

[44] This is the last factor to consider. The question is whether, if the fresh evidence from the preliminary inquiry, the videotape and the court order were admitted into evidence and believed, could this evidence reasonably, when considered with all of the evidence, be expected to affect the result.

[45] If the Court's findings of credibility changed, then applying the test in *R. v. W.D.* could have resulted in a different outcome (*Callender* at para. 44).

[46] There exists additional evidence that was not before me which could, alone or collectively, have raised a reasonable doubt. The evidence of the prior testimony at the Preliminary Inquiry, the videotaped evidence, the court order and the CFSA witness could all alone or collectively affect the court's assessment of the witnesses' evidence, the strength of the Crown's case, the credibility and reliability of the complainant's and N.J.H's evidence. and whether there existed a reasonable doubt. All of it goes to G.S.'s opportunity to commit the offence and the denial. How would the complainant have responded? How would N.H.H have responded to the order, and the compliance in the face of the provisions of the Order, and lack of complaints

about compliance? We do not know. But it is reasonable to expect that this could have affected the trial result.

Core Allegation

[47] I now turn to a consideration the court raised. At trial the complainant testified about an incident in her mother's home in an upstairs bedroom where, she said, the accused touched her under her night dress and under her underpants with his hand, rubbing her vaginal area. She stated:

> Q: So you mentioned that, that he was touching you with the arm that was around your waist?
>
> A: Yes.
>
> Q: Ah, did he touch with one hand or two?
>
> A: One hand.
>
> Q: And, ah, with what part of his hand?
>
> A: Ah, fingers.
>
> Q: And was that above or under, ah, under your nightgown?
>
> A: Under.
>
> Q: Above or under your underwear?
>
> A: Under.
>
> Q: Was his hand moving or staying still?

…

> Q: Can you describe the movement of the hand?
>
> A: Ah, up and down.
>
> Q: And, ah, just to be clear what part of your body is he touching at that point?
>
> A: Ah, my vagina area.
>
> Q: He's moving up and down on your vagina?
>
> A: It's like a, a rubbing motion, like up and down.

[48] In the preliminary inquiry the complainant gave evidence through the operation of s. 715.1 of the *Criminal Code* by way of videotaped evidence. The Crown, as an officer of the court, summarized the videotaped statement at the preliminary inquiry as follows:

> Through the evidence that was admitted by virtue of Section 715.1, there is evidence that G.S., the accused, touched R.M. on her vagina. The questions and answers that were elicited through the video, through the questioning that was presented to the Court on video, established or presented evidence that R.M. was touched by G.S. between her legs, over her panties. That was referred to as, by Mr. O'Neil in his questions, both as between her legs and in her crutch area or her crotch area.

[49] While this inconsistency was not specifically referenced by the defence, it was clearly on the face of the material they placed before me. I can not ignore this in the context of this defence motion, in the face of a conviction. I asked the Crown to address this and appreciate him doing so. I note his reticence and comments that the Court raised this and it is a defence motion. I am alive to that but I can not ignore what is before me and be a passive observer to a potential injustice. The need to prevent a possible miscarriage of justice outweighs the interest protecting integrity of the trial process.

[50] This is a direct inconsistency as to the core allegation which was never put to the complainant on cross-examination. The Crown agreed that the description by former Crown counsel was an accurate summary of the videotaped evidence, and that it goes to the core of the allegations. Her prior statement was never raised in cross-examination. This is a most concerning issue. The Crown provided me with the excerpt from the videotaped evidence. I thank him for doing so as an officer of this Court. The relevant portion is at p 69, line 8-10:

> Q: Okay. G.S. ever put his hand inside of your panties?
>
> A: No.

[51] This is clearly credible evidence in the context of an application to reopen, as it was sworn videotaped evidence given close to the alleged events. It is relevant. Any inconsistency as to the core allegations is relevant and could have an obvious effect on the trial result. This is not a scenario such as found in *R. v. M.G.T.*, *supra*. The Crown suggests this is a minor inconsistency. I disagree. Whether sexual touching is above or below clothing is a core allegation. After trial, a court could accept the Crown's characterization. I can not do so at this time. This could reasonably be expected to affect a trial. Furthermore, I am satisfied this application is not an attempt to undo a tactical trial decision.

[52] Given all of this, taken cumulatively, the defence has meet the test and I conclude that this is the exceptional case where the matter must be reopened to admit

the evidence. I grant the motion to re-open. Now the issue is what process do we follow next?

Issue No. 2 – Remedy

[53] Unless it is the clearest of cases, upon reopening a case, the trial judge would continue and hear the new evidence. However, there are times this would be untenable. In *Callender, supra,* Justice Hood stated:

> [48] In *R. v. Arabia*, 2008 ONCA 565, Watt, J.A. said in para. 49:
>
> > 49 The authorities, like *Kowall*, which involve the proffer of further evidence after a finding of guilt has been recorded, contemplate two remedies:
> >
> > i. re-opening of the defence case; and
> >
> > ii. declaration of a mistrial.
> >
> > As a general rule, permission to re-open would be followed by setting aside the prior finding(s) of guilt, reception of the further evidence, together with any evidence offered by the prosecutor in reply, the submissions of counsel, and a decision on the adequacy of the prosecution's proof in light of the new evidence. In some instances, of course, a decision to receive the further evidence might require the declaration of a mistrial, or a similar conclusion may be warranted absent a decision on admissibility, for example where the proposed evidence was not disclosed in a timely way by the prosecutor.
>
> [49] He continued in para. 50:
>
> > 50 *Kowall* and cases following its lead furnish trial judges with workable criteria the application of which will inform the decision on re-opening. But where re-opening is permitted and a decision made to allow the introduction of further evidence, the trial judge will then be required to determine whether to continue proceedings to verdict, or to terminate them prior to final decision. *Kowall* and subsequent cases do not explore the preferential ordering of available remedies, or articulate the factors according to which the trial judge is to decide which is the more appropriate remedy.
>
> [50] He concluded in para. 52:
>
> > 52 While there may be some uncertainty about the precise standard a judge is to apply in determining whether to declare a mistrial before verdict or judgment, it is well-settled that the authority to declare a mistrial should only be exercised in the clearest of cases. *R. v. R. (A.J.*). (1994), 94 (C.C.C. (3d) 168 (Ont. C.A.) at 174; *R. v. Paterson* (1998), 122 C.C.C. (3d) 254 (B.C.C.A.) at paras. 93-98. There seems no reason in principle to apply any

> less rigorous standard to applications for the same remedy made after verdict or judgment.

[51] I therefore should favour continuing on with the trial with the fresh evidence unless I am satisfied that this is one of those "clearest of cases" or a mistrial must be declared. In *Drysdale, supra,* the court gave guidance in this regard. In that case, the trial judge made an adverse finding with respect to the accused's credibility. He quoted that conclusion in paragraph 7:

> 7 ... I reached the following conclusion:
>
> In all of the circumstances, I do not accept this aspect of Mr. Drysdale's evidence. I reject it. This causes me to treat the rest of his evidence with caution, which, in all of the circumstances, I also reject.

[52] Trotter, J. quoted *Kowall* and *Arabia* for the test to reopen. He opened the trial on the basis that there was a concern "that a miscarriage of justice may have occurred." (para. 24)

[53] The Crown submitted that the trial judge should continue on with the trial and the defence "did not really quibble with the Crown's wish to adduce further evidence and carry on with the trial" (para. 26).

[54] However, Trotter, J. concluded in paras. 27 to 29:

> 27 Despite the submissions of counsel, I decided that a mistrial was the only reasonable course of action in the circumstances. The problem with continuing the trial was that I had already made a very strong adverse finding of credibility against Mr. Drysdale, one that caused me to reject his evidence as a whole. While it might have been the intention of the Crown to adduce evidence on whether the police would have been able to see the distinctive markings on Mr. Drysdale's hoody in the heat of the moment (and in view of the lighting conditions early that evening), this would not have impacted directly on the specific adverse credibility finding I made.
>
> 28 The Crown also urged me to come to the same conclusion about Mr. Drysdale's evidence and the case as a whole by finding other reasons to disbelieve his evidence. But this would be an artificial and highly unsatisfactory exercise because I was very clear about what it was that caused me to disbelieve Mr. Drysdale's evidence. Any attempt to re-build my credibility findings on a different footing would be disingenuous. The reasoning process would have to look something like this: 'I said that the hoody issue caused me to reject all of Mr. Drysdale's evidence, but what I really meant was that it was just one of the many things that caused me to reject his evidence.' This chain of reasoning could not be relied upon as authentic.
>
> 29 Let me put it another way. If I were to continue the trial and permit further evidence to be called, short of finding Mr. Drysdale not guilty on all counts (a result I am not sure is warranted either) he, along with reasonably

> informed members of the public, would always wonder whether my 'new' conclusions and reasons were infected by my prior adverse finding of credibility. Whatever result I reached would always be open to question. The only way to address this issue in a manner that is fair to both sides is to start all over again.
>
> [55] I find myself in the same position. I made an adverse finding of credibility against Mark Callender which caused me not to believe his evidence or caused me to have a reasonable doubt with respect to his guilt. If I continued with the trial with new evidence and if I again found Mark Callender not to be credible, there would always be a question of whether that conclusion was affected by my previous credibility finding. In my view, the only way to eliminate that risk is to declare a mistrial.

[54] Here I find myself in the exact same position. I made a finding of credibility against G.S. The following are relevant excerpts from the trial:

> 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.
>
> …
>
> 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.

[55] I did not have a reasonable doubt. I also accepted the complainant's evidence, after a careful assessment.

> 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.
>
> …
>
> 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.
>
> …
>
> 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.

[56] The evidence that was not placed before me - the preliminary inquiry, the videotaped evidence, and the Court Order - could have affected the assessments quoted above. I cannot continue to assess this evidence and assess G.S. and his evidence. A question would always linger as to the impact of my previous credibility findings.

Conclusion

Having been persuaded that it is necessary to admit evidence from the preliminary inquiry, the Court Order and the videotaped statement, following *Callendar*, *supra*, I find no other remedy appropriate than one of declaring a mistrial. I do not do so lightly, but the circumstances before me cry out for this remedy.

Brothers, J.