SUPREME COURT OF NOVA SCOTIA
Citation: *R v. C.E.Z*, 2022 NSSC 372

Date: 20221208
Docket: *CRBW*, No. 506024
Registry: Halifax

Between:

Her Majesty the Queen

v.

C.E.Z.

Restriction on Publication: s. 486.4 of the *Criminal Code of Canada*

Judge:	The Honourable Justice Diane Rowe
Heard:	February 16, 2022 and June 14, 15, 22, 2022, in Bridgewater, Nova Scotia
Oral Decision:	June 30, 2022 in Bridgewater, Nova Scotia
Counsel:	Bryson McDonald, for the Crown Robert Chipman, KC, for the Accused

RESTRICTION ON PUBLICATION: **Sexual Offences – *Criminal Code of Canada***

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 79.011, 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).

(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.

(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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(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.

(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.

(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. 2005, c. 32, s. 15, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48(6); 2015, c. 13, s. 18(1); 2019, c. 25, s. 190

By the Court, Orally:

Procedural Background

[1] CEZ comes before the Court on a preferred indictment. He is charged with one count of sexual interference with a person under the age of sixteen years, contrary to s. 151 of the *Criminal Code*, and one count of sexual assault, contrary to s. 271 of the *Criminal Code*. The incidents are alleged to have taken place between May 1 and November 1, 2018.

[2] The trial began on February 16 and 17, 2022. There was one voir dire held before the trial regarding the admission of a videotaped statement of the complainant "X", pursuant to s. 715.1 of the *Criminal Code*. The videotaped statement was admitted into evidence, with weight to be determined at trial. I will note that at the hearing of this voir dire that the fourth element in the test for admissibility, concerning whether the Complainant attempted to be honest and truthful in the statement, was highlighted by defence counsel.

[3] There was notice, with a brief provided prior to trial, by the Crown concerning its introduction of evidence by a witness "Y" concerning other sexual activity of the complainant pursuant to s. 276(2) and (3) of the *Criminal Code*.

This other voir dire was set down for hearing for January 10, 2022, though was unable to proceed. However, on this evidentiary issue, the Court relied upon the written submissions that the Crown and Defence counsel filed on this issue, the evidence heard during the witness' direct evidence, and both counsels' oral submissions in regard to this at trial. At the outset of trial, it was determined that submissions on the content of Y's evidence on the complainant's prior sexual activity would occur at the close of evidence or in the closing submissions. Defence counsel referenced Y's testimony in their closing submissions to the Court, without objection from the Crown, and the evidence the Court considered on this evidentiary issue was limited to just this aspect of Y's testimony.

[4] CEZ made a mid-trial application pursuant to s. 278.3(1) of the *Criminal Code* seeking an Order for the production of third party records relating to complainant X's therapeutic records on the second day of trial. During the examination in chief of X, he referenced speaking about the allegations to his counsellors and treatment providers. The trial was adjourned for determination of that motion.

[5] The motion was heard April 25, 2022, with a written decision of the Court made on April 26, 2022, dismissing the application.

[6] The hearing then resumed on June 14 and 15, 2022, with the continued cross examination of the complainant, followed by the Defence's case. Closing oral submissions by counsel were heard on June 22, 2022.

Background

[7] The Complainant "X" alleges that in 2018, when he was eight years old, that the Accused, CEZ, sexually abused him at X's family home. X's family was living at a home in South Brookfield and then moved to one located in Caledonia.

[8] CEZ is X's second cousin. X's now deceased mother, XY, was CEZ's first cousin, who CEZ enjoyed a close relationship with as a member of their extended family.

[9] CEZ visited XY and X regularly throughout this period. CEZ was often accompanied by members of his own immediate family, and his girlfriend of the time, during these visits.

[10] In 2019, X's mother passed away. In March, 2019, X and his sister, KH, then went to live with his maternal uncle, JC, and his wife, HC's, family.

[11] In August 2019, X was discovered by HC pinning her young son, then four, to a bed and grinding on him. HC contacted her family doctor, who then contacted

the RCMP, beginning an investigation, which led to the indictment before the Court.

[12] X alleges that CEZ engaged in sexual touching and sexual assault when the two were home alone in two places: the child's bedroom in South Brookfield, and then in his sister's bedroom in Caledonia.

Burden of Proof

[13] Throughout all criminal proceedings, there is a presumption the accused in innocent. The burden of proving all the elements of an offence lies wholly with the Crown. The standard of proof for the Crown to meet is high, with the proof of each element of the offence to be established beyond a reasonable doubt before there is a finding of guilt.

[14] As Cory, J., in *R v. Lifchus* [1997] 3 SCR 320 stated at paragraph 36 in regard to the standard of proof beyond a reasonable doubt:

> 36
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> · the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
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> · the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
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> · a reasonable doubt is not a doubt based upon sympathy or prejudice;
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> · rather, it is based upon reason and common sense;
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> · it is logically connected to the evidence or absence of evidence;

> · it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
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> · **more is required than proof that the accused is probably guilty** -- a jury which concludes only that the accused is probably guilty must acquit.

[15] I also note the recent comment of Justice Brothers in *R v. Snow*, 2022 NSSC 175 at paragraphs 7 and 8, in which she considered reasonable doubt:

> [7] It is not a matter of who I believe; it is a matter of whether, based on all the evidence or absence of evidence, the Crown has proven its case beyond a reasonable doubt. It is not for a trier of fact to simply choose which version of the events to believe, if any. The trier of fact must consider all of the evidence.
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> [8] In considering the evidence, if I find the complainant credible, it does not in any way shift the onus to the accused (*R. v. C.L.Y.*, 2008 SCC 2). All of the evidence needs to be considered (*R. v. E.M.W.*, 2009 NSPC 33, aff'd 2011 SCC 31. As Judge Campbell (as he then was) stated in *E.M.W.*, at para 47:
>
> > ...It is not only appropriate, but necessary for judges to consider all the sources of reasonable doubt. The sources may include the doubt left by the complainant's evidence, the doubt created by the evidence of the accused, the doubt found in any other evidence or the doubt arising from the combination of those sources.

[16] As the Supreme Court of Canada held in *R v. W. (D.)*, [1991] 1 S.C.R. 742, the Court must, when considering evidence at trial, engage in a three step analysis:

> (a) If the evidence of the accused is believed, he must be acquitted;
>
> (b) If the evidence of the accused is not believed, but the evidence still raises or leaves a reasonable doubt, he must be acquitted; and,
>
> (c) Even if the evidence of the accused does not raise a reasonable doubt, he must be acquitted if a reasonable doubt is raised by other evidence that is accepted. In order to convict, the evidence that the court does accept must prove his guilt beyond a reasonable doubt.

[17] I will also note the comment of Keith, J., in *R v. Michaud* 2022 NSSC 160 at paragraphs 14 and 15:

> [14] Before leaving this section, one further comment regarding the presumption of innocence is appropriate in the especially emotive context of alleged sexual assaults against children. Society's most innocent and vulnerable must be protected. Sexual predators must be held accountable. At the same time, the Court must guard against the presumption of innocence sinking under a wave of vengeful anger. In *R. v. J.* (F.E.) (1990), 1989 CanLII 7131 (ON CA), 53 C.C.C. (3d) 64 (Ont. C.A.), Galligan, J.A. wrote about how the impulse for retribution can trigger a rush to judgment and test our commitment to the presumption of innocence:
>
> > … Sexual abuse of children is a despicable crime. It is not easy to detect and, because it invariably happens in private, it can be difficult to prove. Usually, it comes down to the word of a child against that of an adult. It is easy, therefore, to be sympathetic with the efforts of those who try to discover these crimes and prosecute their perpetrators.
> >
> > While there is no scale upon which conflicting evils can be weighed, it should be remembered that, revolting as child sexual abuse is, it would be horrible for an innocent person to be convicted of it. For that reason, I think the courts must be vigilant to ensure that the zeal to punish child sexual abusers does not erode the rules which the courts have developed over the centuries to prevent the conviction of the innocent.
> >
> > [at paragraphs 7 – 8]
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> [15] In *R v W.(R.),* 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122 ("*W.(R.)*"), the Supreme Court of Canada echoed the same concern when it wrote:
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> > Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person requires a solid foundation for a verdict of guilt, whether the complainant be an adult or a child.
> >
> > [at paragraph 26]

Elements of the Offences

[18] In regard to the charge of sexual assault, the Crown must prove that the offence took place at the time and place set out in the indictment. Further, the Crown is to prove that the Accused touched the Complainant, directly or indirectly, with intentional force, for a sexual purpose.

[19] In regard to sexual interference, the Crown must prove that the Accused intentionally touched the Complainant, directly or indirectly, for a sexual purpose, without requiring proof of the element of force.

[20] It is not possible for the Complainant to have provided consent. At the time of the alleged offences, he would have been eight years old.

[21] The Accused, CEZ, would have been about 19 years old at the time of the alleged offences.

Legal Principles on Assessing the Children's Evidence and Credibility

[22] As the Court held in *R v. Beland* [1987] 2 SCR 398 at paragraph 20, credibility is a question for the trier of fact, "using their experience of human affairs and basing judgement upon their assessment of the witness and on

consideration of how an individual's evidence fits into the general picture revealed on a consideration of the whole of the case."

[23] In *R v. HC* 2009 ONCA 56, the Court, at paragraph 41, remarked that credibility and reliability are different concepts, with credibility addressing the witness' truthfulness and reliability being a measure of the witness' ability to accurately see, recall, and then recount the events. As the Court noted:

> "Any witnesses whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability; a credible witness may give unreliable evidence: R. v. Morrissey 1995 CanLII 3498 (ONCA).

[24] In the context of a charge of sexual assault and sexual interference, credibility of the complainant and the accused concerning the offence is often a key issue. In this matter, the Crown acknowledges that the Accused engaged in sexual touching and assault when he was alone with X.

[25] The Court must take care when assessing the Complainant's evidence with an awareness of his capacity and vulnerabilities as a young person, which may affect his recall or ability to communicate, while still be mindful of the presumption of innocence and the right to a fair trial of the Accused.

[26] In *R v. Michaud*, *supra*, Keith, J., observed the following, in the context of a careful analysis of the principles underlying the assessment of children's evidence at paragraphs 32 to 35:

> [32] Recall the challenge identified by McLachlin, CJ in *I.D.*: protecting vulnerable persons from the trauma of sexual assault and permitting the truth to be told while, at the same time, protecting the presumption of innocence and the accused's right to a fair trial. The following related but, at times, competing pressures arise:
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> > 1. On the one hand, the Court has firmly denounced the proposition that the evidence of children or childhood memories are inherently unreliable and therefore should be either automatically discounted or treated with special caution. The historic legal requirement for corroboration of a child's evidence has been repealed. (See (*W.(R.)* at paragraph 23. See also *R.* v *B. (G.)*, 1990 CanLII 7308 (SCC), [1990] 2 S.C.R. 30 ("***B.(G.)***") at paragraph 56 and *R.* v *Marquard*, 1993 CanLII 37 (SCC), [1993] 4 S.C.R. 223 ("***Marquard***") at paragraphs 20 - 21). The Court now recognizes that vulnerable witnesses may not perceive the world in the same manner as adults. The fact that childhood memories may not be retrieved with photographic precision does not mean the essential aspects of the memory are not true. Or, as Wilson, J succinctly wrote in *B.(G.)* at paragraph 56: "…a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. ... While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it."
> >
> > 2. On the other hand, and importantly, assessing the veracity and accuracy of children and vulnerable witnesses must not become so forgiving that the presumption of innocence is ignored or diminished.
>
> [33] In response to these competing pressures, the Court approaches the testimony of vulnerable witnesses by applying "criteria appropriate to her mental development, understanding and ability to communicate" (*W.(R.)* at paragraph 26). In addition, the Court takes "a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults" (*B.(G.)* at paragraph 56). The factors which bear upon this assessment will include the witness' mental development, their ability to understand the questions being asked, the presence of any animus, and their capacity to accurately recollect and communicate their memories to the Court.

> [34] In addition, mistakes, inaccuracies or inconsistencies on peripheral matters will not necessarily raise a reasonable doubt or fatally wound a complainant's credibility. (*R.* v *Bishop*, 2009 NSCA 32 at paragraph 5 and see also *R* v *R.B.*, 2018 NSCA 78 at paragraph 80). By separating those issues which are "peripheral" from those which are "core", the Court recognizes both the strengths and frailties of childhood memories in a common sense and contextual way while vigorously protecting the accused's fundamental right to a fair trial.
>
> [35] A difficult but practical question arises as to how "peripheral" issues are distinguished from those that are "core". Evidence that clearly goes to the elements of the offence must be considered "core" and approached with increasing scrutiny. However, separating "core" from "peripheral" evidence is not always so obvious. There is no fixed list of issues deemed to be "peripheral". Equally, there is no clear formula by which "peripheral" and "core" issues can be easily tagged or categorized. The analysis is more nuanced. As Derrick, J (as she then was) observed in *R.* v *A.W.H.*, 2017 NSPC 19, "The assessment of a child's evidence should not fall prey to rigidity and should draw on common sense" (at paragraph 75).

[27] Finally, I am aware of the recently decided case, *R v. Gerrard* 2022 SCC 13, in which the Supreme Court of Canada denied leave to appeal a decision of the Nova Scotia Court of Appeal's decision upholding a trial judge's credibility findings in relation to a motive to lie. In *Gerrard*, *supra*, the trial judge assessed that the complainant of a sexual assault was credible, and there was no evidence of a motive to lie. The accused appealed, disputing the credibility finding, and arguing that the trial judge has improperly engaged in weighing all the evidence before her, with the Court noting that:

> Two of these factors warrant a few additional comments. Lack of evidence of a complainant's motive to lie may be relevant in assessing credibility, particularly where the suggestion is raised by the defence (*R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at paras. 10-11; *R. v. Ignacio*, 2021 ONCA 69, 400 C.C.C. (3d) 343,

> at paras. 38 and 52). Absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, is a common sense factor that suggests a witness may be more truthful because they do not have a reason to lie. That said, when considering this factor, trial judges must be alive to two risks: (1) the absence of evidence that a complainant has a motive to lie (i.e. there is no evidence either way) cannot be equated with evidence disproving a particular motive to lie (i.e. evidence establishing that the motive does not exist), as the latter requires evidence and is therefore a stronger indication of credibility — neither is conclusive in a credibility analysis; and (2) the burden of proof cannot be reversed by requiring the accused to demonstrate that the complainant has a motive to lie or explain why a complainant has made the allegations (*R. v. Swain*, 2021 BCCA 207, 406 C.C.C. (3d) 39, at paras. 31-33).

Evidence before the Court

[28] Informed by the jurisprudence set out in this decision to this point, I will review the evidence heard in the course of trial prior to making a determination on the charges before me. The credibility and reliability of the witnesses was considered as each gave their testimony, and the Court received evidence.

HC

[29] The Court first heard the evidence of the Crown's witness, HC, X's aunt. X joined the JC/HC household in March 2019, upon the death of this mother. He was joined by his sister, KH. HC had a young son, as well.

[30] HC stated that X found her household to be too strict, and after two years with her family, chose to leave to live with his paternal grandfather in 2021. His father lives with him, there, from time to time now.

[31] HC's evidence was that she discovered X, then nine, humping her four-year old son, in the presence of his sister, KH, who was laughing. She then contacted her husband, X's uncle. In her evidence on direct examination by the Crown she stated:

> Q: Okay. And so, what action did you take after sort of witnessing this?
>
> A: I got upset. I told X that he needed to stay in his room, and I called my husband. When I had my husband on the phone, X told him, because I got him to tell him what he did and he said that he was doing what two people would do when they have sex, but they had their clothes on.
>
> Q: Okay. And, in discussions with X, what did he disclose about what he had done?
>
> A: At first, he tried to tell us he had been allowed to watch inappropriate videos with his father. So, then we had questioned maybe if that's how it was, we wouldn't be allowing him to see his father until we figured out the situation. And, then he changed his story and said it had been something that his cousin, CEZ, had done to him so he thought it was okay to do it to other people.

[32] HC then contacted her doctor, who then reported it. She and her husband also reported the incident, and brought the complainant and his sister for interviews.

[33] On cross examination, HC was consistent in her recollection of X's initial statement concerning watching inappropriate videos, and added that he changed his story within five minutes to alleging CEZ had assaulted him, in tears.

[34] HC's evidence was provided in a calm and detailed manner, despite the circumstances of recounting this incident including her child.

[35] On cross examination, she answered that her experience of X when he lived with her was that he lied "a lot" and was a difficult child.

[36] HC gave statements to Children and Family Services, but this statement was not before the Court, although she confirmed on cross examination that she spoke with them about this incident.

[37] I considered HC's evidence as it regarded other sexual activity of the Complainant, specifically that she saw X humping her son. I am of the view that this is admissible as limited "narrative" for the purposes of linking the complaint to the police investigation, and is not being considered for the purpose of bolstering the credibility of the Complainant. Also, there are no "twin myths" engaged in admitting the evidence, as it is not being considered in furtherance of an argument that the Complainant was more likely to have consented or less worthy of belief.

[38] In regard to X's statement of HC and his uncle concerning watching inappropriate videos (presumably with sexualized content) with his father being admissible, despite being hearsay, I am satisfied X's statement concerning watching explicit videos is admissible, as its probative value outweighs its

prejudicial effect, and speaks to an element of credibility of the Complainant. Further, X's statement to HC was spontaneously made, as an initial response made contemporaneously to their question. The witness had strong recall of X's quick change of the narrative when their own questions raised an issue concerning an appropriate path forward regarding time with his father.

[39] Finally, the hearsay statement attributed to X is a statement made against interest, which the Court finds weighs toward its admission.

[40] **Constable Christa Pye**'s evidence was offered by the Crown. She conducted a videotaped interview of the Complainant, as a joint interview with Children and Family Services. While interviewing X, she drew a picture of two males, one representing X and the other CEZ, in the course of the interview. Both pictures were entered as evidence.

[41] Constable Pye indicated she had training and experience in conducting interviews with children, and had conducted this one in keeping with hat training.

[42] She noted in her evidence that she experienced X's demeanour as initially friendly and then becoming more withdrawn as the interview proceeded, and then crying, and then finally resolving back into a friendly baseline.

X

[43] Upon X beginning his evidence, he was asked to promise to tell the truth. The videotaped interview was prepared for viewing. The Complainant was placed behind a privacy screen, and his grandfather was seated next to him on the stand for support. A transcript of the video was provided to the Court for reference purposes.

[44] Approximately 15 minutes into the viewing of the videotaped statement, without any direct examination, the witness became distressed and the Court took a 15 minute break. The Court resumed viewing, with another break for lunch.

[45] On returning, the remainder of the video was viewed by the witness and the Court. The Crown began its examination.

[46] X demonstrated difficulty in remembering telling Constable Pye and the Child Protection worker about the assault:

> Q: You remember meeting with them?
>
> A: Ish.
>
> Q: Okay and do you remember telling them that stuff?
>
> A: Nope.
>
> Q: Or at least being in the room and having that meeting?

A: No.

[47] Eventually, on direct, X did acknowledge meeting with Constable Pye at the police station. He did demonstrate to the satisfaction of the Court that he understood the difference between a truth and a lie and he confirmed that he was being truthful and honest to Constable Pye at the videotaped interview. Even with some consideration of the difficult circumstances for the witness, and allowance for his age, he was initially non-responsive and appeared resistant, however, he did confirm on cross that he understood the difference between a truth and non-truth and confirmed he was "trying to tell the truth" in the video.

[48] X's evidence was that CEZ would visit with his mother, his girlfriend "E", and other people. He indicated that CEZ was dating E for about three years. He stated on direct that CEZ would not come to the house much by himself, but mainly with E. CEZ would go "hang out" with X's mom, as she was a young woman in her late 20's.

[49] X said that he told his uncle JC about CEZ's sexual touching and assault first and then he told his dad. He stated his uncle JC, who he had been living with, called CEZ's mother and told her about the allegations. He did not remember the context in which the conversation with HC or JC started.

[50] X indicated on direct that JC called CEZ's mother "A" and she was mad, but that he did not hear it. He then adjusted this to that his uncle told him that he called A and X guessed she was mad.

[51] X's evidence was punctuated by breaks, when distressed. He requested that the privacy screen be taken down, and the Court observed him leaning around it at various times during his testimony.

[52] X was reminded by the Court twice that he was required to answer questions posed by the Crown, regarding any interference or assaults at the South Brookfield residence, as he refused to answer at times, saying either "I'm not forced to say it" or "I'm not forced to say it and I don't have to."

[53] X's evidence on the incidents was confusing, at points, as he alternated between whether incidents occurred at South Brookfield or at Caledonia. X did give evidence that CEZ was usually with his girlfriend E at their house, and joined by his mother A regularly.

[54] In the 2019 videotaped interview, X referred to "a couple" of incidents in South Brookfield, and then to "four or five". He then referred to "two or three" incidents at the Caledonia home prior to his mother's death. The video interview occurred about one year after the period of the alleged incidents.

[55] On direct examination, X spoke in detail of one incident at Caledonia, involving watching a video of the Jungle Book in his sister's upstairs bedroom with CEZ and his sister. This video was referenced in the 2019 statement.

[56] In the 2019 video, X's account was that this humping incident in Caledonia happened once in the dark, and then at daytime. Then he stated it was two times in the night and once in the day.

[57] On direct examination, X's account of the Caledonia incident was that his sister left the room to make popcorn, downstairs, and that CEZ got up, locked the bedroom door, placed X on the bed, pinning him with both hands and proceeded to hump him, through clothing. CEZ then stopped.

[58] There were alternative versions in X's evidence on how this incident did stop, either with X about to yell, or when his stepfather, who is also now deceased, entered the room.

[59] X was resistant to giving his evidence on direct examination and on cross. His responses to the Crown included, "I don't really want to talk. This is just pissing me off"; "Can we just move on, I don't want to flippin' talk about it".

[60] He was not able to respond to defence counsel's questions concerning CEZ's actions in getting up from the floor, where X and CEZ were seated watching the

Jungle Book video on his sister's television in Caledonia. His evidence was that CEZ then locked the door, and then approached X and pinned him to the bed with both hands, while then humping him, with or without clothing or genitals touching. It was not clear to the Court whether they were clothed or unclothed at times, which is a core, and not peripheral, fact in issue.

[61] The time for KH to make popcorn and then return was said to be about five minutes, from leaving the room to returning.

[62] X's evidence was contradictory in regard to time and place, whether at South Brookfield or Caledonia, as well as to other occurrences. X alternated from indicating the "Jungle Book" incident was the first time this activity occurred, with force, and then that this incident was the last time.

[63] X also contradicted his own evidence on some key aspects of the progression of the "Jungle Book" incident in Caledonia. On cross examination by counsel for the defence, he indicated he misspoke about there being a lock on he door, which was his evidence on direct and was referenced in the videotape interview, but that it was instead just closed, not locked as the door did not have a lock.

[64] X, on cross examination concerning the Caledonia incident, and whether there was a light on or if it was daytime, responded angrily that he "…lied to the cops…" in his video statement about there being a light on as "he did not want to get in trouble."

[65] X's evidence expanded on cross examination, as he alleged that CEZ took his underwear down and that he had forgotten to say this in the video statement.

[66] X denied strongly that he ever said to either HC or his uncle JC that he saw sexualized videos with his father.

[67] However, on cross, defence counsel asked X if, because he wanted to see his dad, he changed his story, with a response from X that he "did not care if he would see his father". He continued to speak about "not having YouTube at that time, because there was no internet."

[68] X appeared to not appreciate the seriousness of the Court proceedings at times and, to a point, I did discount this as the witness is young and in a stressful situation. Fidgeting in a chair is not an unusual thing for an active youth. Even spinning in the chair was not of importance to me in assessing X's credibility as a witness. X appeared to be a person who is physically active and a spirited young person who did not want to be sitting, whether in the Court or elsewhere.

[69] However, the disrespectful responses to counsel and to the judge, with gentle reminders that he was required to answer questions, was unanticipated and led the Court to question whether the witness was fully engaged in giving reliable testimony.

[70] X was reliable in uncontentious details, like the layout of his two homes, but not reliable in recounting some of the key elements of the allegations. His credibility was also undermined by aspects of his demeanour on examination and on cross.

E

[71] The defence called E. Her evidence was that she was, essentially, continually with CEZ from the time of their meeting in January, of 2018 until their recent breakup in January, 2022. E shares a child with CEZ.

[72] She formerly lived with the Accused and his mother, A.

[73] The couple are involved in family court litigation concerning their child. The subject matter of that proceeding is not before this Court.

[74] E demonstrated some reliability as a witness in some aspects. X, on direct examination, had stated that he and KH, his sister, had ripped boards off the walls

of their bedroom in South Brookfield. E's evidence was that there were holes in the wall created by the kids at that home, with extensive damage to the wallboard. Her knowledge of the layout of the South Brookfield and Caledonia residences was consistent with all the other witnesses, who were all consistent in this regard.

[75] Her evidence was that she was always with CEZ and he was at X's homes and that he had little to do with either child and was never alone with either one. She saw CEZ assist his cousin, X's mother, with car repair and yard work, or he was smoking, as both CEZ and E were heavy smokers who smoked outside the home.

[76] E appeared quite hostile to participating, and reacted strongly to Crown's suggestion that she may have an interest in CEZ being found not guilty of the charges, given the impact on their child's legal proceedings.

[77] As I do not have knowledge of the subject matter of those proceedings, this is conjecture by the Crown, and is not given any weight.

[78] I will note that while it is not out of the ordinary for teenagers in a relationship to "spend all their time together", it is unlikely that they were together at all times so as to create a form of alibi for the Accused.

[79] E's evidence was that she made popcorn at X's residence and that it would take two to three minutes. I would accept that.

[80] I will note that X, the Complainant, agreed that E was with CEZ most times CEZ was at X's home and that CEZ was a smoker.

A

[81] A, CEZ's mother, also gave evidence for the defence. She stated she had not received a call from JC, and was first contacted by the RCMP who requested CEZ come in for an interview. Her evidence was that she had not spoken to HC in years.

[82] Her evidence was that she was usually with CEZ and with his former girlfriend, E, who then lived with them.

[83] A stated that there was only one microwave and one TV, as her cousin did not own much. She said the kids were usually fighting.

[84] A's evidence was that when CEZ visited X's home, that CEZ would do the yard work, work on cars, and had no opportunity to be alone with the children. She would go to X's mother's home and take CEZ along to help her clean, as X's mother was morbidly obese with limited mobility. She also assisted X's mother with grocery shopping.

[85] A indicated that CEZ did not drive, and that she was the only driver for him and E at all times during the period as set out in the indictment. A thought CEZ was being asked to come to the RCMP to address a charge of illegal garbage dumping, which A felt she was responsible for committing.

KH

[86] KH is X's sister. She resides with their maternal grandmother, who accompanied her as a support person in Court. There is one year difference between KH and X. Although KH is quite young, still, she impressed the Court with her ability to answer questions and to read, as directed, portions of her own videotaped statement made in 2019.

[87] She also alluded to the microwave popcorn taking about two to three minutes to prepare. However, she did refer to CEZ spending time with her and X alone, and referred to a Jungle Book video.

[88] Her recollection was that it would be no more than about 10 minutes at a time they were alone, and that CEZ would go out to smoke.

[89] She stated that there was no lock on her bedroom door in Caledonia.

[90] Before proceeding with CEZ's evidence, I want to note that E and A's evidence was oddly consistent in regard to CEZ "never being alone with the children."

[91] Their uniformity in answering did make the Court doubt this aspect of their evidence. KH's more forthright evidence that she was sometimes alone with CEZ and her brother was more credible.

CEZ

[92] CEZ presented as a quiet, soft spoken man. He stated that he cannot read or write, despite receiving a Grade 12 certificate. The Court notes that he did struggle functionally, as he had halting speech patterns and appeared to have a very slow functional ability.

[93] CEZ is able to repair and build cars, and has taken to bartering his labour for cigarettes. CEZ indicated that he was usually with his former girlfriend E, but not always, as he did occasionally do labour work elsewhere.

[94] CEZ receives social assistance, and referenced he is "on disability", which was undefined for the Court.

[95] CEZ strongly maintains his innocence and denied ever being alone with the children. CEZ was subject to vigorous cross examination by Crown counsel, and was largely consistent.

[96] His evidence was quite detailed about his regular day during the time period, in order to bolster this.

[97] CEZ, on direct, established that during the time in question, he was often at his cousin's house, as his mother would drive him and EH in the morning at South Brookfield. E would go to school, as CEZ wanted her to resume high school. CEZ would then meet her at recess and lunch and then after school to smoke. They would then return to get picked up by A, his mother. CEZ would spend portions of his day with an older neighbour, Aberdeen.

[98] His recollection of his typical day when going to X's home was consistent, and reliable, in some respects. X also made reference to CEZ going to "Aberdeen's" in the video statement.

[99] I have more difficulty with CEZ's credibility concerning his evidence, and that of others, that only his mother drove him to X's residence, thereby having a person always present with him to speak to whether he was or was not alone with X.

[100] CEZ did admit on examination that he is currently charged for driving under the influence. His evidence is that he drove an old vehicle used only on his family property (which would not require licensing), and that this was the first and only time he ever drove it off the property. This is difficult to believe, and is a negative factor for the Court in regard to his credibility assessment.

Analysis

[101] The Court is very aware that every person's reaction to a breach of personal sexual integrity is individual. There is no "one response". Some people react with anger, and are expressive in their sense of violation, with some, in the alternative, becoming quiet and withdrawn. Human behaviour in response to trauma may occur along a wide spectrum, with multifaceted aspects.

[102] However, in Court, the "telling" of the incident, with a consideration of the credibility of the persons involved, which in this case is the testimonial evidence surrounding the allegation of a child's sexual assault, is what the trier of fact must review, weigh, and consider.

[103] I must apply the law, as was earlier referenced in this decision, to the evidence accepted by the Court from the people who swore, promised, or affirmed to tell the truth.

[104] As the first branch of *W.D., supra*, sets out, "a) If the evidence of the Accused is believed, he must be acquitted." I do not believe the Accused's evidence that was "never alone" with the Complainant.

[105] The defence's evidence that CEZ did not have opportunity in that sense, is not made out. I also reject the implication that a breach of sexual integrity would take longer than five minutes. A serious personal invasion can take place in mere minutes or even mere seconds.

[106] In regard to the evidence of bad character of CEZ, which the Crown established by reference to his pending driving under the influence charge, this evidence cannot be used for the purpose of determining CEZ's guilt on the basis that he is a person of bad character and therefore more likely to have committed the offences. However, I can consider the bad character evidence for the purpose of assessing the Accused's credibility (*G. (S.G.)* 1997 CanLii 311 (SCC)) and more recently, *R v, P.N.,* 2021 NSCA 68.

[107] I will move on to considering both the second branch of *W.D., supra*, that of "(b) If the evidence of the accused is not believed, but the evidence still raises or leaves reasonable doubt, he must be acquitted;" and on the third branch, "(c) Even

if the evidence of the accused does not raise a reasonable doubt, he must be acquitted if a reasonable doubt is raised by other evidence that is accepted."

[108] The Court has considered the evidence presented by the Crown and defence, in totality, and finds that a reasonable doubt exists in regard to X's evidence, based on the Court's assessment of the Complainant's credibility and reliability. I'll also note that there was no evidence that X had a functional incapacity concerning memory or speech.

[109] The examination of the Complainant in regard to the occurrence of the Caledonia incident was inconsistent and unreliable in certain details, including whether the door was locked and the time of day. These appear to be peripheral aspects to the main allegation. However, in relation to core facts of the offence, such as whether the Accused and Complainant were or were not clothed and, if not clothed, how was the clothing removed; whether penises touched; and whether clothed or unclothed humping occurred, all this was not clearly made out. Even accounting for the Complainant's age, and ability to recall, which was adjusted by the Court to a degree, the differences in how the alleged assaults occurred and the manner in which one or more occur, when, and how the assaults ended were not made out.

[110] It can't be enough for the Crown to establish that an offence probably occurred, as the Accused had opportunity and the Complainant has established some of the elements of the offence. A higher standard must be met.

[111] Further, there is credible evidence that the Complainant has a motive to lie, specifically as the Court found HC's evidence on X's initial statement to her concerning watching inappropriate videos with his father. I am satisfied that X made the statement to HC. HC was available to be cross examined on her statement, and confirmed this statement.

[112] It would be very difficult for a child who had very recently lost his mother to risk losing an opportunity to continue to see his father, which would be imperilled if X admitted watching inappropriate videos with his father. X's tie with his paternal family is strong, and ongoing, and has established itself more strongly since the disclosures X made in 2019. The child now lives with his paternal grandparent, sees his father regularly, and this grandparent was his support person.

[113] The family dynamics observed by the Court in this matter are complex, and tragic.

[114] The Complainant, and his sister, lived with their mother and her partner, who was a stepfather to both children. Both of these caring adults are now

deceased. The Accused was their mother's first cousin, and a daily fixture in their lives.

[115] The Complainant's sister gave evidence on behalf of the defence, assisted by their maternal grandmother, with whom she now resides with apart from the Complainant. Their grandmother is also the aunt of the Accused.

[116] It was recognized in the Supreme Court of Canada's decision in *R v. Gerrard, supra,* the defence is able to lead evidence tending to show that the Complainant had a motive to lie about the allegations. In this case, the defence highlighted a portion of the Crown's evidence on this point. The Court can use the inference that the witness had a motive to lie as one factor, which may be considered in assessing the credibility of a witness. If this evidence is available to the defence, it is important evidence to consider, especially where the case for the Crown rests completely on the credibility of one witness, as happens often in sexual assault trials. The Court has kept this in mind that this was only one factor to be considered in light of all other evidence presented.

[117] I am not satisfied that the Crown has proven beyond a reasonable doubt that CEZ is guilty of either the offence of sexual assault or the offence of sexual

interference, as set out in the indictment, and find CEZ not guilty. That concludes this matter before the Court.

Diane Rowe, J.