

**NOVA SCOTIA COURT OF APPEAL**

**Citation: *R. v. J.A.H.*, 2012 NSCA 121**

**Date:** 20121207

**Docket:** CAC 365899

**Registry:** Halifax

**Between:**

J.A.H.

Appellant

v.

Her Majesty the Queen

Respondent

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**Restriction on Publication:** Pursuant to s. 486 of the *Criminal Code*

**Judge:** The Honourable Justice Peter M. S. Bryson

**Appeal Heard:** September 24, 2012

**Subject:** Criminal Law. Sexual Assault. Misapprehension of evidence. Reasonableness of verdict. Sufficiency of reasons. Included offences.

**Summary:** J.A.H. was convicted of sexual interference arising from an incident of sexual touching of his nine-year-old daughter (s. 151(a) of the *Criminal Code*). The trial judge found that J.A.H. came home after drinking and ordered his daughter to stand in front of him. He put his hands down the front of her pyjamas, touching her thighs and vagina. She told him to stop and removed his hands. J.A.H. testified, denying the touching. He said he intended to spank his daughter for lying but she ran to her room. The trial judge rejected the evidence of J.A.H. and accepted that of his daughter. He found the Crown had proved the offence beyond a reasonable doubt. He stayed a charge of sexual assault arising on the same facts.

**Issues:** 1. Did the trial judge reverse the burden of proof?

2. Did the trial judge misapprehend the evidence of J.A.H.?
3. Did the trial judge misapprehend the evidence of Crown witnesses?
4. Did the trial judge err in assessing the complainant's evidence by not considering contradictory evidence?
5. Did the trial judge err by failing to consider included offences?

**Result:**

Appeal dismissed. The trial judge did not misapply the burden of proof. Consideration of an accused's motive to fabricate is not an automatic error of law, unless the judge assumes that he will lie to secure an acquittal. This was only one of a number of factors cited by the judge in rejecting the evidence of the accused and was preceded by a lengthy self instruction regarding the burden of proof, presumption of innocence, and the principles of *R. v. W.(D.)*, [1991] 1 S.C.R. 742. Nor did the trial judge err by considering the complainant's motivations which had been raised as a live issue at trial.

The trial judge did not err in his appreciation of J.A.H.'s evidence. Any errors were not material nor substantial. The findings of credibility were well supported by the record.

The trial judge did not resolve all differences in the evidence between Crown witnesses. However, none of those differences touched upon the events of the offence itself. The judge's reasons were more than adequate to understand his decision. There was no obligation to confront every inconsistency in the Crown's evidence. Rather, the question was whether the judge "seized the substance of the issue".

There was no need to consider common assault. It was not a live issue at trial, it was not argued at trial, and not supported by the evidence.

*This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 21 pages.*