

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Edwards*, 2021 NSPC 58

Date: 20210818
Docket: 8366384-85
Registry: Kentville

Between:

Her Majesty the Queen

v.

Roger Lee Edwards

Restriction on Publication: 486.4 CC

Judge:	The Honourable Judge Ronda van der Hoek, JPC
Heard:	April 26, July 5, 26, and August 3 and 18, 2021, in Windsor and Kentville, Nova Scotia
Written Decision:	February 22, 2022
Charges:	s. 271, 151 <i>Criminal Code</i>
Counsel:	William Fergusson, Q.C., for the Crown Zebedee Brown, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

By the Court:

Introduction:

[1] Mr. Edwards is charged with sexually assaulting S.M., contrary to section 271 of the *Criminal Code*. She was under the age of sixteen years, and he is also charged with touching her for a sexual purpose, commonly referred to as sexual interference, contrary to section 151 of the *Criminal Code*.

[2] Over five days of evidence and much Covid-19 related delay, the Crown called the complainant, S.M., her younger sister, A.M., and girlfriend, B.H, two sexual assault nurse examiners (SANE) and a number of police witnesses. Mr. Edwards testified on his own behalf and the defence called a former friend of the M. family.

Decision:

[3] After hearing submissions of counsel and considering the evidence, I found the Crown had not proven the case beyond a reasonable doubt. Understanding Mr. Edwards was on an extended immigration hold and awaiting immediate deportation from Canada, I provided a brief oral decision. These are my promised written reasons.

The principles applicable on a criminal trial:

[4] A trial is not a credibility contest. The Crown's onus is proof beyond a reasonable doubt and that onus never shifts to Mr. Edwards asking him to instead prove he did not commit the offences. He benefits from the presumption of innocence. Only after considering all of the evidence in the context of the evidence as a whole does the Court reach a determination as to whether the Crown has met its onus. If the Court is not satisfied every element of each offence has been proven, there is a reasonable doubt, and a conviction will not be entered against Mr. Edwards.

[5] A conclusion that Mr. Edwards is probably or likely guilty does not meet the criminal standard. Instead, reasonable doubt lies much closer to absolute certainty than to the civil standard of proof on a balance of probabilities.

The evidence:

[6] While I may not refer to all of the evidence of each witness, I listened carefully and took very good notes. I also listened to the court recordings where I thought a review would be of assistance. I will now set out the uncontroverted evidence followed by a concise statement of the controverted evidence which I will expand upon in my analysis.

Uncontroverted evidence:

[7] On July 12, 2019, S.M.'s parents were separated, and she was residing with her mother and younger sister, A.M., in a sparsely furnished three-bedroom apartment. That evening S.M.'s girlfriend, B.H. and Mr. Edwards, S.M.'s mother's boyfriend, were invited guests driven to the apartment by S.M.'s mother. Before arriving there, she stopped at the mall liquor store where Mr. Edwards purchased a pint of Jack Daniels (JD), a beer, and a four pack of coolers.

[8] Mr. Edwards and S.M.'s mother spent the evening in the living room watching television and on the balcony smoking cigarettes. The girls spent the evening in the mother's bedroom, empty but for a queen size air mattress. The bedroom door could not fully close due to the size and placement of the mattress.

[9] The mother's bedroom is located directly across the hall from the bathroom. The living room is to the immediate right of both rooms with a hallway area that opens up into it. The mother's bedroom wall is adjacent to the living room where a love seat backs onto that wall, and a chair sits across from the loveseat. There is also a television set in the living room. The other two bedrooms are empty.

[10] Mr. Edwards gave the girls a taste of JD.

[11] Mr. Edwards was alone with S.M. in the bedroom at the end of the evening before her mother drove him home.

[12] S.M. told the other two girls Mr. Edwards sexually assaulted her. B.H. called her mother who recommended a report to police. S.M. called her father who came to the apartment and took the girls directly to Mr. Edwards' bunkhouse where he rendered Mr. Edwards unconscious.

[13] S.M.'s father directed the girls to lie to the police about some matters in support of making charges "stick".

[14] Ms. X., a former friend of the M. family, has never met Mr. Edwards.

[15] S.M. was examined by the Sexual Assault Nurse Examiners (SANE). DNA collected from a vaginal sample was insufficient to produce the more commonly reliable DNA profile. A Y-STR DNA analysis concluded Mr. Edwards could not be excluded as the donor of the Y-STR profile estimated to occur in 1 out of 9,773 profiles taken from American men currently stored in the searched database.

Controverted Evidence:

[16] S.M. says over the course of the evening Mr. Edwards was in and out of the bedroom continuously providing alcohol to the girls. He gave her much more with the stated aim of rendering her intoxicated. At the end of the evening, he came to the bedroom where she and B.H. were settling for bed and, at the request of A.M., sent B.H. next door to the living room. With B.H. out of the room, he pushed S.M. down on the air mattress and, over her verbal protestations, vaginally sexually assaulted her. When he inserted his penis into her vagina, her protests grew louder and B.H. opened the bedroom door and walked in. Mr. Edwards jumped off S.M., pulled up his pants, and left the bedroom for the bathroom. B.H. tried to comfort a distraught S.M. and A.M. came into the bedroom followed by their mother. Her mother asked S.M. if she was ok. S.M. told her she was tired and drunk but otherwise ok. Mr. Edwards left with her mother.

[17] B.H. says Mr. Edwards gave the girls coolers and a taste of something he brought to them in a can after quelling a dispute between the sisters. She believes he left a cup behind in the bedroom. At the end of the evening, Mr. Edwards came to the bedroom where there were two blown up air mattress, he told her A.M. wanted her in the living room, and B.H. left S.M. and Mr. Edwards alone. From the living room loveseat, she and A.M. heard S.M.'s protests. S.M.'s mother sat across from the girls and did nothing. Upset, B.H. went into the bathroom, slammed the door, heard someone outside the bathroom door, and opened it to see Mr. Edwards standing there. She went back to the living room and Mr. Edwards went into the bathroom. S.M.'s mother took Mr. Edwards home, B.H. went into the bedroom and S.M. reported being raped.

[18] A.M. says Mr. Edwards gave the girls each a sip of alcohol and took the remainder away. He also gave them a pack of coolers. During the evening he spoke to S.M. about her poor treatment of A.M. At the end of the evening, A.M. asked her mother to summon B.H. to the living room, she did so, and the two girls sat

talking on the love seat. With her mother variously on and off the deck, A.M. heard Mr. Edwards in the bedroom “touching” and kissing her sister and heard her sister’s verbal protests. Neither girl left the love seat. It ended when she heard Mr. Edwards leave the bedroom and go to the bathroom. Before her mother took him home, Mr. Edwards extended an offer to the sisters to stop at a sub restaurant to buy them sandwiches. After Mr. Edwards left the apartment, A.M. and B.H. went to the bedroom, found S.M. crying, and she told them he had raped her. They all cried and tried to figure out who to tell “and really, just really, what happened”.

[19] Mr. Edwards says on the way to the apartment, S.M.’s mother stopped at the liquor store, gave him forty dollars and asked him to buy coolers which she described to him. He went into the mall alone and also purchased a pint of JD and a beer for himself. At the apartment he gave the girls a taste of his drink after they pestered him, but nothing more. Just before S.M.’s mother drove him home, the sisters engaged in a jealous squabble that he and the mother resolved. It led to a conversation with S.M. in the bedroom, with the door open and the others just outside it. He sat on one of the mattresses, S.M. was on the other, he recommended she be kinder to her younger sister. S.M. was receptive to the advice, asked him to stop at Subway to get her a sandwich, he agreed to do so, and she hugged him goodbye. Later that night her father arrived at his bunkhouse and rendered him unconscious.

[20] After assaulting Mr. Edwards, S.M.’s angry father located her mother and the group met in a parking lot where they were directed by him to get “their stories straight”, before going to the police detachment. That meant telling specific lies and making “the charges stick”.

[21] Ms. X. testified that S.M. and A.M. told her, unbidden, that their father compelled the girls to lie to police saying Mr. Edwards sexually assaulted S.M. and fed her alcohol.

Issue:

[22] The only issue is whether the Crown has proven the offences.

Analysis:

[23] There was much conflicting evidence in this case and, as a result, reliability and credibility assessments are key. When making those assessment the Court

considered such things as the general capacity of a witness to make specific observations, their ability to recall what they observed or heard, and their ability to interpret what they perceived and to testify accurately about what they recollect. The assessment also considers whether the witness was sincere, candid, biased, reticent, or evasive. *R. v. D.D.S.* 2006 NSCA 34.

[24] I address the evidence of Mr. Edwards aware of the direction from the Supreme Court of Canada in *R. v. W.D.* applicable to assessing his credibility. It makes sense to start with his testimony, although it is also worth noting I made no findings before considering all the testimony of all the witnesses.

Assessing the testimony of Mr. Edwards:

[25] In July 2019, Mr. Edwards was in Canada on a second seasonal work term residing in a bunkhouse on his employer's farm property. He met S.M. the year prior through the children of his Canadian friends. Later, in 2019 he met her mother and the two began to date.

[26] Mr. Edwards testified with a strong Jamaican accent that the Court was nonetheless able to discern and, as with any non-Canadian citizen, his speech was peppered with words and expressions not regularly used in this region of Canada. As a result, the Court paid careful attention, took detailed notes, and reflected upon what he said. Ultimately his evidence was concise, to the point, and he did not waiver as between direct and cross examination. For example, he was firm that the girls took the coolers purchased by him at the direction of S.M.'s mother, he did not give them to the girls, and he did not see them drink anything other than the sip of JD he provided in response to their pestering. He gave them nothing else. He spent the majority of the evening with S.M.'s mother on the balcony smoking or in the living room watching television. The girls were in the bedroom leaving every now and again to ask him for that taste of his drink, go to the bathroom, and ask him how he was. This was only his second time at the apartment, the first time was brief, and he did not even know the bedroom used by the girls was S.M.'s mother's bedroom until she went in and pumped up an air mattress. He asked her why she was doing so in the room where the girls were hanging out, S.M.'s mother told him she did not think it would be a problem. My sense from his testimony, he was a bit annoyed that the girls were going to be in the mother's room for the night, perhaps instead of him and S.M.'s mother, but that is only a guess on my part because it was not explored by counsel. He readily testified that he addressed a dispute between the sisters at the end of the evening after the mother first interceded. The

squabble involved jealousy between A.M. and S.M. over B.H. and it did not seem inappropriate to talk to S.M. and remind her that girlfriends will come and go but a sister remains. He was clear, he sat on a single blow-up mattress located near the bedroom door while S.M. was on the queen mattress that impeded the door from closing. From his seat he was able to lean his head out the door and ask S.M.'s mother if they were ready to leave. Nothing untoward occurred and he detailed some of the brief conversation with S.M.-when would he come back and would he buy subway sandwiches for her and her sister on his way home. She requested a hug goodbye, he hugged her "appropriately", and left.

[27] The only odd aspect of his testimony, arising from a direct examination question, was about the mood at leaving. He said it was sad and attributed this to S.M. wanting him to buy sub sandwiches. It was not explored on cross examination. Ms. X. testified about extreme food insecurity experienced by the sisters and a comment to her by S.M. that there was more food when Mr. Edward was around. So perhaps that was the reason for his answer.

[28] Otherwise, according to Mr. Edwards, it was an unremarkable evening until he was assaulted by S.M.'s father who accused him of infidelity with his wife and trying to rape his daughter. While a female voice identified him to this stranger, he did not attribute that voice to S.M. despite the context and evidence of B.H. that S.M. accompanied her father into the bunkhouse. This added to his credibility because he did not take, what could have been a fair opportunity, to malign S.M.

[29] On cross examination Mr. Edwards was polite, non combative, and clear, never frustrated and not successfully challenged. For example, asked how many coolers were left at the end of the evening he maintained never seeing them consumed. He denied entering the bedroom and providing alcohol to the girls. His assumption that the girls were jumping on the bed was based on hearing the squeaking sounds of the mattress on the floor. Likewise, he reiterated that he was not intoxicated and brought the remaining JD home. As for the beer, he chased the JD with both that and water. Ultimately Mr. Edwards could offer no explanation for how his DNA was found on S.M. and did not speculate. Asked what she was wearing when he left, his best guess was "a pants and a blouse, sweat something on top".

[30] While he testified on redirect about the sip of JD provided to the girls, that I conclude was only because the focused defence questioning did not afford an opportunity to testify about it on direct examination.

[31] So, dealing with the first step in *WD*, I cannot say that I disbelieved his evidence. It was unremarkable and consistent. The cross examination was neither vigorous nor demanding, it was short and simply consisted of opportunities to reiterate that which was said on direct, and there were no meaningful differences between the two. I did not sense an effort to mislead or embellish.

[32] His testimony was also plausible. B.H. and S.M. were in a relationship, and there was an undercurrent of jealousy between A.M. and S.M. The girls squabbled and it makes sense that a man S.M. described as like a father, would intercede to calm the situation. The evidence of the other girls support conflict between the sisters that night and Mr. Edwards speaking about it with S.M. Mr. Edwards appeared sincere when he told the Court that he conveyed to S.M. that girlfriends come and go but a sister remains. At the same time, it was also plausible that he bought the coolers at the mother's request and had nothing to do with the girls obtaining and drinking them. He is not their father, and their mother must be seen to be in charge of these things. Likewise, if S.M.'s mother took no issue with him giving the girls a sip of JD after being pestered to do so, as I find on S.M.'s evidence, why should he not do so. He was also frank about his annoyance that the large mattress was inflated in the mother's bedroom, plausible given he was dating her, it was his first real visit, and he stayed quite late.

[33] His evidence was also balanced. He did not try to implicate S.M. as the female voice that identified him in aid of the father's assault. He easily could have. He also says he never met S.M.'s father and only assumes he was the assailant based on what the man said to Mr. Edwards-sleeping with my wife and tried to rape my daughter. He was very disappointed that charges were never laid in that matter despite providing a statement to police, following up with them, and signing a consent for the release of his medical records. It is quite inexplicable that S.M.'s father was never charged with an offence.

[34] Finally, his ability to recall and communicate what occurred that night contained the level of detail expected from one who was made aware of the importance of such recollection after being assaulted and accused of rape. He was a credible and reliable witness.

Assessing the testimony of AM:

[35] A.M., younger sister of S.M., was twelve years old in 2019 and fourteen when she testified. I am aware that I must assess her evidence, and also that of her

sister and B.H., with regard to instructions from the Supreme Court of Canada about how to treat the evidence of children. While the reasonable doubt standard is not lowered in cases involving child complainants, a careful assessment of a child's credibility should account for them experiencing the world differently than adults. For example, a child may not find details such as time and date as important as an adult witness, and a flaw or contradiction in a child's testimony should not be treated as similar to the same flaw or inconsistency in the testimony of an adult. That said, I must also consider the age of the witness at the time she is actually testifying. (*R. v. W.(R.)*, 1992 CanLII 56 (SCC), [1992] S.C.J. No. 56 at para. 24 and 26 and *R. v. B.(G.)*, 1990 CanLII 7308 (SCC), [1990] 2 S.C.R. 30 at para. 48)

[36] A.M testified that Mr. Edwards was a person she had only met three times prior to the alleged incident. She and B.H. were friends before S.M. met and the two started dating. She did not recall collecting B.H. and Mr. Edwards or stopping at the mall. Given her age, the Court would not expect such an unremarkable detail to remain in her memory. However, B.H. testified that she watched Mr. Edwards put his arm around A.M.'s waist on the walk back to the car. It seems unlikely A.M. would fail to recollect an adult man she barely knew having his arm around her waist. Moreso in circumstances where the same day that man allegedly sexually assaulted her sister, and her father later encouraged her to lie to police to ensure charges against Mr. Edwards would stick. This also speaks to the reliability and credibility of B.H.'s evidence of which I will say more later in the decision. Finally, S.M. testified that the girls did not leave the car when Mr. Edwards went into the mall and, as a result, only B.H. testified about the walk back to the car. The contradiction leaves the Court to doubt it occurred and concerned that B.H. may have been offering the testimony in an effort to malign Mr. Edwards' actions much earlier in the evening.

S.M.'s mother on the deck:

[37] A.M.'s initial evidence placed her mother in the living room when she says she heard S.M.'s protests from the bedroom, described by A.M. as Mr. Edwards touching and kissing her sister. That testimony was then abandoned in favour of her mother being on the deck and only being present during the end and presumably unable to hear anything. I listened carefully to this flip flop, it is significant that A.M. was so casual and imprecise with her evidence. This in light of B.H.'s evidence maintaining S.M.'s mother was in the living room sitting on the chair during the protests and did nothing. Finally, it was also somewhat bizarre A.M.'s testimony that she could *hear* Mr. Edwards touching her sister.

[38] While her account of hearing her sister's protests and doing nothing might certainly be believable in one so young, it did not accord with the testimony of B.H. who says that she left the love seat to go to the bathroom and slammed the door. A.M. maintained B.H. never left the love seat and remained with her until after Mr. Edwards left the apartment. It is difficult to reconcile two such disparate positions and, even allowing for youth, it is inexplicable that the two girls would have such completely different recollections.

[39] One peculiar aspect of A.M.'s testimony was the manner in which she answered questions- with a questioning tone. I recognize this appears to be common verbal tool of youth, but it is perplexing when the Court is not able to discern a question from a statement. It also signals that a witness may be guessing at an answer or is otherwise unsure. In any event, it is not the signal of a confident speaker and contributes to my finding A.M. was not a strong witness.

[40] She was certainly an interested witness, and the Court is aware it may accept some, none, or all of what she or any witness says. Particularly troubling was the police statement given that night. One could expect such a statement to be fairly detailed, benefit from recent recollection and that it would compare favourably to trial testimony. When a witness testifies quite differently many months later certain allowances are made for a difference in recollection. However, on consequential matters that is a much more difficult concession. In her statement to police taken within 24 hours of the allegations, A.M. says she was yelling at Mr. Edwards to leave the apartment at the end of the evening, suggestive of an immediate and quite visceral reaction to hearing an assault perpetrated on her sister. But that account did not carry through to her trial testimony. She did not adopt her recorded statement played back during cross examination. Likewise, she did not adopt the portion where she tells police her mother joined in telling Mr. Edwards to get out of the apartment. Finally, she did not adopt the purported order of hearing protests and kissing, preferring to maintain the order in her testimony. Ultimately, A.M. says she has no recollection of saying any of those things to the officer, but the authenticity of the statement was admitted by counsel.

[41] The forgoing concerns, added to the evidence of her father's anger that evening and the collaborative efforts to make the charges stick, irreparably impact A.M.'s credibility to such a degree the Court cannot accept her testimony on material points. Ultimately, her testimony appeared contrived, and she was so mixed up that her recollection of the night was unreliable. If that was not enough, the Court is concerned that her testimony about the three girls "trying to figure out

really what really happened”, afforded a powerful opportunity to influence her perception. In that context, her recollection of Mr. Edwards offering sub sandwiches to her and her sister as he left the apartment stands in stark contrast to how she portrayed the end of the evening to police. Her demeanor and manner of speech when affirming the subway conversation convinces the Court this was an actual memory recollected at the suggestion of defence counsel. Finally, the evidence of Ms. X., that I accept in its entirety, strengthens the Court’s conclusion that A.M. was neither credible nor reliable. Overall, A.M.’s evidence was implausible, internally inconsistent and biased. That said, this Court has real sympathy for this child placed in the most untenable and unenviable position by adults in her life.

Assessing the testimony of BH:

[42] B.H. was an interested young witness. She admitted lying to the police and says she now understands “her consequences”. Her statement to police followed the effort of the three girls to figure out what “really happened” moments after S.M. told the girls she was raped. It also followed S.M.’s “scary father” telling the girls the “story” to tell the police.

[43] B.H. testified that she heard S.M.’s protests from the bedroom. On cross examination asked if she told police she also heard kissing sounds. She answered “Yes, but I don’t remember hearing that at the moment”. It is often difficult to explain an impression ascertained from how a witness says something, but the cadence of her answer provided the impression she acknowledges telling an officer she heard kissing sounds but does not actually remember hearing those sounds. Asked on cross examination if perhaps this was the kind of detail S.M.’s father would later tell her to lie about to the police, she mused, “No, he did not tell us to say that”. The testimony about kissing sounds also featured prominently in the testimony of A.M., however, the Court finds it implausible sounds of loud kissing sounds, accepted by A.M. as similar to that in a dramatic television show, could carry into the living room. This given B.H. also testified that while she initially heard S.M. and Mr. Edwards talking in the bedroom, described as mumbling that she could not make out, she did not want to interrupt and so remained in the living room so as not to interrupt their conversation. It is difficult to reconcile one sound carrying and not the other. Aside from S.M.’s evidence that she and Mr. Edwards did not talk or mumble at all, instead he immediately assaulted her once B.H. left the room.

[44] There is no doubt B.H. was also an interested witness. She was in a two-week relationship with S.M. and “wanted to keep her safe”. She readily admitted being terrified of S.M.’s angry father who arrived in the middle of the night and later directed the girls to lie about a number of things to make charges stick. While the Crown submitted the father’s direction was confined to his assault on Mr. Edwards, a review of her evidence did not bear that out. Rather, B.H. testified that he told them all “the story we should tell... if I can recall”- the rape happened, they did not go to the bunkhouse but straight to the police, mom was on the balcony and not in the apartment sitting across from A.M. and me. The Court expects her list was too short. B.H. also says, “her dad scared me to lie about it, he was pretty frustrated that night and it was quite scary ‘cause he was frustrated, and I was only 14”. The Court does not accept the invitation to conclude the lies do not rule out the commission of the charged offences. The analysis is not so simple. After assessing B.H.’s evidence, I find there were a number of matters the group was instructed to lie about. To that can be added those listed in Ms. X’s report that S.M. was told to lie and say Mr. Edwards was feeding alcohol to the girls and that a sexual assault occurred.

[45] Finally, the impact on B.H. arising from ongoing pressure to maintain the lies cannot be ignored. She spent a considerable amount of time with S.M. following the alleged assault, five more months. She testified that S.M. pressured her about the trial and directed her “not to mess this up”. She no longer associates with either sister. She says she now knows her consequences and will not lie. The problem is, after being told in the middle of the night what to say after the late-night assault at the bunkhouse, following a scary situation for children to deal with, and an equally scary adult leading the operation and yelling at the mother to “get here now!”, it is not surprising this young girl was in shambles. I expect she does not know the truth from the stories she was told or the efforts the girls undertook “to really understand what really happened” immediately after Mr. Edwards left the apartment after 1 am. That said, I do accept her testimony that she did not walk in on Mr. Edwards jumping off of S.M. or see him pulling up his pants. It is implausible she did so and has no memory of such an event. Instead, I expect, based on S.M.’s evidence, she was expected to say that in court but did not. S.M. was adamant on cross examination that B.H. saw those things, however I accept the evidence of B.H. that she did not see anything untoward, I find that she did not hear anything untoward.

[46] As previously mentioned, another concerning aspect of B.H.’s testimony was the completely unsupported testimony that she and the girls went to the mall

and waited for Mr. Edwards who walked back with his arm around A.M.'s waist. No other witness said the girls went into to mall, and by extension there was no opportunity to walk back from it with an arm around a waist. It appeared to the Court that B.H. was trying to cast Mr. Edwards in a sinister light well prior to the alleged offences. She was not a credible witness on either point.

[47] Both B.H. and A.M. placed S.M.'s mother in the living room while they heard S.M.'s protests from the bedroom. While I have already determined that A.M.'s efforts to retract and place the mother on the balcony lacked credibility, B.H.'s evidence that S.M.'s mother sat across from the girls and did nothing was implausible. I accept the mother was in the living room however I do not accept that there were verbal protests from the bedroom. While the mother certainly appeared neglectful allowing the girls alcohol, there was no foundation to conclude she was an overall negligent parent. S.M. reports mom's caring concern at the end of the night and Mr. Edwards reported same when the girls were arguing. I cannot accept B.H.'s account that the mother sat, heard, and did nothing with the television off in an under-furnished apartment. Surely sounds such as those reported would carry to all in the living room.

[48] Once again, my findings were made only after considering all of the evidence, including that of S.M.

Assessing the testimony of S.M.:

[49] The complainant, S.M., was fifteen in July 2019 and seventeen when she testified.

[50] In her direct examination S.M. described Mr. Edwards as her "mom's boyfriend, not a boyfriend but getting ready to be my mom's boyfriend and he was going to be my stepfather". Defence counsel probed the "stepfather" characterization and S.M. explained that her mother and Mr. Edwards "were labelled as friends", but they were "getting to know each other in more than a friends way" and "he would pay my phone bill and get me things, so I thought 'he is helping with things we need and helping mom out', so I thought of him in that way, no other way... mom never referred to him as a stepfather, I just thought of him that way, I knew he wasn't, I just looked at him as a father-type because mine was gone". According to the SANE report completed by the nurse at the hospital, S.M. described her assailant as "a friend of a friend's mother". That may accord with how she came to meet him in 2018, but seemed somewhat odd in the context

of the close relationship she described to the Court. However, it does accord with Ms. X.'s testimony that S.M. reported there was more food in the house when Mr. Edwards was dating her mother.

[51] S.M.'s evidence about the amount and type of alcohol she consumed that evening did not find support in the testimony of the other Crown witnesses or that of Mr. Edwards. Finding support in the evidence of others is not a requirement, but it does assist in weighing her evidence. Her credibility on that point is also challenged by Ms. X.'s testimony that S.M. says she was instructed to lie about Mr. Edwards "feeding her alcohol". S.M. described Mr. Edwards offering the girls some JD, and she sought and received permission. It was clear from her mannerisms and speech during testimony that the permission was sought from her mother. That part of her testimony generally accords with the evidence of the other girls, however, she added he continued to come in and out of the bedroom over the course of the evening regularly providing all the girls more alcohol, coolers, and beer that he poured into their cups, or they split amongst themselves. She says he vocalized a requirement that she needed more than the others because she was not drunk enough and gave her much more than the other girls. All three girls consumed the same alcohol products.

[52] There is no dispute the three girls spent the evening together in the bedroom and it could be expected their evidence would accord with that of S.M. However, A.M. says Mr. Edwards gave them the four pack of coolers and a cup of liquor, half full, from which each girl had a taste, and he took the rest away. B.H. says Mr. Edwards gave them coolers and something in a can that they tasted. She is inexperienced with alcohol but did not think it was hard liquor and did not say he called it "burning liquor" as did S.M. and A.M. While she believed he left a cup behind, her evidence on that point was confusing. In any event, the other girls reported neither a beer nor repeated comings and goings by Mr. Edwards nor encouragement that S.M. drink much more than the other girls.

[53] Finally, the evidence of Ms. X., which I accept, strongly supports a directed effort on the part of S.M. to mislead the police, and by extension the Court, about the amount of alcohol consumed and provided by Mr. Edwards; this at the behest of her father who was described by B.H. and Ms. X. as a scary man. That direction and the contrary evidence of the other girls, leads the Court to conclude S.M. was not credible. Ultimately, the Court finds Mr. Edwards gave the girls only a sip of JD, and at worse passed along the coolers purchased at S.M.'s mother's direction. While it is shocking that the mother of such young girls would allow her daughters

and their friend to consume coolers, I cannot but find she did. Afterall, I also find, she directed and paid for their purchase and there was no evidence she drank any of them.

[54] S.M. testified that she was drunk both at the apartment when she finished drinking between 10:30 and 11:00 pm, and still drunk later that night at the hospital during the SANE examination. In order to find she was intoxicated I would have to accept that she consumed more than the four coolers she says were shared equally amongst the three girls. The other girls did not testify that they were intoxicated and S.M. says they drank the same substances. As an aside I do not recall counsel asking the other girls if they were intoxicated. The nurses testified, as a general statement of their duties, that they would do a toxicology collection if there was alcohol involved in an alleged assault. Their report was not filed as an exhibit, and they did not testify that a toxicology assessment was done, or alcohol use was noted in their report.

[55] S.M. says the drinking ended between 10:30 and 11:00 pm leaving her drunk. The alleged assault occurred more than two hours later, and the examination occurred much later still. Without evidence of the impact of the amount of alcohol purportedly consumed, common sense suggests a fifteen-year-old would not be drunk two hours later from at best four coolers shared amongst three girls and a sip of JD. I find she was not a credible witness on these points. Instead, her testimony accorded with the direction from her father to lie about alcohol in accordance with her tearful confession to Ms. X.

[56] The Crown points out that the father's involvement occurred after the alleged offences, and is not something S.M. need concern herself about, but rather the police. With respect, that fails to capture the impact of such a situation for the girls. It is impossible to fathom how scary that man's involvement was for these children. It is implausible they did not know the father assaulted Mr. Edwards in the bunkhouse on a farm property in the middle of the night. It cannot be downplayed the power of the direction to lie coming from the father following his decisions that night.

[57] Other concerning aspects of S.M.'s testimony include her denial of a dispute/incident involving the sisters. Asked on cross examination if A.M. was crying at one point in the evening, she said no and asked counsel, "when?". Although she may have been confusing A.M.'s reported tears at the close of the evening after being told of the assault, such was not clarified and S.M. ultimately

denied A.M. cried at all that night. A.M. on the other hand agreed her sister was cruel and exclusionary leading to Mr. Edwards talking to S.M. She became emotional at this point in her testimony that also included enquiries about her father encouraging the girls to lie. B.H. also agreed S.M. and A.M. were at odds and Mr. Edwards spoke to S.M. about her behaviour a number of times. Mr. Edwards testified that a singular blow up involving the sisters led to him speaking alone to an ultimately receptive S.M. and that heralded the end of his visit. I accepted the evidence of A.M., B.H., and Mr. Edwards on this point. It is unlikely they all recall jealous upset, and A.M.'s emotion during her testimony strengthened my conclusion she was recalling a painful episode of exclusion involving B.H., her "friend before she met [S.M.]", who was in a relationship with her sister. I find it occurred, but I also need to consider just when it occurred.

[58] S.M. says the night ended with her and B.H. in the bedroom and Mr. Edwards directing B.H. to the living room at the behest of A.M. B.H. agrees, but A.M. says her mother summoned B.H., not Mr. Edwards. Mr. Edwards says both B.H. and A.M. were on the couch where B.H. was comforting an upset A.M. following the dispute with her sister and while he spoke to S.M. in the bedroom.

[59] S.M. says while alone in the bedroom, Mr. Edwards kissed her all over and sexually assaulted her over her verbal protestations. While S.M.'s evidence about protestations seems plausible and is supported by the evidence of the other girls, there are some problematic aspects of her testimony. She says her protests increased in volume, the others did not. She says the louder protests led B.H. to walk in and end the assault by her presence. This evidence is highly problematic because, as already stated, B.H. did not agree and A.M. says B.H. did not leave the living room. While the Crown argues S.M. may be mistaken about this aspect given she was being sexually assaulted, that position is difficult to reconcile. S.M. was adamant and argumentative with defence counsel about B.H.'s entry into the bedroom. She also displayed great confidence that B.H. would say the same thing. Having heard her adamant testimony on those points, I cannot agree that she was simply mistaken.

[60] Other concerns arose on S.M.'s description of the sexual assault involving penile penetration, but to the SANE she purportedly described both penile and digital penetration, or at least that is what the nurse recorded in the report. S.M. was not asked to explain the discrepancy or what exactly she reported to the nurses.

[61] On cross examination S.M. denied discussing the allegations with Ms. X. and was clearly distressed and angry at the mention of her name: “What does she have to do with this? Do I have to answer these questions?” She denied telling Ms. X. that Mr. Edwards did not sexually assault her, that she was bothered by the allegations, wanted the case to go away, and made it up to support her father.

[62] Overall, I could not find S.M. a reliable or credible witness. Her evidence was implausible. She was inexplicably defensive about Ms. X and argumentative when asked about the assault- “all doors creak”, “he is a person on top of me getting off of me”, “he hears door and gets off and [BH] came in”, “he was already off pulling up pants as [BH] came in”, “I could see [BH] as he pulled up his pants”, “[BH] could see him pulling up his pants”.

[63] S.M. was also not forthcoming about the meeting with her mother at McDonald’s and she was the only witness to testify about a stop at her grandparents’ house before the police station.

[64] Finally, the Court is also concerned about S.M.’s efforts to downplay her conversations with B.H before trial. B.H. testified that S.M. intimidated and pressured her about the trial.

Assessing the testimony of Ms. X:

[65] Ms. X. was an independent witness. Although she heard S.M.’s mother mention his name, she does not know Mr. Edwards. She says she was once like an aunt to the sisters but now has no relationship with the family. She also knows their father who she described as a scary man who has told her about some equally scary things he has done. While her name was mentioned during S.M.’s testimony, and she did not testify until a number of months later, she was not interviewed by police.

[66] Ms. X. was aware, from S.M.’s mother, that something had happened involving S.M., but did not know the details until a crying S.M. told her, completely unbidden, that she had been coerced by her father to give a statement that Mr. Edwards sexually assaulted her. Ms. X. was empathetic to the girls’ situation and asked questions to clarify. She learned that the girls were told to be afraid of Mr. Edwards and to say he had given S.M. alcohol. None of this was true and Mr. Edwards was more of a father figure, there was food when he was around, and they liked him. This evidence was consistent with S.M.’s description of Mr. Edwards helping her mother.

[67] Her evidence also dovetails with that of B.H. including that the father told them what to say. Defence is correct, how would Ms. X. know any of this if she was not told by S.M.

[68] Ms. X. explained that S.M. told her “this was a set up” by her father to get back in her mother’s life. A.M. was crying throughout saying it was all a mess and they were being bought off by their father “to say stuff”. Ms. X. explained to the girls that the situation was wrong and S.M. said, “well I love my father”. S.M. also told Ms. X. that the allegation about Mr. Edwards feeding her alcohol was not true, if he had offered, she would have taken it willingly. A.M. said their mother knew nothing was going on because she just left. S.M. also told Ms. X. the trial was adjourned due to Covid. Ms. X. says she did not come forward to police due to her fear of the father, a feeling that was shared by B.H. Ms. X. says she is now in a more secure position in her life and, while still concerned, says she had to testify to avoid a potential miscarriage of justice.

[69] On cross examination Ms. X. added, “to make it look more believable they were to say Mr. Edwards fed [S.M.] alcohol”. She also explained that the conversation arose, because S.M. was crying when she arrived at the apartment and was upset that her mother was saying Mr. Edwards was driving by the apartment—the reason Ms. X. was asked to sit with the girls. The girls denied seeing him drive by. Ms. X. says, “they unloaded all of this on me while at their apartment and it was the first time I understood there was a sexual assault allegation from [S.M.] who did most of the talking while [A.M.] cried”.

[70] The Crown is very concerned about the testimony of Ms. X. and points out her testimony was not corroborated by either sister. While not denying S.M. was upset when defence counsel asked questions about Ms. X., he notes “we do not know why she was upset” and the Court should not speculate about her reaction. Rather, he submits the Court should be suspicious why, “out of the blue”, the girls would tell Ms. X. about lies involving Mr. Edwards and the case. The Court should approach her testimony with caution and skepticism, find she lacks credibility, and give her testimony no weight.

[71] After careful review of her testimony, the Court finds her evidence powerful, compelling, and completely believable. There was no discernable effort to mislead, she was forthcoming even disclosing a personal reason why she considered lying about sexual assault such a serious matter. She easily withstood cross examination and her elaboration on direct questions made sense and flowed organically. It is

plausible her relationship with the girls placed her in a position of trust and that is why they confided in her. Her evidence was balanced in both care and concern for the girls despite disapproving of their actions, and plausible in light of not possibly knowing B.H.'s testimony regarding S.M.'s father was similar. Finally, there was no hint of an interest in this case other than a civic duty. There was no suggestion of animus toward the girls, and she does not even know Mr. Edwards. I accept all of her evidence.

The DNA evidence:

[72] The Crown says the DNA sample taken from S.M. is another piece of evidence to combine with the oral testimony of the girls moving the analysis from strictly a credibility and reliability analysis. On the other hand, defence counsel says, "don't be dazzled by the DNA evidence", it is just one more piece of circumstantial evidence to be weighed.

[73] DNA evidence was considered by our Court of Appeal in *R. v. O'Brien*, 2010 NSCA 61, where Beveridge J. reminds that "DNA evidence is simply a piece of circumstantial evidence. Like fingerprint evidence, it merely indicates that a person's DNA somehow got where it was found, not that a person committed the crime." Ultimately the Court must ask itself, given all of the evidence and bearing in mind the Crown's obligation to prove beyond a reasonable doubt sexual contact, can I draw an inference that the presence of DNA not ruled out as Mr. Edwards', means it was found on S.M. as a result of penile penetration. The Court is also aware that "the mere existence of any rational non guilty inference is sufficient to raise a reasonable doubt". (*R. v. Griffin*, 2009 SCC 28, [2009] S.C.J. No. 28 at para. 34.)

[74] Defence counsel reminds the Court there was no evidence as to the bodily source of the DNA, a regular profile could not be obtained and, while the Y-STR analysis does not rule out Mr. Edwards based on 1 out of 9,773 samples, that is not the issue. Rather, how many other people does it match. For example, brown hair standing on its own does not mean anything. He queries just what narrows the profile to Mr. Edwards when the analysis uses a reference group of American citizens, and it is unknown if that reference group relates well to Nova Scotians or Jamaicans. Rather, the analysis is simply an effort to take a reference population and compare it to ours in Canada.

[75] Defence counsel's stronger argument is the ample opportunities on the evidence to find the DNA located on S.M. arose as a result of transference. The options are many- from the mother, from the bathroom, from the mother's car, from the apartment in general, from the hug, from the cup, from the father, from the father's car, from the examination room where the mother interacted with S.M., or even the means used to collect the swab. The opportunities were myriad, and the DNA sample collected was infinitesimal. Counsel suggests it makes sense given the nature of the reported contact- vaginal intercourse- that there would be a more substantial amount of DNA present. While making no finding on that latter point, the Court does not disagree that transference opportunities were numerous.

[76] The collection evidence also concerned the Court. There was a complete lack of testimony from the nurse as to where and how she collected the "vaginal sample", other than calling it a vaginal sample. By way of example, her evidence about collecting the mouth sample was detailed- she swabbed the cheek and teeth. Also, the evidence about glove changing during collection to reduce risk of contamination from the two nurses did not find concurrence. And the assisting nurse testified that she took each swab and placed it in a tube while the collecting nurse says her role was simple to put tubes in envelopes and she never touched the swabs. It was perplexing evidence not clarified by redirect. Overall, the Crown did not, through its witnesses adequately explain the collection process, assure the Court that the nurses followed proper collection procedures to reduce risk of transference, or reduce the Court's concern about the many opportunities for transference. When added to the RCMP DNA expert's evidence that DNA has been known to transfer from a handshake to a penis when later urinating, the Court finds the defence concerns matched my own. I simply cannot rule them out and when combined with the evidence I do accept, the DNA evidence does not move the Court to conclude Mr. Edwards Y-STR DNA was found in the sample as a result of committing a sexual assault. Transference is a reasonable alternative explanation that cannot be ruled out. Moreso when there has been a concerted effort by S.M. to make charges stick.

[77] The Crown argues against the suggested motive to lie. He says it makes no sense the girls would lie in aid of getting S.M.'s parents back together and that evidence came only from Ms. X. However, the Court finds it is not a red herring. S.M. agreed with defence counsel that her parents had only been separated for a few months and she did want them back together. Ms. X. would not be aware of S.M.'s position taken on cross examination. Overall, motive as regard parental unification is a fairly minor aspect and not a "make-weight" in this case. The lack

of credibility and reliability of the Crown's witnesses proved a much higher hill to scale.

Conclusion:

[78] After considering the testimony of all the witnesses, the Court accepts the evidence Mr. Edwards. The main Crown witnesses, despite allowances made for the testimony of children, were neither reliable nor credible. The Crown has not met the heavy burden to prove guilt beyond a reasonable doubt.

[79] Judgment accordingly.

van der Hoek J.