PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. C.M.*, 2023 NSPC 4

Date: 20230123
Docket: 8390365, 8390366
8390367, 8390368
Registry: Kentville

Between:

His Majesty the King

v.

C.M.

Restriction on Publication: s. 486.4

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	July 6, 2022, July 14, 2022, December 6, 2022, in Kentville, Nova Scotia
Decision	January 23, 2023
Charge:	Sections 151, 171.1(1)(a), 173(2) and 271(1) *Criminal Code*
Counsel:	Robert Morrison for the Crown Kyle Williams for the Defendant

By the Court:

Introduction

[1] The complainant was between 13 and 15 years old when her mother's live-in boyfriend, Mr. M., regularly slapped and firmly grabbed her buttocks, massaged her feet and knees as a pretext to touching her vagina both under and over clothing, exposed his penis and testicles to her, made sexually provocative comments about her body, and grabbed her breasts. While away from home on a summer holiday in 2019, she confided some of those details to a relative who in turn took her to the police.

[2] Mr. M. is charged with sexual interference (s. 151), indecent act-exposure (s. 173(2)), and sexual assault (s. 271) between May and August 2019. The Crown offered no evidence on a charge of making sexually explicit material available to a child (s. 171.1(a)). The Crown proceeded by indictment.

[3] The Crown called one witness, the complainant. Mr. M. testified in his own defence, denying all of the allegations. His witnesses also included the complainant's mother who says she saw nothing untoward, and the relative to

whom the complainant disclosed, who did not confirm important details of a conversation with the complainant following the police interview.

Issue

[4] The only issue is whether the charges were proven to the criminal standard-proof beyond a reasonable doubt.

Decision

[5] After reviewing all of the evidence, carefully assessing the reliability and credibility of the complainant and applying the test in *WD*, I do not find the Crown has proven the charges beyond a reasonable doubt. These are my reasons for reaching such a conclusion but first I will set the applicable principles and burdens.

Principles and burdens applicable in criminal trials:

[6] In a criminal trial the Crown bears the burden to prove the elements of the offences charged beyond a reasonable doubt. Mr. M. is not required to prove he did not commit the offences with which he is charged, instead he benefits from the presumption of innocence. Nor does he bear a burden to prove the complainant had a motive to lie, and I should guard against reversing the

burden by asking him to do so. (*R. v. Gerrard*, 2022 SCC 13) Finally, the presumption of innocence remains firmly in place until such time as the Crown discharges its heavy burden.

[7] The beyond reasonable doubt standard is a heavy one and does not equate with probable or likely guilt. Instead, it lies much closer to absolute certainty than the civil standard of proof on a balance of probabilities. Only after considering all of the evidence as a whole can the Court determine whether the Crown has met its burden.

[8] Courts are also cautioned to guard against simply deciding a case by choosing between the testimony of the complainant or the accused. To do so reduces a trial to a credibility contest and that simply cannot be sanctioned. Instead, the Court considers the whole of the relevant evidence, makes findings of fact, and determines, only after weighing all the evidence, whether the Crown has proven the elements of the offences charged beyond a reasonable doubt.

[9] Assessing the testimony of a witness requires the Court to consider its reliability and truth- quite different concepts. In doing so, I brought my focus to such things as intrinsic and extrinsic consistency in the evidence, things said differently at different times, plausibility of the evidence, balance, possible

interest, the ability to recall and communicate what was observed and how that ability might be impacted by such things as the passage of time, emotion, age, or other factors. I also considered whether a witness was being sincere, candid, biased, reticent and/or evasive during testimony. Finally, I am aware that I can accept some, none, or all of any witness' testimony.

[10] On the issue of credibility, I am also guided by the decision in *Faryna v. Chorny*, [1952] 2 DLR 34 wherein the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by determining whether the personal demeanor of the particular witness carried conviction of truth. The real test of the witness' testimony is how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the circumstances at that place and in those conditions.

[11] That proposition, as well as the following, was adopted by our Court of Appeal in *R. v. D.D.S.* 2006 NSCA 34 at para. 77.

> Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the

> evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a …criminal trial?

[12] While I consider the allegations under logical headers related to the specific type of complaint, presenting reasons for judgment in such a manner requires me to point out that I made reliability and credibility assessments only after considering all of the evidence, the submissions of counsel, and the law. Findings of fact were also made only after the foregoing was complete.

[13] Before considering that which is subject to dispute, I will first set out that which is not.

Context and background:

[14] The complainant, her mother, her mother's partner, Mr. M., and her younger brother moved from New Brunswick to a rural property in Nova Scotia in 2017 when the complainant was 13 years old. The move accommodated Mr. M.'s change in employment and he was described by the complainant as the first father figure in her life.

[15] The complainant was responsible for the care of a few horses on the rural property where the family also had a number of dirt bikes. Her mother suffered from depression and her brother was a loner who spent a significant amount of

time in his bedroom. The complainant's other sibling resided in New Brunswick with extended family.

[16] Mr. M. and the complainant's mother married prior to the complainant's report to police in July 2019 following the initial disclosure to a cousin while out of province visiting family. That initial disclosure included some details of the allegations and led the cousin, Ms. H., to take the complainant to a police detachment where she provided a statement while Ms. H. waited in the car. The complainant provided her statement to a police officer who was accompanied by a social worker. I will now consider and assess the contested evidence, after setting out the elements of the offences.

The Elements of the Offences of Sexual Assault and Sexual Interference:

[17] *R. v. Ewanchuk* 1999 CanLII 711 (SCC), [1999] S.C.J. No. 10 remains the leading case on the elements of the offence of sexual assault. To be convicted of sexual assault, the Crown must prove beyond a reasonable doubt the "two basic elements": (1) that the accused committed the *actus reus* of unwanted sexual touching, and (2) that he had the necessary *mens rea*, intention, to touch the complainant knowing she did not consent (para. 23). The *actus reus* is established by proving there was intentional touching, and that the touching was

sexual in nature. Both are objectively assessed. While absence of consent is subjectively assessed, lack of consent is not an issue in this case given the age of the complainant (para. 25).

[18] Whether touching was intentional requires the Court to consider all the circumstances surrounding the acts, including the nature of the contact and any words or gestures that may have accompanied it, along with anything else that indicates the accused's state of mind at the time the touching occurred.

[19] Sexual assault is a general intent offence. The Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement (*Ewanchuk*).

[20] Sexual interference involves a similar burden of proof with the distinction that the touching must involve the body of a person under sixteen years of age.

The Elements of the Offence of Exposure:

[21] Section 173(2) CC requires the Crown to prove beyond a reasonable doubt that Mr. M. (1) exposed his genitals (2) to a person under sixteen years old (3) for a sexual purpose. Clearly the complainant was under sixteen years old, says

he exposed “his testicles”/penis while seated on the living room couch, and the Court is asked to conclude that exposure was done for a sexual purpose.

The Evidence of the Witnesses:

[22] The complainant was eighteen years old when she testified about events that she alleged occurred when she was between 13-15 years of age. As a result, the Court is cognizant of the Supreme Court of Canada’s direction in *R. v. W.(R.)*, and while the reasonable doubt standard is not lowered in cases involving child complainants, a careful assessment of a child’s credibility should account for experiencing the world differently than adults. For example, a child may not find details such as time and date as important as adult witnesses, 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)

[23] The complainant’s testimony was not particularly balanced and was at times quite confusing. She argued with defence counsel and sought breaks when it appeared he had successful achieved the goal of cross examination- pointing to

inconsistencies in the account. Her ability to recall was no doubt impacted by age and the passage of time, but why she left out of her police statement significant aspects of the complaints was not satisfactorily explained. That said, it was not made entirely clear the circumstances under which that statement was taken, other than a police officer and a social worker were present, Yet during the taking of that statement she explicitly denied Mr. M. grabbed her buttocks, yet testified at trial that such grabbing occurred regularly and over a significant period of time. Overall, the differences between her statement and her testimony, between her testimony on direct examination v. her testimony on cross examination, I found concerning. These things affected her credibility when considered with the totality of all her testimony. It is useful to consider these concerns and others.

[24] At the outset, the complainant did not profess to have a complete memory of events. She testified “I’ll try my best to be as … detailed… as I can. It's just there's a lot of things I've tried to block out because it's very traumatizing to me…. So, I'm sorry if it doesn't sound correct… with my wording”, “this is what [I] told the officers and what has happened”.

Touching on the barn ladder:

[25] The complainant testified that “there's been many cases of him slapping my bum and also grabbing it and… like a firm grip… And because I had a barn with my horse, every time I went up the ladder, he would grab my ass and push me up, or if I was going down, he would hold my ass and bring me down, *like holding my hips pretty much while he was doing it*”. She explained that Mr. M. would be “right below” her and would have his hands on her bottom and he would grab it “as best he could”. That latter point was not particularly well explained in her testimony. On redirect the Crown Attorney showed her a portion of her statement wherein she told police that Mr. M. would “*hold* her butt” when she was going up or down the barn ladder. I note, waist holding is not the same as buttock grabbing, and she does not appear to have mentioned the latter to police.

[26] The complainant testified that she does not recall Mr. M. saying anything to her during the barn touching incidents but does recall telling him to ‘stop’ or ‘I don't need help’. Finally, she says she did not require his assistance and did not ask him to touch her, adding the height of the small barn did not present any issues for independent climbing.

[27] With respect to frequency, she estimated Mr. M was in the barn with her on weekends and overall “probably” four days out of seven days, “to be safe”, but

it could have been more often “because he was only ever at the barn for a minute or two”, thus suggesting the individual interactions were exceedingly brief.

[28] At the outset, I will say that I do not find it was established beyond a reasonable doubt that the alleged touching was done for a sexual purpose. As a result, I do not find these incidents constituted a criminal offence. While the complainant conveyed discomfort, without more I cannot conclude the touching constituted sexual assault.

[29] Sexual assault is a crime of general intent, and proof of sexual motivation is not necessary to establish *mens rea* (*R. v S.(P.L.*), [1991] 1 SCR 909 at 918, 923–924), although the intent or purpose of the person committing the act is a factor to be considered in determining if a sexual context is visible to a reasonable observer (*R v K.A.*, 2017 SKCA 39 at para 7 and *R v Lutoslawski*, 2010 SCC 49, [2010] 3 SCR 60).

[30] The touching was not accompanied by words of a sexual nature and could certainly be considered a straightforward helping. Some people are, rightly so, quite nervous around ladders and people climbing them. However, Mr. M. testified that he did not ever help her up a ladder, noting the ladder was a short

one in a low barn and she did not require assistance. He did not rule out helping her get on a horse, but she did not mention that and was not asked about it as I recall.

[31] An objective person viewing this situation would come to the conclusion an adult was helping a child up or down a ladder. I say this aware that I can accept some none or all of what a witness says. The complainant and Mr. M. both testified that the ladder was short, and she did not require help. I find that touching a child in such a manner either up or down a ladder is not objectively sexual touching based on the evidence of the complainant. The purported touching was brief, she was on a ladder, touching the bottom/waist of a child in these circumstances can certainly make objective sense, and all agreed Mr. M. was there to help her as encouraged by her mother. The complainant suffered from arthritis in her knees and foot pain, and she was climbing up the ladder to retrieve heavy saddles and the like. Perhaps Mr. M. does not recall helping her because it was so inconsequential, but in any event, I find the charge has not been proven. It now makes sense to move on to the other allegations.

Slapping and grabbing buttocks:

[32] Ms. A. also testified that Mr. M regularly, “every day for multiple times a day” slapped her buttocks and grabbed her buttocks forcefully. The context of that touching, she explained, involved him coming up behind her and doing so, and “sometimes it would just be a slap, other times it would be grabbing”. She says this touching occurred both inside and outside the house, for example when she was engaged in barn chores such as scooping manure - “of the incidents, I'd say, for slapping my ass and grabbing, it happened outside, although there was still many times it has happened inside when no one was home”. In addition to not occurring in the presence of others, she says it occurred often when she was simply walking around the house. My sense, she alleges opportunistic touching that was regular and persistent. She was quite emotional during this portion of her testimony.

[33] The complainant provided detail with respect to a specific incident that occurred in the house. She says she was in her pajamas washing dishes when Mr. M. came up behind her “slapping” her buttocks, she then added “or he would firmly grab it and like hold it.” It was not clear to the Court if the grabbing and slapping both occurred during one incident of washing dishes or if she was providing an overview of many incidents while dishwashing. She also demonstrated the grabbing with a two-handed scooping motion.

[34] The complainant says during the incidents of touching, Mr. M. would sometimes say “you have a nice ass”. There were multiple times when she would “get defensive” and tell him she did not like it and not to do it because it made her feel uncomfortable. She described his reaction to her protests- “he would get all mad and be like, why are you so selfish, you're such a bitch”. As a result of the chastisement, she says she “felt sad and would cry or something”, and the next few times he touched her she would not say anything because she believed she was in the wrong. She testified that she now realizes she had the right to say no. My sense from her testimony about those verbal responses, they were in reference to the general touching and not the aforementioned barn ladder touching in which she testified that she told him she did not need help.

[35] On cross examination, the complainant agreed that her police statement was true, confirmed she did not review it prior to testifying at trial, and acknowledged it was taken mere days after the final incident.

[36] After agreeing with defence counsel that her statement addressed regular, almost daily, slapping of her buttocks, defence counsel proposed that she did not, however, tell police that Mr. M. also *grabbed* her buttocks. After disagreeing with that proposition, the complainant reviewed a portion of her

statement in which she advised police that Mr. M did *not* grab her buttocks. Her explanation for the discrepancy is as follows:

> Q. And so my next question is, why would you tell the interviewer that Mr. M. didn't grab your buttocks if, in fact, he did?
>
> A. To ... because I was ... there's been a lot of incidents, and I don't want to say that every incident he has grabbed my ass. Because that would be wrong. But there has been times where he grabbed my ass, and what I was saying in the statement is he would slap my ass but the times he would slap my ass he wouldn't grab it. But like, if we were in the barn he would grab it. Like, if I were to go up or down the barn ladder he would grab my ass, but like, if I were to be standing, like, in the kitchen or in the living room or anywhere he would slap it. This is just a lot. Okay? I'm sorry. (crying).

[37] Defence counsel continued, asking her to agree that nowhere in her police statement did she ever use the word *grab*. Recollecting that the statement was not reviewed before trial, the complainant testified as follows:

> A. I don't know because I don't remember what I said in the statement with them. I don't remember. So I don't really know if ... what to tell you.

[38] Ultimately, she conceded it was possible she did not use the word *grab*, adding "but I also do believe I mentioned the barn and ladder incident". As previously mentioned, she did tell police that Mr. M. would "*hold* her butt" when she was going up or down the barn ladder. So, while she mentioned the ladder incident, she did not describe it to police as a grabbing of her buttocks in the same manner she did during direct examination, nor did she complain of frequent grabbing outside the barn. I agree with defence counsel, this is a

difference of which the Court should pay careful attention, as her testimony at trial rendered the complaint somewhat more serious in nature and described a repetitive action that differed from what she initially told police in a statement provided very close in time and while she was three years younger-15 years old.

[39] It is worth noting that in many cases the buttocks can certainly be rendered a sexual area of the body, and the touching or grabbing of a teenager's buttocks by an adult man can support a sexual connotation. Doing so persistently in the face of protest from the recipient, doing so only when others are not present, accompanying the action with somewhat lewd comments about the body part, and reacting by calling the child a name when she protests, all combine to strongly support a conclusion touching that area of the body is done for a sexual purpose. Ultimately the Court must test the evidence.

[40] I should start by saying that it is not realistic to expect a witness to testify about something that happened years ago with perfect recollection. Most witnesses will need to have their recollection called to mind before they testify in order to refresh their memory. The complainant testified that she did not review her statement to police before testifying and that cannot be ignored by the Court. I will not, however, speculate as to why that occurred in this case. There are myriad reasons for not doing so ranging from not attending trial

preparation meetings to the individual practices of a crown attorney. That said, this particular Crown attorney has a reputation for being exceedingly diligent and I have no doubt he did everything possible to prepare the witnesses.

[41] Given the array of interactions and the different locations over a period of time when the complainant was still a young teenager, it should perhaps not be surprising that she has an imperfect memory.

[42] It is true that something said differently, for example, on direct v. cross examination can have meaning when assessing witness credibility and reliability. It appeared she was testifying about slapping and grabbing interchangeably both inside and outside the house, and it seems somewhat difficult to accept that such a thing could be confused so as to deny grabbing when providing a statement shortly after the final incident. Because she clearly accepted that there is a difference between slapping and grabbing, and I am left somewhat concerned about her ability to accurately relay events, her credibility takes a hit here.

[43] Also, despite the purported regularity of the slapping/grabbing, the complainant provided very few specific examples- while cleaning up manure,

on the barn ladder, and while washing dishes. Her evidence lacked valuable detail and was overall inconsistent and imprecise.

[44] Cognizant of the fact the complainant was quite young at the time, combined with her general 'young affect'- not recalling the month that follows July, I will say I do not find it particularly surprising that she used the word *grab* in testimony but not with the police, however it cannot be ignored that she denied grabbing in response to a specific question posed by police. It is, however, fair to say the slapping and grabbing pale in comparison to the other allegations.

Vaginal touching every week or every other week:

[45] Ms. A. also testified on direct examination that "more or less" a few nights a week Mr. M. would give her a 20–30-minute leg massage while the two were seated on the living room couch. The massages were sought out by her and appreciated because they relieved the arthritic pain in her knees and foot pain from doing barn chores.

[46] The complainant recalled an occasion when her mother came into the living room and Mr. M. stopped such a massage. Afterward she asked him why he stopped, and he told her "mom thought it was inappropriate". Mr. M. testified denying anything of the nature occurred, and says his wife never suggested

there was anything inappropriate about him massaging the complainant's legs. Asked on cross examination if her mother was in the room *many* times when Mr. M. rubbed her feet, she denied it. Her mother would testify that she was present during leg rubs, was not concerned about them, and did not express disapproval to Mr. M.

[47] The complainant explained that it was during leg massages, when she and Mr. M. were alone, that he touched her vagina. She testified that there was "a time when it was over my underwear and there's been a few incidents where it's been under, and he's actually touched ...the skin... of my vagina and pretty much trying to finger me". She says "every time" he would "go for" her thigh and panty line, and the vaginal touching occurred probably once a week. She explained that she tries not to remember, but confirmed that touching occurred a fair number of times both over and under her underwear and described the action of Mr. M. sliding his fingers under her underwear and moving his hand until he touched her vagina.

[48] She says the touching was always short lived as she would "quietly freak out and I would just leave" or sit up and try to avoid it. She did not say anything to him and did not know how to react.

[49] While it was unclear if she was referring to these specific touching incidents, the complainant later testified that Mr. M. would have a “hard on” when he was touching her, otherwise there was no particular detail about that observation.

[50] On cross examination, defence counsel was clearly taken aback by the complainant’s testimony that the alleged vaginal touching occurred more than once. He challenged her testimony about repeated touching by once again drawing attention to her police statement:

> Q: [do you recall telling police]…“Mr. M. has <u>almost</u> touched your vagina a lot of times but he's only ever ... or he's only actually touched your vagina once. Do you recall that?
>
> A. Sorry ...
>
> Q. Saying that.
>
> A. ... can you re-say that?
>
> Q. Yeah, of course. Yes. So do you recall telling the interviewer that ... and I'll break it down into two pieces because it kind of was a bit of an unfair question now that I think about it. So, do you recall telling the interviewer first that there was lots of times where Mr. M got close to your vagina?
>
> A. Yes, I remember that.
>
> Q. Okay, and do you recall telling your interviewer ... or the interviewer that Mr. M only touched your vagina on one occasion?
>
> A. I remember saying that to [my cousin], because at that time when I first said it, I didn't want to let her know it was more. Because when we were talking at [another relative’s house] I said, Yes, [he] has touched my vagina once. I didn't ... I felt wrong for ... if I say more. So then I just ... I ... I ...
>
> Q. Did you tell Ms. H that Mr. M. touched you under ... on the vagina underneath the underwear?
>
> A. I don't know. I don't remember. I don't know. I want to go home. (crying)

[51] The complainant was visibly upset during this portion of her testimony, but never did answer counsel's question. It was interesting that she explained what she told the relative and that somehow translated into telling the police something other than what she testified to on direct examination. Her testimony on this point was less than candid and evasive, quite concerning, and caused me to doubt her veracity. Overall, she was neither a credible nor reliable a witness to these allegations.

[52] She also explained that immediately upon providing the police statement, she joined Ms. H. in the car where she told her the vaginal touching happened more than once, and understood Ms. H. would pass that additional information along to the police. She also agreed with defence counsel that she did not tell anyone else that vaginal touching occurred more than once and that included the Crown Attorney before trial.

[53] Ms. H. testified that she was the recipient of the complainant's initial disclosure, took her to the police and social worker to provide a statement, and waited for her in the car. When the complainant returned to the car, she was crying, but there was no mention of more than one incident of vaginal touching and no conversation whatsoever about Ms. H. passing along such information to the police.

[54] Cross examination continued addressing whether the complainant. told the police interviewer that the vaginal touching occurred over or under her underwear. She could not recall. Asked to review her police statement the following exchange occurred:

> Q. Okay, and having read that passage,**. would you agree that you told the interviewer that Mr. M. touched your vagina over your underwear?
>
> A. Yes, because that was the first incident with it. The first incident was over. The first few times where ...
>
> Q. Right, but again, you had told the interviewer there was only one time, though. Correct?
>
> A. I told the interviewer ... yes.
>
> Q. Okay.
>
> A. But there was more.
>
> Q. And you had said earlier you told the interviewer everything that you knew at the time of the interview?
>
> A. Everything that was coming to my mind, yes.
>
> Q. Right.
>
> A. Because there's so much that goes through, I don't know what to say.
>
> Q. And then it was on the drive home that this recollection came ...
>
> A. As I recall, yes.

[55] Ms. A. was also challenged with respect her reaction to the vaginal touching. She testified on direct examination that when Mr. M. touched her vaginal area she would freeze then get up and leave to go to her horse. Counsel explored the end of that touching in light of her direct testimony that the touching occurred more than once. She explained that she would both freeze and scoot away. She

clarified the first time she moved back right away and did not freeze, but on the subsequent occasions she would freeze and then move away.

Attempted insertion:

[56] After testifying on direct examination that Mr. M. tried to insert a finger in her vagina, she agreed under cross examination that she also did not mention this in her police statement. She explained that she does not want people to know and still does not want people to know. She was young and did not want those words to come out of her mouth. Despite agreeing she told police everything, she left this information out because she was young and did not know what was happening. The complainant offered the lack of a father while growing up meant she did not have context to know that what Mr. M. was doing to her was wrong.

[57] Defence counsel pointed out that she protested the buttock slapping that was less serious. To this I would say, not wanting to be touched and slapped on the buttocks and her protests were, she says, met by humiliation and self doubt when Mr. M. called her selfish. It is readily apparent how these words would add to a child's confusion. Also, it is not inconsistent to both reject being touched and fail to understand what certain touching means in one so young.

[58] Counsel was also concerned about the difference between the complainant and Ms. H.'s recall of the conversation in the car after the statement was provided to police. I found the complainant's cousin, Ms. H., both credible and reliable. She was compelled to bring her young relative to the police, not an everyday occurrence, and seemed to genuinely care for her. She appeared surprised when asked if the complainant talked about additional vaginal touching in the car after leaving the police statement. She denied both that and an expectation she would contact police on behalf of the complainant to provide more details of the alleged offences. This is something one would surely recall in these extraordinary circumstances. Overall, she did not resile from any of her testimony.

[59] With respect to the vaginal touching, defence argues troubling inconsistencies in the frequency of that act weaken the complainant's credibility. Likewise, credibility was impacted by the confusing testimony about the touching taking place over and under her clothing. She maintained that she told police everything that happened, everything she knew at the time, but on cross examination explained that she recalled things later such as the weekly touching both under and over her underwear, thus one incident became many and different. I agree this testimony was cause for concern. It was clear defence

counsel did not expect the testimony of multiple incidents of vaginal touching, and it is always disconcerting when such things occur in the course of a trial, especially a criminal trial where the defence can expect full disclosure in advance.

[60] Defence counsel also points to confusion in her evidence as to whether she froze during vaginal touching or moved away. She says she did both. That was explained by the additional incidents of vaginal touching, but appeared to be an improvised and evolving narrative.

[61] Defence also asks the Court to reject her explanation for why she did not tell police about the attempts to “finger me”, vaginal penetration, and reject her explanation that she was young and did not want to say those words to the police interviewer.

[62] One defence argument I can easily dispense with asks the Court to engage in impermissible speculation about whether actions taken by the complainant make sense if she was really being assaulted- accepting foot rubs, allowing another after the first touching. The complainant’s evidence on that point made sense and shows why it is unacceptable to engage in reasoning based on what one thinks a victim should do. She says she was young, did not have a father,

did not understand what was happening, and hoped he would not do these things again. That she recalls her mother suggesting it was inappropriate is also not surprising; that her mother recalls none of this but says she saw Mr. M. give her daughter a leg massage a few times and thought nothing of it, likewise so. Clearly the complainant's mother had no idea what was going on in her home, and one might say, they never do. That said, it would be expected she would recall seeing leg massages, and I find she did. Her mother saw him do it a few times, had no concerns about it, and did not tell him not to do it.

[63] Mr. M. testified denying vaginal touching, and all the allegations. I could not find flaw in his testimony. The Crown has not proven the vaginal touching charge to the criminal standard. There are a few more charges to address.

Exposing genitals and inappropriate comments:

[64] The complainant also testified that Mr. M. would, while in the living room, have his fly down and she could see his testicles. This she believed started in 2017 when he also started saying inappropriate things about her body. The other touching actions, she explained, occurred from 2018 onward until she left the house in 2019.

[65] After confirming that timeline, the complainant continued on cross examination:

> Q. And do you recall telling the interviewer that the ... that Mr. M. didn't start making inappropriate comments until after Christmas, the Christmas holiday, in 2018? So that would be 2019. Do you recall?
>
> A. I ... I don't. I don't know.
>
> Q. That's okay.
>
> A. Do you think I could just have a minute?

[66] After taking a break, cross examination continued:

> MR. WILLIAMS: Okay. Okay. **., I ... the last thing we were talking about was the time that Mr. M.'s inappropriate comments started, and my notes indicate that you said that you could not ... you did not recall telling the social worker that the inappropriate comments started after the Christmas holiday of 2018. Is that correct that you don't recall telling the social worker that?
>
> A. I'm sorry. It happened, like, when I was a child, and it was very traumatizing during the time that ... I don't ... I'm very confused.

[67] Given her lack of recall, she was provided the police statement once again for review, but maintained no recollection of what was written there which she attributed to her age at the time she gave the statement.

[68] Also asked if she testified on direct examination that the touching “was occurring since 2017”, she testified that she did not recall exactly when it happened but generally agreed with counsel. Asked if she told the interviewer it occurred in the last few months prior to giving her police statement in August 2019, the complainant testified:

A: I'll ... I'm saying yes to that, but to clarify myself, when I was talking to her and what I meant by the inappropriate actions was the rubbing up my leg and touching my vagina and more so, like, grabbing my ass. But before those few months there was still minor incidents.

Q. So you're saying that you recall telling the social worker that the acts occurred within three months, however, what you meant to say was that you were only referring to the touching of your vagina and the slapping/grabbing of your buttocks.

A. Well, yes, because I was a child who did not know what was happening. I didn't know what I was supposed to say or what I was doing.

A. I was very scared, and just talking to a stranger, I'm not fully understanding everything she's saying to me.

Q. Did you tell the interviewer that those actions started three months or within a few months prior to giving your statement?

A. I apologize, but I don't recall. Like, I'm trying. I haven't thought about that ... everything that has happened in, like, years and now I have to talk about it as best as I can and...

Q. Mm-hmm.

A. ... there's still a lot that ... I don't know. It's just blurry at this point because I've chose to forgot it.

[69] Counsel asked her to agree that there is a big difference in a timeframe between 2017 and 2019, and mere months. She agreed. Defence counsel asked what she would say if he suggested everything complained of occurred within a few months of giving the police statement. The complainant testified:

A. I'm just trying to process that question in my head, and I'm sorry.

Q. That's okay.

A. Could you just please repeat it?

Q. Yeah. Yeah, so I'm ... and what I'm referring to is all of the inappropriate actions that you described today in court…

A. Yeah.

Q. And I'm asking ... I'm basically suggesting to you that all of those things ...

A. Okay.

> Q. ... started to occur three months prior ... or a few months prior to you giving your statement.
>
> A. I would say no because it went longer than a few months.
>
> Q. Okay.
>
> A. Certain things were ... yes, only a few months. At the end of it some things were a lot longer than a few months. If you understand what I'm trying to say.

[70] While the complainant revisited her timeline and appeared to move it back to 2017, her evidence was overall quite difficult to follow.

[71] Continuing with the alleged exposures, she testified that she saw Mr. M. lying on the couch with his pajama bottoms unbuttoned. She could see his genitals and he would not do or say anything. She would be seated at the other end of the couch, and he would “be rubbing his genitals”, and she would look over and his penis would be there. She says this last occurred a week before she left the house for last time in 2019.

[72] Mr. M. testified denying the allegation. He offered the possibility that he adjusted himself for comfort after changing into pajama bottoms from his work clothes, but denies any exposure.

[73] On cross examination the complainant testified as follows:

> A. Yeah. I ... I clearly have seen him touch his balls underneath and above.
>
> Q. Okay, and I ... sorry if I keep asking you this question, but you're certain of that?

> A. Yes, I'm pretty sure I'm certain of the things that have happened to me. Oh my God. I was young. I didn't know what was going on. So I didn't know what to say when all these adults are asking me a million different things. So of course there was things that were left out when statements were happening because I don't know what I was doing. I was a traumatized kid, and I still am. I'm 18 and I'm petrified. (crying)
>
> Q. So you're saying that at the time you didn't understand the significance of what was going on?
>
> A. Yes.
>
> (Arguing with counsel)
>
> Q. Okay, and when you gave your statement, you told the interviewer that Mr. M. only touched himself on the couch over his pants. Is that correct?
>
> A. I don't remember. How many times do I have to say I don't remember things from the interview? Oh my God. (crying) I have seen him jerk off in the living room. I have seen him touch his balls over his pants. I would hear him moan.

[74] The complainant agreed with defence counsel that she told the police Mr. M. touched himself over clothes, her memory was better then, and she was trying to tell the truth. She explained once again that she left things out of the statement.

> It looked like he was scratching his balls under his pants but then he was ... he would also do it above his pants. So, I don't know. Maybe he didn't make ... maybe he didn't want me to see it. I don't know. But the things that happened, they happened. (crying)… But over his pants was a sexual motion.

[75] Ultimately, under cross examination she agreed Mr. M. touched himself over clothes when she was in the living room, and not under clothes. She agreed that she did not mention that during direct examination. She added, “maybe he did not want me to see that”.

[76] Defence counsel argues the evidence did not support conviction because it was not established beyond a reasonable doubt Mr. M.'s actions were done wilfully or with intent, in the presence of the complainant. If his genitals were exposed, the Court is asked not to rule out accidental exposure without intent. Defence says it is likely Mr. M. was simply adjusting or scratching himself and not expecting the complainant to see. The Court should likewise not ignore the complainant's mother's evidence that Mr. M was unable to achieve an erection between the spring and October following a motor vehicle accident, thus rendering an account of an erection suspect.

[77] The Crown also had concerns about her testimony involving seeing his penis or his testicles and agrees this was not the strongest charge. He would not be upset to see a finding that the case for a s. 173 offence had not been proven beyond a reasonable doubt.

[78] Overall, I found the complainant’s evidence very confusing, unreliable, and not consistent as between direct examination and cross examination. I also considered Mr. M.’s evidence on that charge. He was fair and balanced with respect to his denial and the offer of a possible innocent explanation. He was unshaken on cross examination, and I was left doubting exposures even occurred. I should not be taken to be preferring the evidence of one witness

over that of the other, but given the concerns I had with the entirety of the complainant's evidence, of which I will say more, the Crown has not discharged its burden to prove exposure and will not have a conviction on this charge.

Touched on the breasts while riding dirt bikes:

[79] Finally, the complainant testified that she and Mr. M. rode dirt bikes and stopped at a beach. She says he tripped her and grabbed her breasts as they fell. She was not, however, clear as to how she was tripped. Her evidence was imprecise as to the position of Mr. M.'s hands and she was extremely argumentative with defence counsel.

[80] Asked to refer to her police statement, she confirmed telling the interviewer she tripped, but explained to counsel that she "got tripped on something"- his foot or a rock, and is now confused by the questioning. She apologized saying she meant the same thing but now realizes it could mean he tripped her v. she tripped on his foot. She added:

> …but no matter what, he ... I got tripped by either him, by me, and yet overall it doesn't matter who fucking tripped me. Overall, he grabbed my boobs and made comments on them, which is uncomfortable and it's not okay. Why can't you just focus on that? (crying)"
>
> A: he kept moving between ... like, beside me or behind me. So his feet were getting all tangled up with mine….

> A. Yes, because he ... when ... oh my God. He grabbed my boobs when he caught me. What is so fucking difficult about that? Okay? He ... he brought his arms around me and grabbed my breast. I wasn't falling, like, off a cliff. It was just a little stumble and he grabbed my breast and then we both went to the ground. And that's when he said, 'You have nice tits', or whatever the fucking thing was. Oh my God. (crying)

[81] Mr. M. testified agreeing they rode dirt bikes, but says any stops were in aid of him smoking which he did not do near the children. He denied tripping, falling, and grabbing of the complainant's breasts.

[82] The Crown says with respect to the grabbing of her breasts on the dirt bike ride, there is not just one way to grab a person, and overall, she says it happened when they fell, his hands were on her breasts, and he made an inappropriate comment. While her evidence is not perfect, she was emotional, adamantly upset, yet forced herself to carry on with her testimony.

[83] The Crown says it makes sense the complainant, a child at the time, would be confused about what was going on. And while her evidence was not perfect, it is not expected or anticipated that the evidence of an 18-year-old testifying about things that occurred when she was 15 years old would be held to such a standard. However, the reliability and credibility concerns I have with the testimony of the complainant were apparent during this portion of her evidence. I am not satisfied she is a careful and accurate historian.

[84] Defence says Mr. M. provided a straightforward denial, says nothing happened between him and the complainant. He cannot think what brought on these allegations that he says, “came from out of left field”. Defence counsel says his evidence cannot be rejected. The Crown says his evidence should be rejected as the Court should look at the entire context.

[85] I remain concerned about the complainant’s credibility and reliability and am not convinced the incident occurred. I also do not reject the evidence of Mr. M. The Crown will not have a conviction on this charge.

[86] A word should be said about a concern raised by the Crown. The Crown was troubled that at times defence counsel invited the Court to engage in stereotypical reasoning when considering the evidence of the complainant. He says it should be clear there can be no generalizations about what a child is expected to do in the context of ongoing sexual assaults. For example, she is neither expected to stay out of her living room nor stay away from Mr. M. who lived in her house. It is not unexpected that she would go on a dirt bike ride with him or find him in the barn, and the Court is reminded that there is no reasonable household sexual assault victim given the wide range of human experience. The Crown says the complainant was overall a reliable and credible witness, and ignoring myths and recognizing that she was a confused child who

was being touched in her new home, away from her extended family in New Brunswick, her evidence makes sense.

[87] Concerns about stereotypical reasoning are commonplace in sexual assault cases. There is considerable appellate case law from which I draw these conclusions. It is an error to rely on assumptions or preconceived notions about how complainants are expected to act, and doing so when assessing credibility is to err in law. (*R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218, at para. 2) Doing so also impacts the truth-seeking function of the court. (*R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.) at 693) Stereotypes impose harsh and irrelevant burdens on complainants. (*R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.) There can be no assumptions about how victims of sexual assault react, including an expectation to engage in avoidant behaviours, nor aspirations cast about delay in disclosing. (*R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275) The danger of stereotypes is they become a standard against which a complainant's behavior is assessed and judged. If the behavior fails to conform with a stereotype, the complainant's evidence could be judged not credible.

[88] While defence counsel suggested a few such points, I was not influenced by any of them. Instead, I assume nothing about how a person complaining of

sexual assault is expected to act. Experience gained over numerous trials certainly instils the sense that there is nothing common about ‘common sense’.

[89] It was also argued emotion can explain inconsistencies in the evidence. For example, inconsistency with respect to grabbing versus slapping, how the breasts were touched, the vaginal touching, the exposure, are all explainable based on age and emotion. But careful testing of the evidence is the task. After carefully reflecting on the complainant’s testimony, I had the sense she was exaggerating. She did not appear sincere during her testimony and was easily flustered. For example, with resect to the exposure charge, and indeed the others, her evidence was imprecise, her report evolved from the time she gave her statement to the dates of trial, and she ultimately appeared to accept a version where she was not meant to see anything.

[90] At points in her testimony, the complainant’s evidence was weak and not supported by that of other credible witness who would, I find, be expected to recall certain events. For example, asked if her mother took her aside for a private conversation in May 2019, prior to the marriage, to ask if there were concerns about the pending marriage, the complainant provided this answer:

> A. I don't remember having a conversation. Mr. M. barely had anything to do with me until we moved to Nova Scotia away from everyone. I had no family in Nova Scotia.
>
> Q. Do ... and I know you don't recall the conversation, but is it possible that in May of 2019 your mother asked you if you had any concerns about her marrying Mr. M.?
>
> A. I remember this, yeah.
>
> Q. So you do recall this conversation in two- ... May 10 2019 now.
>
> A. Oh, if that's the conversation you're referring to, yes.
>
> Q. Okay.
>
> A. Sorry for the confusion.
>
> Q. That's okay. That's all right. So you do recall your mother asking you that question about whether you had any concerns?
>
> A. She said, Mr. M. and I want to get married and want to make sure it's okay with you kids. And my brother was like, Yeah. My sister was like, Yeah. And the I just didn't really say anything.

[91] She testified about a group family discussion and denied a private conversation with her mother about the marriage. The complainant's mother testified that the conversation occurred in private with each of her children and not as a group. She was unmoved from that testimony and appeared sincere and balanced in her recollection. I also found her to be credible and reliable. I say this recognizing that she was an interested witness placed between a daughter and husband and her role could best be described as suggesting nothing untoward occurred because she would have noticed such things. On that point, there is one bit of common sense on which I can certainly rely- sexual assault of children rarely occurs in the presence of witnesses and most certainly occurs in family homes right under the nose of the other parent. That said, her evidence

was valuable with respect to her awareness and lack of concern about foot rubs, and not chastising her husband. Her evidence that the conversation about marriage occurred with each child separately was also credible and certainly memorable given the significance of marriage. I did not detect an effort to mislead.

Conclusion:

[92] The complainant presented as a regular 18-year-old in manner of speech and vocabulary, from the outset she explained that she was trying to forget, had not reviewed her statement for court and was traumatized by the events that occurred when she was young, and they continue to impact her today. These events led to estrangement from her mother and moving away to New Brunswick. It is fair to say the outcome has been far reaching. Her disclosure led to losing her horses for some time.

[93] Many of the issues in the complainant's evidence were not unexpected given her age and the circumstances in which her statement was taken by police in New Brunswick. I will say I am surprised an additional statement was not taken as follow up sometime later to ensure the first was complete.

[94] The Court was not overly concerned that she spoke of more incidents at court than she did to police. In a case such as this with ongoing allegations of numerous incidents, it is not uncommon to hear more at trial than was initially disclosed in a police statement. It is also not unusual for a complainant to provide additional detail to the Crown trial during trial preparation meetings. The complainant offered a reasonable explanation for why such occurred in this case- her age, embarrassment, trying to forget, trauma, and the context in which she spoke to police, however the problems with her evidence were too numerous and remained concerning to the Court.

[95] Ultimately, I am unsure whether I believe the complainant's allegations. She could well be telling the truth, but I am not convinced of it beyond a reasonable doubt. Her evidence suffered from too many frailties. Her credibility was successfully challenged such that the Court was left concerned that her narrative was evolving from that which was initially disclosed to the police.

[96] There is the suggestion she made these things up to perhaps stay in New Brunswick, and that is certainly possible, but the cost of such a move included- losing the horses and contact with her mother and brother. That seems a high price to pay for such a relocation.

[97] While it is possible the complainant's evidence was true, I am also required to apply the *WD* analysis, that I need not recite, to the evidence of Mr. M. After carefully reviewing his testimony, as I said, I am not convinced that I can reject it. Quite simply, he was unshaken on cross examination, very direct with both counsel, and his evidence was overall plausible. I do not know if he was being evasive or lying, but if he was, I did not detect it. Instead, I was left with no cause to doubt his account. He did not resile from his position that none of these things happened. He presented as a plain-spoken person who was dealing with serious allegations and maintained that they did not occur. He mused about some reasons why these allegations might have been made up, but he is not required to prove a motive. Left with those conclusions, and after assessing all the evidence, I simply cannot agree the charges were proven to the high criminal standard of proof beyond a reasonable doubt. While I might be suspicious, that is fortunately not the standard in use to convict a citizen of serious criminal charges.

Judgment accordingly.

van der Hoek PCJ