

PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Vincent Roy Smith*, 2023 NSPC 56

Date: 20230913
Docket: 8552920
Registry: Kentville

Between:

His Majesty the King

v.

Vincent Roy Smith

<p>Restriction on Publication: PURSUANT TO s. 486.4 Criminal Code of Canada</p>

Judge: The Honourable Judge Ronda van der Hoek

Heard: June 15, 21, July 17, 2023, Kentville, Nova Scotia

Decision: September 13, 2023, in Kentville, Nova Scotia

Charge: Section 271 *Criminal Code of Canada*

Counsel: Nathan McLean for the Crown
Zebedee Brown for the Defence

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

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

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

Mandatory order on application

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

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

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

REPORTING OF THIS PROCEEDING IN ANY MANNER THAT WOULD IDENTIFY THE NAME OF ANY INDIVIDUAL WHOSE NAME IS COVERED BY THE BAN IS STRICTLY PROHIBITED WITHOUT LEAVE OF THE COURT. THE INTENT OF THE FOREGOING IS TO PROTECT THE WELFARE OF ANY WITNESS OR VICTIMS REFERRED TO IN THE PROCEEDINGS, AND/OR AVOID PREJUDICE BY ANY PERSONS FACING CRIMINAL CHARGES.

By the Court:

Introduction

[1] The complainant, J.S., resided in the Smith family home for a short-term foster care placement during which it is alleged Mr. Vincent Smith sexually assaulted her on four occasions. He is charged with a single count of sexual assault between dates, contrary to section 271 of the *Criminal Code*. The Crown proceeded by indictment, and Mr. Smith elected trial before this Court.

[2] The Crown called one witness, the complainant, who testified about her recollection of events thirty years prior when she was a teenager.

[3] Mr. Smith, his former spouse, and their son testified calling into question many aspects of J.S.'s recall such as the layout of their house, where various people slept, the types of vehicles possessed by the family, the nature of Mr. Smith's employment, and the unlikely presence of various items on the property. Mrs. Smith also provided important details about the foster placement and her own relationship with Mr. Smith. Mr. Smith testified that he barely recalls J.S. and did not sexually assault her.

[4] Jurisdiction and identity were admitted, as were documents from the Department of Children and Family Services (CFS) confirming the exact dates of J.S.'s placement, and concerns expressed to them by Mrs. Smith. House/property

drawings, various photographs, as well as Mr. Smith's medical records were also entered as exhibits.

Issue and Decision

[5] The sole issue is whether the Crown met the heavy burden to prove guilt beyond a reasonable doubt. I find it did not do so. Before considering the evidence, I will set out the principles and burdens of proof in a criminal trial.

The Principles and Burden of Proof in a Criminal Trial

[6] A trial is not a credibility contest. The Crown's onus is proof beyond a reasonable doubt and that onus never shifts to Mr. Smith 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 the offence of sexual assault has been proven, there is a reasonable doubt, and a conviction will not be entered against Mr. Smith.

[7] A conclusion that Mr. Smith 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.

[8] Not all of the evidence of each witness will be mentioned in this decision, however I listened carefully, reviewed my notes and short portions of the court recordings for added clarification. As in any trial there are certain matters that are uncontroverted and agreed upon by the parties.

Uncontroverted evidence:

[9] The Smiths were foster parents in 1993 in their house located on a rural property. J.S. resided with them for a few weeks during a short-term placement. The Smiths fostered other children at the time and had two young children of their own. All else will have to be determined based on the evidence of the witnesses.

Analysis of witness testimony:

[10] Witness reliability and credibility assessments are key, and in making those assessments a Court considers such things as the general capacity of a witness to make specific observations, their ability to recall what they experienced, observed, or heard, and their ability to interpret what they perceived and testify accurately about what they recollect. These assessments also consider whether a witness was sincere, candid, biased, reticent, or evasive. (*R. v. D.D.S.*, 2006 NSCA 34)

[11] A trial is not a credibility contest with a simple choice between the evidence of the accused and that of the complainant, rather I can accept all, some, or none of the testimony of each witness. In this particular case, it makes sense to start with

J.S.'s testimony, noting once again that while I make findings as I review the testimony of each witness, I did not reach any conclusions until I heard all the evidence and considered the evidence as a whole.

Assessing the Testimony of J.S.

[12] J.S. was an adult at the time she testified about incidents from 1993 when she was fourteen years old. I am aware that I must assess her evidence in accordance with the 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)

[13] J.S. testified describing the summer of 1993, adding on cross examination that it was a "whirlwind", including running away from a residential group home. The

Smith house was, she believes, a transitional placement between residential facilities, and her only home-based placement.

[14] Further, on cross-examination, she also explained “I was not there very long, a couple of weeks or a month” and could not recall whether she had regular contact with her mother, left with her for a visit, or went camping with her for a week. She conceded the latter was possible because her family “used to camp a lot”. Contact with her mother was addressed in the CFS records and suggested J.S.’s short time with the Smith family was further reduced by a long weekend and a week of camping. Such may also account for J.S.’s belief she was once in a car with a social worker, wanted to tell that worker about the allegations, but was afraid she would get into trouble.

[15] Throughout her direct examination J.S. testified that she was twelve years old in 1993 and described herself as “just a skinny 12-year-old”. Under cross-examination she conceded, based on her birthdate and the CFS records, that she was instead fourteen years old in 1993, but added that age does not accord with her recollection.

[16] J.S. described the Smith’s house as “large”, with a somewhat open concept living room/kitchen off of which was a computer room with possibly two computers and two chairs. She also recalled a deck running along one side of the house or

wrapped around to the other. On cross-examination, she was provided exterior photographs of the Smith's house but testified she had no recollection of it or the decks. Instead, she did recall the large shop/barn behind the house "that sticks in my head and seeing Mr. Smith working there". Otherwise, she testified, "I'm not really recognizing this, nothing stands out".

[17] J.S. drew a picture of the inside layout of the Smith house. While unable to recall where others slept, her bedroom and the Smith's were upstairs. J.S. testified that she never ventured around "up there" except to go to her bedroom. However, on cross-examination said she and her foster brothers searched through dresser drawers in Mr. and Mrs. Smith's upstairs bedroom and "located lots of drugs and alcohol". I will say more on this point later.

[18] J.S. testified that the other residents of the house included Mr. and Mrs. Smith, their two young children, six and three years old, a foster brother whom she liked and attended school with over the years, and another young girl of fifteen years who shared a bedroom with a newborn baby. On cross-examination, J.S. rejected the suggestion a second foster boy also resided in the house, instead she recalls only one foster boy of similar age and having a few conversations with the foster girl. J.S. fairly conceded that if she saw a picture of the second proposed foster boy, she might be able to remember him.

[19] While staying with the Smiths J.S. recalled “the children” played frequently in the yard, that there were four wheelers, and walks to the water. On cross-examination, she testified that she actually drove the four wheelers and recalled an incident when she rode over rock piles located on the property, and Mr. Smith being unhappy when she drove out of his sight. She also recalled breaking the rules once when she and the foster brother drove four wheelers off the Smith property.

[20] J.S. says Mr. Smith was “into martial arts” and allowed the foster children to play with his sparring gear. On cross-examination, she described sparring in the gear with the foster boy, recalled a foam headgear pad that she did not wear, and gloves that were not boxing gloves. She talked about chest protectors made of foam that could be kicked or punched without injuring the wearer. When defence counsel challenged her that Mr. Smith did not own such gear, she replied “that’s a lie” adding “I sparred at least once with the foster boy”. Her latter comment suggested she may have exaggerated her evidence on direct - suggesting the sparring was a regular event reduced to at least once.

[21] J.S. testified that in 1993 Mr. Smith looked like the actor Jean Claude Van Dam, was in in his 30’s, charismatic, played music, and was “generally pretty cool”. She says she would not recognize him today if she saw him. On cross-examination, she testified that the man in the courtroom bears no resemblance to Mr. Smith from

1993. With that background, it is now time to consider her testimony regarding the allegations.

Sexual Assault in the Computer Room

[22] J.S. testified that the first incident occurred “possibly” the day she arrived at the house or the next day. She did not yet know anyone and was not oriented to the house. She recalled a couple of computers in a room on the main floor and “they said I could play games on it”. By “they” she clarified she meant Mr. Smith.

[23] After supper, the other people were “running around in the house”. She was wearing a nightie, because that is what she “used to wear” and sitting in the computer room having difficulty figuring out how to play a game or how to turn it on. Mr. Smith entered the small room, which “possibly” had a door that was “open the entire time”. He asked her to stand up so that he could sit and fix the computer.

[24] Mr. Smith sat on a chair, and she stood next to him. He “put his hand up my nightie and was touching my vagina”. The touching did not last long, she was “mortified, frozen, and in shock”. J.S. expanded her testimony on cross examination adding Mr. Smith grabbed her legs with his hands, rubbed them, and put his fingers *in* her vagina “a bit”.

[25] On cross-examination, defence asked J.S. if she recalled other people in the house using computers and to specify the location of the computer room. J.S.

testified reminding counsel “I said I did not get to play a computer game because the computer did not work”. She testified that it was all a ruse by Mr. Smith to get her alone so that he could sexually assault her. She expanded her testimony adding the computer *could* have been in a room, or it could have been in the living room, and she did not, in any event, use it, adding she “felt like it was in a room with walls around it” but could not be sure and was also unsure if the room had a door. Ultimately she has no recollection of anyone using a computer in the house.

Sexual Intercourse on the Living Room Couch

[26] J.S. testified that she was “trying to recall if the second incident happened the same night” as the touching in the computer room, and decided it was either that night or the next.

[27] She explained that after everybody had gone to bed, Mr. Smith told her she could stay up and watch television with him. She recalled thinking “that was cool” and sat on the “not overly long and kind of square” couch.

[28] J.S. says her “foster mother” had gone up to bed minutes before, and Mr. Smith got on his knees in front of the couch, pushed her back, “and had sex with me”.

[29] She recalled no words being spoken, he simply jumped on her, and pulled her panties off. J.S. testified, “I was like ‘no, my foster mother just went up’”. I pause to

say that it is always difficult to understand if a witness is saying that she said something or was thinking something when she opens with “I was like”, nonetheless since she testified that no words were spoken, I conclude those words were thought and not spoken.

[30] On cross-examination J.S. was asked about the exact location of the living room couch, and fairly conceded that she may not have an accurate recollection of the layout of the living room but recalls the couch was pushed against a wall. She also conceded that if the foster girl’s bedroom door was open, one could see into it from the couch.

[31] On cross-examination J.S. estimated the assault occurred between 15 and 20 minutes after she sat on the couch. She also, once again, provided more detail under cross-examination, testifying that while Mr. Smith was on his knees, he took off her underwear and spread her legs. She testified “I’m like ‘no, no’, I was trying to diffuse the situation”. She says Mr. Smith was so quiet and she was wearing a nightie. She says he was pushing her back on the couch and trying to get her underwear off and his penis out of his pants. She indicated that he was doing so with one hand and explained that he was really big, she was a very small person, and it did not take long, the sexual intercourse, it lasted a few minutes. She says it was disgusting what he did to her and was very emotional at this point in her testimony.

[32] J.S. testified on direct examination that after Mr. Smith had sex with her, he told her she had to go to the bathroom and wash his semen out of her, alternatively “Go to the bathroom and rinse myself out”. She believed he said this because he did not want her to get pregnant, and she was meant to use the douche, or a turkey baster, she found on the bathroom sink. She did as she was told. On cross-examination, a portion of her police statement was played, and J.S. was asked if she told the police directly that Mr. Smith told her to rinse herself out because he did not want her to get pregnant. She replied, he said “there is something to rinse out with”, adding she has blocked a lot of the details.

[33] When she returned from the bathroom J.S. sat on the couch and Mr. Smith went into the kitchen and “made the biggest sandwich I ever saw”. She explained that she was hungry, possibly because she did not like the dinner served that night and could not believe he did not offer her food, but instead told her to go to bed.

Under the Deck

[34] J.S. believes the third incident occurred a week or two after the last, when she “was a bit more established” in the household. She testified that Mrs. Smith was away and “all the kids were outside playing in the yard”. “All was good”, until Mr. Smith asked her to get under the deck with him. J.S. testified that she knew he wanted to have sex with her, had already done so, and “why else would he want to take me

away from the other children”. She recalled thinking “you've got to be kidding”, and “I somehow got under the deck”. On cross-examination, she explained that she does not recall how she got under the deck because she has “blocked out a lot of it”. She waited there for approximately five minutes.

[35] Mr. Smith, who she described as stocky, heavy and into martial arts, got on top of her. She recalls being on her back under the deck looking up, Mr. Smith pulled her panties down, and put his penis in her vagina. She says he was hardly moving, and she thought it was because he did not want anyone to hear. His face was in hers, and since then she has been “traumatized” while in close quarters. She testified that his eyes were blue.

[36] J.S. explained that there was not much room under the deck, and her foster brothers were running around calling out to their father. She explained that the situation occurred with “100% stealth”, believes, or feels, as though she said no, felt as though the other children could see from above her on the deck, and explained that she did not want to be caught in that predicament and “have people see”.

[37] On cross-examination defence counsel challenged her evidence with respect to Mr. Smith’s eye colour, J.S. testified “I don’t know if he had blue eyes, he might’ve had blue eyes. Blue eyes is not drilled into my memory and during the sexual assault I had to put myself outside of myself.”

[38] She testified that once again, this incident of sexual intercourse did not last long, but “long enough to mess up my head”, she “got out of there”, and does not recall much about what happened afterward. She does not remember whether Mr. Smith asked her to wash, or specific details of his clothing, but says she expects his clothes were loose.

A Drive to a Community Dance

[39] The final incident, which J.S. “feels” would have taken “place a few weeks after the deck incident”, leaves her unclear as to exactly what happened. In closing submissions, the Crown conceded he could not ask for a conviction on this allegation. It is however necessary that the Court consider it, as all testimony has the potential to impact reliability and credibility assessments.

[40] J.S. explained that there was a teen community dance and “they said I could go”. On cross-examination, she clarified that she did not recall Mrs. Smith having anything to do with the plan to go to the community dance. J.S. explained that, at the time, she was quite a social person and got ready for the dance believing she would have worn her best t-shirt and jeans and taken great care with her makeup.

[41] The hall was located close by, and J.S. believes she could have walked there, but Mr. Smith offered to drive her in his truck. On cross-examination she was

challenged with respect to her evidence that the hall was located close by and testified that she did not recall saying that on direct examination.

[42] J.S. says she accepted the drive but “never made it to the dance”. Instead, Mr. Smith drove to a field, parked the truck, and “a drink was just there in front of me of a sudden”. She believes Mr. Smith may have told her it was alcohol that may have been in a cup. She explained to the Court that she did not want to drink because she was going to a teen dance, and on cross-examination explained that she was pressured to drink by Mr. Smith’s charisma and charm. She added, he said “drink it and I’ll take you to the dance”.

[43] J.S. drank and now wonders, “what was in that drink for me to lose that time”. She added it would not have taken a lot because she “was only twelve at the time”.

[44] J.S. testified that she recalls “coming to”, finding pieces of her clothing off, and her hair and make-up a mess. She was hysterical, scared, and crying. She says she thinks sex occurred because otherwise why were her clothes off, noting her “pants were off, for sure”. She says she does not have any recollection of what she was wearing but remembers coming to and being barely able to walk. She recalls thinking that she did not want his wife to think that she was with her husband and kill her. Pressed on cross-examination about her recollection of not being able to

walk, J.S. testified inexplicably that she does not specifically recall having trouble walking.

[45] She remembers Mr. Smith bringing her back to the house and begging him not to do so because she believed his wife would look at her and know that something had happened. J.S. testified that Mr. Smith told her that when they get back to the house she is “to go straight up to her room, and he would deal with it”.

[46] Mrs. Smith “did not look happy” when J.S. arrived at the house and went straight upstairs to her bedroom. She believes Mrs. Smith knew something had happened. On cross-examination, she expanded upon her testimony describing Mrs. Smith as “very pissed off” and recollecting tension in the atmosphere. J.S. testified that she was under the influence and does not remember if she had trouble walking upstairs to her bedroom.

[47] Sometime after the incident, J.S. says Mrs. Smith took her to town. “She told me not to be alone with him anywhere, not his work site, his truck and not to be with him under any circumstances”. Following that conversation, J.S. does not believe she was at the Smith house much longer.

The Truck

[48] There was extensive cross examination about the truck she says took her to the field. J.S. testified that it was a good size truck, not jacked up, adding she recalled

telling the police that there might have been a label with *Smith Construction* on it. She says she does not have any memory of seeing this logo, but knowing he owned a construction company in the present, she thought perhaps there had been a decal on his truck in the past. She told this to police as a means of assisting them to find Mr. Smith. She quickly reminded defence counsel that she was very traumatized when she told the police what happened, noting that they were strangers and until that time she had not told anyone other than her parents.

[49] J.S. was very upset during this part of her testimony. She concluded by saying to defence counsel “I was a 14-year-old girl, I did not know what he did, just construction!” She also confirmed that her only memory of that truck was during the community dance incident. She reminded counsel that she was a mess and he wanted to take her back to the house and she did not want to go back to the house in that state. Defence counsel asked if she was in pain as a result of the incident, and J.S. testified that she did not believe she was in pain as a result of any of the sexual assaults but was not prepared to rule it out. It was at this point that she spontaneously said Mrs. Smith got in touch with her on Facebook, but the topic was never explored or clarified.

Attending His Workplace:

[50] J.S. testified that she believes she went to Mr. Smith's workplace once, but on cross-examination explained that she had no independent recollection of doing so, instead she believes she must have done so based on Mrs. Smith's direction not to do it. To say so on direct examination then qualify same on cross-examination affects reliability and suggests a loose connection to the truth and the solemnity of the court proceedings which causes the Court concern.

Short Timed Showers

[51] On cross-examination, asked to describe a typical day in the Smith house, J.S. says she recalled Mr. Smith timing the children's showers which "gave me anxiety", and she certainly did not have a long time in there, only a few minutes. She recalled Mr. Smith threatening to turn off the water.

Loud Sex

[52] She also testified on cross examination that she spent a lot of time with the foster brother walking, talking, sparring, noting they were friends and used to watch the Smith's youngest child play. She recalls Mr. Smith playing on a harmonica and he and his wife having loud sex.

[53] Asked by defence counsel to explain what she meant by the latter comment. J.S. testified that she could hear the headboard banging off the wall and the creaking of the bed. She says she remembers Mr. Smith was "verbally loud with his wife but

not with me”. With her, “he was super quiet”. She testified that she would plug her ears with her pillow and is “traumatized” by what she heard. She explained that it was all very loud and verbal, and believes she heard it one to three times, “enough that it bothered me”. She added “listening to this made me feel like a complete piece of useless trash”.

[54] It was at this point that defence counsel suggested the possibility that her bedroom was not upstairs but instead downstairs. J.S. agreed saying, “yes that’s possible”. She added, “I just know that when I returned from the field, he told me to go upstairs”. She was also shown a drawing purported to be that of the inside of the house. She was asked if it was true that the principal bedroom and the two children’s rooms were upstairs, with the foster boys and the foster girls having bedrooms downstairs off the living room. J.S. did not seem to take great issue with that suggestion, adding it was not quite how she recalled it.

Alcohol and Drugs in the House

[55] While under cross-examination with respect to the consumption of alcohol in the field, defence counsel suggested Mr. Smith did not consume alcohol at all. J.S. laughed and testified, “me and my foster brothers were snooping around the house and found all kinds of alcohol.” When asked why she used the plural of brother, J.S. testified that she meant her and one foster brother, quickly adding they found

mickeys in the parents' bedroom dresser and lots of drugs, and she remembered being "stunned by how much drugs" she found in the house. She did agree with defence counsel that she did not tell the police about finding drugs adding "because this is not what the situation is about". She also said she did not know that Mr. Smith went to AA until she met him five years ago, not explored by either counsel. She emphasized that she was a foster child and why would she know that.

[56] Finally, J.S. testified that she went to the police decades later because her whole life was affected by this situation, and because she hoped other victims would come forward.

[57] J.S.'s testimony was not reliable. Despite her age at the time of the allegations, she was an adult when she testified, and the Court was surprised that what she clearly stated as fact on direct examination, was taken back, or forgotten, on cross examination. This testimony suggested a recklessness that cannot be ignored. For example, a well described computer room evolved to possibly not existing but instead the computer could have been in the living room, stating she never ventured upstairs except to go to bed evolving to a search of Mr. Smith's bedroom drawers where she and her foster brothers found drugs and alcohol, looseness with language including "brothers" and "they" actually meant to represent one person, exaggerating the regularity of actions such as sparring, expanding the details of the

allegations on cross examination, testifying that his eyes were blue until challenged, etc.

[58] The Court is mindful J.S. was an adult when she testified, and while perhaps difficult to explain, there was an overall sense she was telling a practiced story. Challenged on details, she either modified the details or got angry. The Court would expect that an adult testifying under oath to tell the truth and nothing but the truth about things alleged to have occurred when she was a child would not state as fact detail that she would easily retract on cross examination. This approach to giving evidence must impact the reliability of J.S.'s testimony. It also impacts her credibility. The Court does not believe her testimony. It was at times implausible and incredible, evasive, and insincere. For instance, that the three fifteen-year-olds and the family were running around the house while she was assaulted in the "computer room", and the other young people were in bedrooms next to the open concept living room while she was subjected to a vaginal sexual assault on the couch. Leaving out the testimony about finding drugs but aggressively announcing it during cross examination appeared designed to deflect from the defence challenge to her evidence about Mr. Smith giving her alcohol in the field.

[59] Also, at times, J.S. was impatient when asked reasonable questions by defence counsel. Her cross examination was not overly long, and the questioning was not

aggressive. It appeared her frustrations arose from being asked to provide more information than she was prepared to provide. For example, adding details about the Smith's engaging in loud sexual intercourse and her reaction to it seemed dramatic and incredulous. On careful review, many of her answers were not careful, responsive, or detailed.

[60] Many aspects of J.S.'s testimony was challenged by the next witness whom I found both credible and reliable.

Assessing the Evidence of Mrs. Smith

[61] Mrs. Smith testified that she and Mr. Smith have been divorced for a significant period of time and do not maintain contact. That said, she was surprised to hear of the allegations "from so long ago" and agreed to testify at his trial. I discerned no sense of loyalty to Mr. Smith colouring her testimony, no sense of commitment to maintaining a narrative, nor a sense that she was concerned the criminal charge somehow reflected negatively upon her time as a foster parent. Instead, she was a neutral, plain spoken, clear and uninterested witness who provided relevant information arising from her presence in the home during J.S.'s placement. She also appeared genuinely surprised when asked certain questions during cross examination. Only after carefully listening to her testimony, reviewing my detailed notes, and considering it in light of the testimony of the other witnesses, did I find

her to be both a credible and reliable witness. Allow me to explain my reasons for reaching that conclusion.

[62] During the relevant time period, Mrs. Smith was a stay-at-home mother of two small children residing on a large, fairly isolated, rural property in a small community. She also fostered three other children at the relevant time.

[63] Mrs. Smith explained how she and her husband initially reached the decision to foster children. She also described the nature of the CFS training courses they took that included direction to be very careful with the foster children. She appeared fully engaged in the exercise and even now maintains contact with many of the children they fostered.

[64] Mrs. Smith recalled J.S. arriving at the house to join three others, two boys and a girl. The other three children were long-term placements and Mrs. Smith named and offered various details about the circumstances of each.

[65] The Court accepts that the specific time period was significant and memorable to Mrs. Smith because the long-term female foster child had recently given birth and Mrs. Smith was actively engaged in supporting a family reunification. As a result, Mrs. Smith recalled the female foster child was more likely than not with her own family for most of J.S.'s stay but was certainly in and out of the Smith house as well. Mrs. Smith testified that she remains close to that person and her family.

[66] Mrs. Smith had an excellent capacity to make specific observations that would prove diametrically opposed to the recollection of J.S. Her hand drawn house diagram depicted the two-storey family house with three upstairs family bedrooms occupied by the Smiths and each of their two children. The main floor was an open concept living room/kitchen with the sole bathroom as well as two bedrooms for the foster children who were separated by gender. Those bedrooms were located immediately adjacent to the living room.

[67] The foster children, including J.S., did not sleep upstairs. Mrs. Smith testified that the two teenaged boys stayed in one downstairs bedroom while J.S. and the girl with the baby shared the other bedroom. Mrs. Smith readily allowed for J.S. having the bedroom primarily to herself as the young mother was actively transitioning back to her family home.

[68] Mrs. Smith also testified that the family did not have computers nor was there a room in the house dedicated to such use.

[69] As part of the assigned short-term placement Mrs. Smith understood from CFS that she must supervise J.S. around males. This was challenging and Mrs. Smith explained that she recalled the two foster boys engaged in teenage conflict as they competed for J.S.'s attention. The evidence of her discomfort was supported by the

CFS records that detail a telephone call received from Mrs. Smith stating her concerns about J.S. including the requirement to supervise her around males.

[70] Mrs. Smith reviewed the CFS records, and despite having no specific recollection of making the phone call memorialized therein, agreed that the notes did contain her expressed concerns about the placement including J.S.'s frequent laughing, giggly phone calls to her mother, the mother supplying cigarettes and clothing to J.S., and Mrs. Smith's reluctance to accept the CFS clothing allowance money.

[71] The notes also recorded Mrs. Smith's request that CFS find J.S. another placement because the Smith family was going away for a long weekend family event. There was also a noted understanding that J.S. was going camping with her mother for a week following the Smith family weekend.

[72] Mrs. Smith also agreed the CFS notes recorded her suggestion J.S.'s placement may be unnecessary, and was perhaps somewhat abusive of the system, given the nature of J.S.'s contact with her mother.

Household Routine

[73] Mrs. Smith testified about the general household routine. She said it was "inconceivable" J.S. walked about the house in a "nightie". Her reaction to the question suggested she found the idea surprising and laughable. She was firm in her

testimony and explained that she would not allow foster children to walk around the house in pajamas, instead they readied for bed in their bedrooms.

[74] She likewise denied the presence of a turkey baster or douche in the family bathroom. She testified that the whole family including the foster children used that bathroom, and it was not crowded with personal belongings.

[75] Mrs. Smith testified that she and her husband regularly put their two small children to bed, and the couple went to bed together. She recalled Mr. Smith did so because he rose early for work.

[76] Mrs. Smith also confirmed her husband's effective vasectomy well prior to the foster placement and, after reviewing the medical documentation filed by defence, confirmed the exact date of the surgery. She also accepted as accurate the medical record of May 1993 confirming its success.

[77] Mrs. Smith was asked if she and her husband engaged in loud vocal sex. She replied, "most definitely not", noting the presence of their children sleeping across the hall with open bedroom doors as well as the foster children sleeping in the bedrooms below. Her demeanor and shock at the suggestion appeared to the Court quite authentic and her rationale plausible.

[78] She also testified that her husband did not own a business, drove neither a company truck nor any other truck, and never took J.S. to his workplace or to a community dance.

[79] On that last point, she testified that the only dance she could imagine occurring in the small rural community might have been on July 1st for Canada Day celebrations, and that necessarily occurred before J.S.'s arrival. She added, none of the foster children in her care attended dances while residing with the family.

[80] She rejected the possibility her husband took J.S. for a drive to a dance or anywhere else, and also denied J.S. ever returned from such a drive looking disheveled. She testified that she would not forget such a thing and "it did not happen". She also reiterated the CFS direction that males are not to be left alone with J.S.

[81] Mrs. Smith testified that she does not drink alcohol or use drugs and her husband was not drinking alcohol at the time of the placement, instead he was attending AA. She provided information about the problems they had faced with his alcohol use, adding his sober status is anchored in her mind due to the age of their children. She denied the presence of drugs or small bottles of alcohol in her bedroom dresser drawers or elsewhere in the house.

[82] Mrs. Smith also testified that she always took her youngsters with her if she went out for groceries or visits and denied ever leaving them in the care of the foster children. She also testified that she rarely left the property.

[83] Asked about the decks around the house, she did her best to recall, testifying that they were no higher than two feet off the ground, and she could not believe anyone could get underneath them. Shown photographs of deck portions with railings, she could not really recall much and was not particularly specific about the presence of lattice around those decks.

[84] Mrs. Smith testified that her husband has brown eyes, not blue, and always wore jeans, not loose clothing.

[85] Mrs. Smith's testimony was fluid, candid, balanced in her recall and largely unchallenged. It accorded with the CFS records she had never seen. It did not appear affected by the passage of time. As previously stated, I accept her testimony as credible and reliable. As such, I find the complainant did not sleep in an upstairs bedroom; she did not walk about the house in a nightie; there was no turkey baster or douche in the family bathroom; Mr. Smith's eyes are not blue; the family did not own a truck and Mr. Smith did not drive a company truck; the married couple did not engage in loud coitus; Mr. Smith did not drive the complainant to a dance; and

J.S. was not returned from such a drive in a disheveled state whereupon she met an upset Mrs. Smith.

Assessing the Evidence of Smith's Son

[86] The Smith's son was six years old at the time of J.S.'s placement. Not surprisingly he does not remember her and has only a child's recollection of events. That said, he had no recollection of foster children sleeping on the second floor, noting he and his brother slept upstairs in separate bedrooms. The foster children slept downstairs.

[87] He says the family did not have a computer in the "green house", because he recalls being excited to get a first computer when he was thirteen years old, when the family lived in their next house. That said, he does have a vague memory of a Sega Genesis, a black box with two controllers, meant to be hooked up to a television, but believes it arrived in the house in the months before they moved and has no memory of playing it in the green house. In any event, the television was in the living room.

[88] At their next house he recalls getting a Play Station between 1995-97.

[89] He also remembers the three foster children recollected by his mother, and has vague memories of other foster children, but recalls only the named three because they lived in the house "longest" and felt like family. As he recalled, the fostering

ended years before the move to the next house. He guesses the fostering went on for about a year, or maybe two or three years. He believes it ended when he was seven or eight years old.

[90] On cross-examination he recalled a white ATV that his dad used but has no memory of it being driven. He recalled three wheelers at the house after the foster children left, and when he was older. He recalls his mom being the caretaker but has a vague memory of [foster children] “taking care of us once for an hour or so”. Otherwise, his mother was always home, and he “cannot recall mom leaving us home with dad”. He has no memory of foster children having outside activities and cannot recall a community center near the house. He does recall doing taekwondo with his father, but the time range was not explored. He also recalled a blue kick bag that one person would hold while the other kicked it.

[91] He did not play under the deck, instead they played on the ground at the end of the deck at the highest point near the basement entrance where there were creosote logs. He explained “you could not get under the deck” at the high point because “there were concrete steps underneath”. He was able to recall this because there was a space to jump back and forth, and he has a significant memory of being struck between the legs by his brother, falling, and grabbing the lattice. The pain was like nothing he has ever experienced.

[92] His dad did not own a truck, instead he drove a van and his “mom drove a cool car”- a Prelude.

[93] He said it was possible his father owned a construction business at some time but not a truck bearing a decal.

[94] Some of his evidence supports various memories of J.S.- sparring and kicking a pad, the presence of a four-wheeler, the possibility of some type of computer game. But it also supports that of the defence witnesses, where the foster children slept, the lack of a truck. However, his evidence, I must remind myself, was that of an adult recalling matters from a time when he was only six years old. He is also an interested witness who discussed the case with his father. His evidence carries very little weight. However, where it accords with the evidence of his mother, I can accept it.

Assessing the Evidence of Mr. Smith

[95] Mr. Smith was an earnest witness who demonstrated real upset about the allegations. His testimony was careful and not subject to any troubling inconsistencies, nor did it generate concerns for the Court. Given the allegations date back 30 years, it could not be expected he would have a perfect memory of events over a month in the summer of 1993. And I note, the evidence supports deducting a long weekend and a week from that month long stay.

[96] Mr. Smith testified that in 1993 he would have been approximately 31 years old, employed with a roofing company, and residing with his wife and two young children, as well as a number of foster children.

[97] He was employed with a named employer and noted his employment there started in 1988 and ended in 2000. He testified that he did not own a construction business bearing his name or any other, did not have use of a company truck, and worked 5-6 days per week. In the summer, his days started very early, and he was, at times, away from home at job sites located across the province.

[98] The green house was purchased in 1988 and underwent extensive renovations for the first six months. It was eventually sold ten years later in 1998.

[99] He accepted as relatively accurate the drawings and photographs contained in an exhibit book filed by his counsel. None of the drawings were prepared by him and he did not take any of the photographs. The drawn material demonstrated the location of bedrooms, the bathroom, and living areas, as well as a couch. Some pictures were undated, and some were taken well after 1993.

[100] Mr. Smith testified in accord with Mrs. Smith about the course they took in the 1990's to prepare for fostering children. He recalled being taught about funding, how to act and react with children who have issues, and about parenting skills. He

also recalled being advised that there should be no drama, swearing, or the like in front of foster children.

[101] He also testified in accord with Mrs. Smith about the living arrangement the couple put in place for the foster children: two bedrooms on the main floor, one to house girls and the other to house boys. He recalled the three specific foster children named by Mrs. Smith, noting they were present for long term stays. Mr. Smith testified, “in my mind I think of one bedroom as [name]’s room because she was with us for awhile”. He recalled that she fell pregnant, and the baby also stayed for, he believed, six months before the two moved to her family home. He also recalled a crib located in the bedroom next to her bed.

[102] He recalls the two boys were approximately 15 years old and shared the other bedroom. Asked how he was sure those specific boys were present during J.S.’s stay, Mr. Smith testified in accord with Mrs. Smith that the boys got on really well until J.S. arrived at the house. He said there was animosity and resentment between the boys because they both appeared to like her.

[103] With respect to the domestic roles played by him and his wife, Mr. Smith says his wife was a stay-at-home mom, and he went to work outside the home at 6 am. He also recalled never being able to get the children to do chores, and at the weekend, he spent time with his own children.

[104] Mr. Smith denied timing the foster children's showers.

[105] Asked what information CFS provided about the foster children, he testified that a worker would always tell them of any concerns that they needed to consider. Asked if he recalled anything specific about J.S., he testified that he recalled being told to be diligent in watching her around drugs and males - all males. He testified that direction did not impact him, adding he was never alone with her "to my knowledge".

Under the Deck

[106] Mr. Smith denied sexually assaulting J.S. under the deck - "absolutely not". He does not believe anyone could even fit under the low deck. He said there simply was no room underneath it to allow people to lie there.

[107] In addition, he does not remember his own children ever playing under the deck, noting there were "four big round crocks in the ground for septic and that would've been gross". His children would not go near the septic next to the deck because that is where the greywater went into the septic system.

[108] He testified that he built and extended the deck outward around the house soon after he bought the house. The deck joists were two by six and there were no railings installed because the building code did not require railings on decks that stood under

two feet in height. He also recalled installing lattice under the deck to deter rodents and also for aesthetic purposes.

[109] Mr. Smith recalled a portion of the deck was constructed over some old concrete steps, and that was the only part where the deck was slightly over two feet, but the steps would impede anyone from getting underneath. He also recalled building the deck to accord with the contours of the land, and pointed to a photograph to demonstrate the deck was an inch above his knee. On cross examination his testimony was challenged with aid of a defence photograph that appeared to show a higher portion. Unfortunately, the photograph was not clear enough to allow the Court to reach any conclusions.

Time Away from the House

[110] Asked to review the correspondence in the CFS file, Mr. Smith testified that he recalls some particulars including J.S. periodically leaving his house and in his mind he “feels” she was there eight nights total but concedes it could have been a couple of weeks. He explained that summer is a busy season for his employer, and he did not have time to take vacation, but does recall attending a family reunion event over a weekend when he believes J.S. must have gone home to her mother. While mentioned in the CFS document, Mr. Smith did not specifically recall J.S. also leaving his house for a week of camping with her family.

[111] That said, Mr. Smith did recall J.S.'s mother being active in her life while she was at his house. He testified that J.S. was always calling her mother on the kitchen house phone and recalls J.S. being picked up by her mother - "Yeah, her mom came to pick her up. It was not normal that this was done". He recalled a caseworker would have to approve such a thing.

[112] Mr. Smith recalled being active in Taekwon Do for about a year, achieving a yellow belt, and owning a head protector. He recalled [boy foster child] was into boxing, and so they had some gloves, but not kick pads and chest pads. He said the boys had no formal training and would just play around and have fun, but he has no memory of a female foster child joining in.

[113] Asked how good his memory is with respect to these incidents, he testified that he is fairly confident of his memory back in 1993 as he can also remember friends' phone numbers from 30 years ago, but he cannot recall the date a friend died only a few years ago.

Computers

[114] Mr. Smith testified in accord with the other defence witnesses, that there were no computers in his house in 1993, nor was there a computer room, computer games, or otherwise. He says the first computer his family ever owned was a Nintendo which they bought when they lived in a different house. He testified that there was nothing

computer-related for [foster children] to play with, and even to this day he does not have an interest in computers.

Bedtime Routine

[115] He recalled an antique couch in the living room, and says if his wife went to bed, he went with her. He denied remaining in the living room with J.S. and sexually assaulting her on the couch - “absolutely not!”

Vasectomy

[116] Mr. Smith testified that he had a vasectomy on March 26, 1993, and proved it with a letter from his doctor confirming that on May 21, 1993, the surgery was a success as he was “aspermatic”.

Turkey Baster

[117] Asked about the presence of a turkey baster in the bathroom, he said that was bizarre and untrue.

Use of Alcohol

[118] Mr. Smith denied consuming alcohol in 1993, noting he was attending AA which he started in his mid-20s and still attends. He says J.S.’s testimony that she found mickeys of alcohol in the underwear drawer is a complete “fallacy”. He also denied using or having drugs in the house.

Truck

[119] Mr. Smith says he did not drive J.S. anywhere in a pickup truck as he understood driving her was “forbidden”, and he did not even own a pickup truck. He says he owned a van, a Prelude, and a jeep in 1993 and drove his motorcycle back and forth to work. Asked about a construction company decal on the side of a truck, Mr. Smith testified “I never had such a vehicle or company”.

[120] He also added that he could not understand why he would drive somebody four minutes to the community hall, adding it simply makes no sense because the foster children were not allowed to attend any social events outside the house.

Type of Clothing Worn

[121] Mr. Smith also denied wearing jogging pants or loose clothing, instead testifying that he always wore jeans.

Colour of His Eyes and Hair

[122] Mr. Smith also testified that his eyes are brown, and not blue. His hair has always been dark brown, never blonde.

Loud sex

[123] Asked about J.S.’s testimony with respect to he and his wife engaging in loud sex, Mr. Smith disagreed pointing out that his children slept across the hall “and

there were people below us. It's ridiculous!" He says his recollection is more in line with "quiet, kids will hear you".

[124] Mr. Smith testified that he and his wife separated in 1995 and divorced in 2010. They sold the house upon their separation.

[125] Mr. Smith was a witness who had clearly taken the time necessary to reflect on the anticipated testimony of the complainant. He was prepared, and that is of course to be expected. That said, he also appeared quite genuine in his testimony. While it assisted him that his testimony accorded largely with that of his former spouse, whose testimony I found credible and reliable, his did not sound scripted. He had much to say about the impossibility of the under-deck allegation, and I expect one who built the deck would know how high or low it was. That said, there is always the possibility that one could get under a deck. I looked at the photograph placed into evidence and would not rule it out. Unfortunately, some of the clearer pictures were not recent so were of little value. However, the potential to get under a deck, does not alone found a conviction for sexual assault.

[126] Mr. Smith's denials, along with his testimony about being in AA and not drinking at the time, not consuming drugs, and the like, all support a conclusion it cannot be true that drugs and alcohol were found by J.S. in his house. That he also did not own a truck makes the testimony about the incident involving the dance and

alcohol problematic as does the myriad of other points raised in the testimony of J.S. I simply cannot say that I disbelieve Mr. Smith's evidence.

[127] I find he had limited contact with J.S. He did not sexually assault her, drive her to a dance, provide her alcohol, assault her in a computer room, there was no such room, or assault her on the couch outside the bedroom doors of two fifteen-year-old boys and girl with a baby. He did not assault her under a deck with children running around above.

[128] Having accepted the evidence of Mrs. Smith, and rejected the evidence of J.S. which I found neither credible nor reliable, I cannot find the Crown has proven the case to the criminal standard of proof beyond a reasonable doubt. I have also not rejected the evidence of Mr. Smith.

[129] Judgment accordingly.

van der Hoek, JPC