PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. D.C.,* 2024 NSPC 1

Date: 20240105
Docket: 8605222, 8605223, 8605225
Registry: Dartmouth

Between:

His Majesty the King

v.

D.C.

Restriction on Publication: 486.4

Any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way.

Judge: The Honourable Judge Bronwyn Duffy

Heard: November 7 and 8, 2023

Decision: January 5, 2024

Charges: ss. 151, 152, 155, 271 *Criminal Code of Canada*

Counsel: Stacey Gerrard, for the Public Prosecution Service
Peter Kidston, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

By the Court:

[1] The Court has for trial judgment the matter of R. v. D.C. D.C. is charged with a 4-count Information of sexual interference, contrary to s. 151 *Criminal Code* (CC), invitation to sexual touching, contrary to section 152, having sexual intercourse with J.M., while knowing she was his daughter, contrary to s. 155, and committing a sexual assault on J.M., contrary to s. 271. These offences are alleged to have occurred between 1 January 2008 and 1 January 2014, as amended. The incest count is straight Indictable, and the Crown elected to proceed by Indictment on the remaining counts, all of which are dual procedure. At the close of evidence, the prosecution invited dismissal of the s. 155 allegation.

[2] There is a 486.4 Order in effect restricting publication, and particularly, directing that any information that could identify the complainant shall not be published in these proceedings.

[3] There was a testimonial aid application, by consent, for the complainant J.M. to testify behind a screen in accordance with s. 486.2(2), which was ordered and directed.

[4] Sections 276 and 278 do not have application in these proceedings.

[5] There were several admissions, including date, time, jurisdiction, and identification. Exhibit 1, a statement of the accused taken on 17 May 2022 was tendered without the need for an admissibility *voir dire* to determine voluntariness. A testimonial aid to this Exhibit in the form of a transcript is also before the Court.

[6] The prosecution's case comprised the *viva voce* evidence of Det/Cst. Shelly Pierce, the complainant J.M., together with the referenced exhibit and testimonial aid.

[7] The defence case consisted of the *viva voce* evidence of the accused, D.C.

[8] The matter was tried over two days, and oral argument proceeded at the close of evidence.

[9] The key allegations of fact by the prosecution contained in the statement as admissions and elicited in direct examination of Det/Cst. Shelly Pierce, who authenticated the chartered and cautioned audio/video statement include:

- D.C. showered with J.M til she was about 10 years old (p. 11 transcript);
- D.C. touched her in her privates (p. 13);
- D.C. said "She wanted me to shave her down there" (p. 15);
- D.C. said "I've never touched [J.M] in a sexual manner" (p. 16);
- D.C. put cream on her "down there"… "because they're used to it from when they're babies" at around 10 to 11 years of age (p. 21), and that D.C. put cream in her private areas and in her vagina (p.22);
- D.C. said the "Last time I touched her was when I shaved her" (p. 23);
- D.C. said "If she seen me touch myself at some point, it's possible, I can't see it because I just … I don't do that stuff." (p. 24).

The above was in Exhibit 1, though the pages in the testimonial aid are noted for convenience of reference.

[10] The complainant testified for the prosecution. J.M. is a 22-year-old university student; she gave *viva voce* evidence that D.C. is her biological father, and that the events that gave rise to these charges happened when she was a child residing in [….], Nova Scotia, with her father and her paternal grandmother. They lived in a small two-story house with two bedrooms upstairs. Her evidence is that when she first started living there, she shared an upstairs room with her father, but that ended shortly thereafter, when a downstairs room was converted into a bedroom, which became D.C.'s room.

[11] During the summer of 2008, J.M's grandmother was away for a week to visit someone in Prince Edward Island, and the complainant and her father went to the beach. When they returned home, her evidence is that he suggested they shower together. There was more than one incident, and these shower sessions started turning into the accused masturbating while J.M. was there, with his encouraging her to participate. J.M.'s *viva voce* evidence is that he put his penis between her legs and set it there, but did not penetrate. She said this eventually moved into the bedroom; they would be on the bed together, mutually masturbating, with the accused teaching J.M. what to do. The complainant said this happened at least three times, though she does not remember exactly. In describing these incidents, J.M. said in one instance D.C. came up behind her in the shower, hoisted her up, and she remembers feeling and seeing his erect penis on her vulva. During one of these incidents, J.M. remembers his comment "this is what it would look like if you had a dick." She describes his inviting her to touch his penis while he was sitting on the toilet masturbating, which she did once, using a finger and a thumb and said "this is gross, this is slimy". J.M. says it was put to her as a game, and the

way to win the game was to “make the white stuff come out”. J.M. says she remembers one incident that D.C. was masturbating on the toilet to orgasm. She says neither were wearing any clothes. She testified that it did not happen every time we showered. She said this happened at least twice in 2008, and one or two years later, she remembered the game and brought it up to him - they played the game one more time. J.M. said a couple of years later, she told her grandmother, who is now deceased. J.M. said she remembers the look on her face, which was angry, shocked, and bewildered. Her grandmother said not to talk to anyone about it, and that she would deal with it.

[12] J.M. recalls two additional specific interactions. One involved D.C. putting cream on her vaginal area. When she was a child, when she would eat or drink certain items, she would develop a rash in her pubic area. She says she was concerned about it; it really hurt her. She called her father in to look at it. At some point, he asked her to spread her legs and get a better look, saying “I just wanted to check something”. Her evidence is that he took his thumbs and spread the lip of her vulva, which she says was not necessary to see the rash because her entire vaginal area was red and inflamed, even up to where her pubic hair ends.

[13] J.M. gave evidence about one more incident she says she remembers very well; at approximately age 13 she developed white spots on her back. She was provided an anti-fungal cream by a physician. She asked her father to put it on her back. He offered to give her back rubs while applying the cream; would have her remove her shirt and bra. She testified that “every time he put it on my back, he would give me a back rub”. The last time, he said “why don’t you flip around, I can do the front.” The excuse she gave him was that “I don’t want a purple nurple” and she remembers thinking that is not the real reason. His response was “you’d like the way I twist your nipples but that’s okay, but I guess you won’t.”

[14] J.M. was cross-examined on each of these incidents, and remained consistent in her version of events. She conceded under cross that the impetus for showering together may have been that there is a small water tank, and water is scarce. J.M.’s statement of 4 April 2022 was put to her, and she agrees that in response to questioning as to whether more than one shower incident occurred, her response in the statement was “I don’t know”. J.M. says that as time went on, she remembered things in more clarity. She was cross-examined on her statement of 6 May 2022. She agreed that statement did not contain a description of her father sitting on the toilet masturbating. She said that occurred to her at some point between then and today. She agreed under cross that she did not consider that the back rub involved D.C. touching her in a sexual manner. J.M. was cross-examined on her evidence that a couple of years later she brought up the game again, and asked D.C. why

they do not play it anymore. Her evidence in cross was that in response, "he dropped everything and played the game with me." J.M. said that the memories started coming back to her early in the new year of 2022. She said that "once I remembered one thing, I started remembering a lot of things – the domino effect almost."

[15] The prosecution closed its case and tendered the exhibit, and the defence elected to call evidence.

[16] D.C. testified in his defence. In examination-in-chief, he described being in a domestic relationship with J.M.'s mother until the child was going into Grade 1. She lived with her mother for a few months, and then moved to live with her father and his mother in […] when she was going into Grade 2. They resided in the home until D.C.'s mother died in 2019 or 2020. He says that J.M. had very little contact with her mother, who moved to Alberta shortly after J.M. came to live with him. D.C. disputes J.M.'s evidence that he ever shared a bedroom with her. His *viva voce* evidence is that he and his daughter did go to the beach and shower together thereafter. He denies ever having an erect penis in her presence, denies masturbating in her presence or instructing her to masturbate, denies asking her to spit on his penis, and denies having any sexual contact with J.M.

[17] In response to J.M.'s evidence regarding the rash in her pubic area, and D.C. spreading her legs to look, he responds "it is possible…if I had to look at my daughter, it was because it looked like there was something wrong down there." With respect to the back rub allegations, he does not remember doing anything of the sort, denies touching her in a sexual manner, and disputes J.M.'s evidence that he asked her to rub her front. In response to the evidence of J.M., which is also in D.C.'s statement to police, that he shaved J.M.'s pubic area, he said he did do that on J.M.'s request, that his mother was also home at the time, but she cannot go and lean over the tub, and it only took a minute or two minutes.

[18] D.C. was cross-examined extensively. He could not remember the address of the home in […]. He was cross-examined on both his statement tendered in evidence as Exhibit 1, as well as a statement not before the Court in accordance with section 10 *Canada Evidence Act*. D.C. agreed he showered with J.M. until she was approximately 10 years old, noted on p. 11 of the transcript of Exhibit 1. When cross-examined on the content of Exhibit 1, he agrees he touched her in the vaginal area with a razor when he shaved her (p. 15), but then agrees he touched her vagina with his hands when applying cream (p. 21), and concedes he did this when J.M. was at the age of 10 or 11 years. D.C. says J.M. was "10 or 11 years old, tops", when he shaved her pubic hair.

[19] The suggestion was put to D.C. on cross-examination, based on the content of the second statement not before the court, that he has to stroke his penis to clean it. He concedes that “it is a possibility” that it could look like he was masturbating while cleaning his penis, but denies ever masturbating. He maintained that if the complainant “ever saw him touch [himself in that area], it was because he was bathing or something along that line”. Under cross-examination, it was put to D.C. a portion of his statement not in evidence, and it was suggested that he put his penis between J.M.’s legs while in the shower. When asked, can he say with absolute certainty he’s never done it, his answer was no. He explains he would pick her up to wash her hair, hold her in his arms, put her on his hip and wash her hair while they were both in the shower. When put to him “was your penis ever between her legs?”, his response was “yes it’s possible, it may have touched her at some place, I can’t deny it is not possible. Can I ever recall doing it? No.” D.C. denies ever having an erect penis when in the shower with J.M., and says “I can guarantee” it was not in a sexual manner. Later in cross-examination, when it was put to D.C. that he cannot say for certain he never had an erect penis against J.M.’s vagina, he agrees “100%, no, I cannot say that.”

[20] Upon questioning with respect to the rash, D.C. agrees he would put his hands on J.M.’s vagina when inspecting the rash. D.C. agreed that J.M. liked to put nivea cream in her vaginal area when she was younger. It was put to him that he was putting cream on J.M.’s vagina when she should have been doing it herself, and D.C.’s response was “I have to agree with that”. He confirms on re-direct that this was never for a sexual purpose.

[21] I turn to counsel’s submissions. For the defence, Mr. Kidston agrees that time, date, jurisdiction and ID are not elements in dispute. He argues that the invitation to sexual touching and sexual interference allegations are specific intent charges, and there is divergent evidence from the complainant and the accused that the Court must assess in accordance with the instruction in *R. v. W(D)*, [1991] 1 SCR 742. The defence quite properly concedes in argument there are certain facts admitted by D.C., that he did shower with J.M., that he at times applied cream to her vaginal area, and that he shaved her pubic area, but that his position is that none of it was done for a sexual purpose. He argues that as the primary caretaker, living in a rural area with an ailing grandmother, these actions were in the proper care of his daughter, and submits that it is not proven on the criminal standard, and particularly, the *mens rea* required for these specific intent allegations should leave the Court in a reasonable doubt on these facts.

[22] The sexual assault allegation is a general intent offence, which does not require a sexual motive or sexual purpose, and Mr. Kidston argues the parties

simply disagree on what happened, accordingly necessitating a credibility analysis. Defence counsel submits the Court must determine on an objective standard, whether a reasonable person would see the conduct as a violation of sexual integrity. He posits this is the most difficult, and argues the case of *R. v. BJT*, 2019 ONCA 694 is distinguishable. In that case, there was an allegation of a father shaving the daughter's pubic hair. In *BJT*, the father was told it was not appropriate, and he had instructed his daughter never to tell anyone, contrary to the case at bar, in which there was no shroud of secrecy.

[23] For the prosecution, Ms. Gerrard emphasizes the admissions in Exhibit 1, the statement of D.C., tendered in the Crown's case:

> P. 11 – D.C. showered with JM until she was about 10 years old;
> P. 21-22 – D.C. put nivea cream in/on her vagina up to age of 10-11 years old;
> P. 21 –D.C. adamantly denies masturbating;
> P. 24 – D.C. admits it is possible she may have seen him masturbating;
> P. 15 and 23 – D.C. admits to shaving J.M.'s pubic hair at age 10 to 11 years.

[24] The Crown Attorney reviewed the incidents detailed by J.M. in her *viva voce* evidence: the allegation that D.C. put his penis between her legs while they were showering together; that he masturbated in front of her, sitting on the toilet; that he invited J.M. to touch and spit on his penis. She described a game where J.M. masturbated at D.C.'s instruction until he would orgasm. J.M. described a rash on her vulva and D.C. placing his hands on her labia to inspect it; and that during a back rub, he invited J.M. to roll over to her front, and when she declined, saying she did not want a "purple nurple", he said she would like the way he touched her nipples.

[25] The prosecution argues that J.M.'s evidence was clear and concise, that she admitted what she did not know. Ms. Gerrard highlights that the two incidents involving shaving of pubic hair and applying cream to the vagina were not alleged by J.M., but rather raised by the accused in his statement and admitted in his testimony. The prosecution raises that the Court should be concerned, in my credibility assessment, with D.C.'s inability to remember his own address. The prosecution argues that D.C.'s agreement under cross-exam that J.M. was old enough to wash herself, but then for him to apply nivea cream on her buttocks and vagina when she exits the shower is notable. D.C. admits in his statement that J.M. may have felt inappropriate, and the Crown argues that this admission of impropriety is itself proof of the sexual nature of the acts. The prosecution submits there is no reason for D.C. to place his hands on J.M.'s vagina under any

circumstance; if he needed to inspect it, he could have asked J.M. to use her own hands. The Crown submits that D.C.'s evidence with respect to J.M. ever seeing his erect penis began as an adamant no, but was revised under questioning to it being a possibility, which is important for the trier of fact to evaluate in the credibility assessment. Moreover, Ms. Gerrard argues in relation to the 151 allegation of sexual interference, that D.C. talks about not having sexual relations with anyone for a period of time, and suggests this invites the Court to infer that what he was doing was for sexual gratification. The prosecution characterizes D.C.'s evidence as self-serving, and not a categorical denial, which supports a finding of guilt on the specific intent counts.

[26] The prosecution agrees that the sexual interference and invitation to sexual touching are specific intent offences. In essence, the Crown Attorney argues that if I believe the evidence of J.M. in relation to the masturbation in the bathroom, the invitation to touch the accused's penis, and the invitation to roll over during the backrub, the mental element of the act - and the communication - being of a sexual purpose is made out on that evidence.

[27] With respect to the 271 count, counsel are agreed it is a general intent, and that consent does not enter into the assessment. There is no sexual purpose requirement, and there is no sexual gratification requirement. What the prosecution must prove is a violation of J.M.'s sexual integrity. It is an objective standard that must be considered in all of the circumstances, with a view to the body parts touched, the nature of the contact, words and gestures, force, and intent or purpose. The prosecution relies substantially on the *BJT* decision from the Ontario Court of Appeal, citing *R. v. Chase*, 1987, 2 SCR 293 for the essential elements of a 271 offence. At paragraph 16, the Court concludes that the shaving of the pubic region itself constitutes a sexual assault. Ms. Gerrard refers to paragraph 46, in relation to the application of nivea cream – " [the trial judge] then observed that parents changing diapers or putting cream on a young girl's vagina would not be a sexual assault from an objective standard, but that in the case of a pre-teen or teenaged girl, there was no instance where a father could apply cream to his daughter's vagina, stating: 'objectively, it would make no sense with a plethora of alternative solutions available to resolve this personal care need'". The Court of Appeal upheld the trial judge's findings of sexual assault on this evidence.

Analysis

[28] In a criminal trial, the Crown must establish beyond a reasonable doubt that the accused committed the allegations levelled against him. The burden of proof remains unyieldingly with the prosecution, who must prove each and every

essential element of the offence charged (*R. v. Lifchus,* [1997] 1 SCR 320; *R. v. Starr,* [2000] 2 SCR 144). I have considered all of the evidence carefully. In evaluating the evidence in this case, as in all cases, it is important to return to general principles. The Supreme Court reminds us of the fundamental importance of the onus resting upon the Crown at paragraph 13 of *Lifchus, supra*; it is inextricably linked to the presumption of innocence, and is essential to trial fairness. Reasonable doubt is logically connected to the evidence or absence of evidence, and that is the context within which I consider the evidence before me.

[29] I will deal first with the uncontroverted elements. All witnesses, for both crown and defence, were in accord on date, time, jurisdiction, and identification, as well as the admissibility of Exhibit 1, the chartered and cautioned a/v statement of D.C., for which there is a transcription before the Court as a testimonial aid.

[30] The fundamental issue in relation to the 271 count is whether the sexual integrity of J.M. has been violated on an objective standard. Counsel have both identified this in their respective arguments, in accordance with the test in *Chase*, *supra*. It is a general intent offence, so in the absence of proven sexual intent, the issue is whether the touching was committed in circumstances of a sexual nature: *R. v. S(PL),* [1991] 1 SCR 909. The relevance of the accused's purpose varies, and sexual gratification is not requisite to proof on the criminal standard. There is a host of jurisprudence on this: *R. v. Bernier* (1997) 119 CCC (3d) 467 (Que CA) affd, 1998 1 SCR 975, for one, and *BJT*, for another. As acknowledged by counsel, the defence of consent is not available, so the mental element requires an intentional touching, in circumstances where a reasonable person would perceive the sexual context of the contact.

[31] The sexual interference and invitation to sexual touching allegations require proof on the criminal standard that the accused specifically intended a sexual purpose for the touching or the invitation, as applicable. As the Manitoba Court of Appeal said in 1990 in *R. v. Sears*, 58 CCC (3d) 62, an accused who intends sexual interaction of any kind with a child and with that intent makes contact with the child's body, touches the child within the meaning of the sexual interference provision, even where the sexual interaction is suggested by the child. The 152 count, in its essence, requires a positive act by the accused to cause the complainant to engage in sexual touching, though does not require proof of actual physical contact (*R. v. Fong* (1994), 92 CCC (3d) 171, Alta CA, leave to appeal ref'd).

[32] The Court must therefore assess the evidence as it relates to the contact between D.C. and J.M. In this regard, I undertake the credibility assessment. The

defence has led evidence; accordingly, the analytic procedure as directed by the Supreme Court in *R. v. W(D),* [1991] 1 SCR 742, applies. It is important to keep in mind, however, that in assessing the ultimate issue of reasonable doubt, I must assess the credibility of each witness, not just the defendant. A credibility assessment involves both credibility and reliability. Credibility is a factual determination (*R. v. GF*, 2021 SCC 20). It relates to the veracity of the witness, the witness' sincerity, and willingness to tell the truth as they believe it. Reliability involves the capacity for accurate observation, recall and recounting of events or circumstances, and may be affected by factors, without limitation, such as flawed observation, defective recall or lack of understanding or ability to communicate. An incredible witness cannot give reliable evidence on the same point. A credible witness, however, may give unreliable evidence – a witness may be truthful in testifying but honestly mistaken (*R. v. HC,* 2009 ONCA 56; *R. v. DDS,* [2006] NSJ No. 103; *R. v. G(M),* [1994] 73 OAC 356).

[33] A trier of fact is entitled to believe all, some or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts (*Novak Estate, Re*, 2008 NSSC 283). Further, I can afford different weight to different parts of the evidence. I bear in mind the Court of Appeal's comments in *R. v. Mah,* 2002 NSCA 99, in saying that *W(D), supra,* describes how the credibility assessment relates to the issue of reasonable doubt. The judge's function is to decide whether each of the essential elements of the allegations has been proven, and the ultimate issue is not parsing whether the judge believes the accused or the complainant or some or all of what each said - "the issue at the end of the day in a criminal trial is not credibility but reasonable doubt" (para. 41). *R. v. HHS*, 2008 SCC 30.

[34] In assessing the evidence of these witnesses as it relates to the nature of the contact between D.C. and J.M., I focus first on the *viva voce* evidence of J.M. She describes many of the events with precision. She was candid, clear and straightforward in her recounting of the circumstances. Mr. Kidston is correct that J.M. conceded there were certain events described that were not in her earlier statements. J.M.'s response to cross-examination on this issue is that she remembered some things in more clarity afterward. She described it like having dreams, "it was like once I remembered one thing, I started remembering a lot of things, the domino effect almost." I consider that a reasonable explanation for this internal inconsistency. Her description of events had a logical flow. I am satisfied this witness has a sufficient power of recollection to provide the court with an accurate account, one of the guidelines applicable to the credibility assessment – *Baker-Warren v. Denault*, 2009 NSSC 59 and *Hurst v. Gill*, 2011 NSCA 100.

[35] I must consider external consistency, how J.M.'s evidence fits with other evidence. D.C. and J.M. have largely divergent accounts of what happened. These are factors that must also be considered in the credibility assessment – *Novak Estate, supra*. That said, there are some external consistencies acknowledged by both counsel. D.C. admitted that he showered with J.M., that he at times applied cream to her vaginal area. To that extent, it is in accord with J.M.'s testimony.

[36] In assessing J.M.'s evidence, I do not rely on neutral factors, which might be, for example, no evidence of a motive to lie (*R. v. Cooke*, 2020 NSCA 66, para 33; *R. v. Laing*, 2017 NSCA 69). I do note that I did not find her evidence to be embellished, exaggerated or overstated. It is important in recognizing this, however, that the absence of exaggeration cannot be used to find a witness credible – embellished evidence undermines credibility, but the absence of embellishment does not bolster credibility (*R. v. Kiss*, 2018 ONCA 184, paras 52,53).

[37] Demeanor is not a good indicator of credibility: *R. v. Norman*, 1993, 16 O.R. (3d) 295 (Ont. C.A.) at para. 55. While I found J.M. to be a stoic witness, reliance on demeanor must be undertaken cautiously; it is "not infallible and should not be used as a sole determinant of credibility" *R. v. WJM*, 2018 NSCA 54, para 45. As the Ontario Court of Appeal said in *R. v. Rhayel*, 2015 ONCA 377, para 85, this is partly due to the artificiality and pressures associated with courtroom.

[38] What is, however, a good indicator of credibility, and what the Court must consider, is whether the evidence was provided in a candid and straightforward manner, or whether the witness was evasive, strategic, hesitant or biased (*Baker. v. Aboud*, 2017 NSSC 42). It must be considered whether the witness had a stake in the outcome or were they personally connected to either party. J.M., of course, does have a personal connection to D.C. J.M. was cross-examined on her testimony, including particularly the absence of the masturbating on the toilet incident from her statement, and the suggestion was put to her that the back rub did not happen and she was making it up as she went along. These are all fair questions on cross-examination, to be sure, but I found her responses not to be flippant. She was considered, and careful, in her answers, and she was not defensive or dismissive of questions put to her. She did make concessions against her interest; she said she did not remember certain conversations; she admitted she did not remember D.C. ever asking her to keep the interactions a secret, for example. She admitted she told one of her friends about the incidents, and that this admission is not in her statements.

[39] I must bear in mind what the Supreme Court has said when engaging in the credibility assessment. It is not always possible to "articulate with precision the

complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" *R. c. Gagnon*, 2006 SCC 17 (SCC), para.20. "[A]ssessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" *R. v. M. (R.E.),* 2008 SCC 51 (SCC), para. 49. Also see *R. v. Dinardo*, 2008 SCC 24.

[40] Specifically with respect to this case, I must refrain from inappropriate behavioural assumptions (*R. v. Pastro*, 2021 BCCA 149), referenced sometimes as stereotypes that operate unfairly against women and girls (*R. v. Darrach*, 2000 SCC 46). There is no expected way for a sex assault complainant to behave (*R. v. DD,* 2000 SCC 43; *R. v. ARJD*, 2018 SCC 6. This is particularly so when the complainant is a child living in the accused's house - *R. v. WJM*, 2018 NSCA 54, para 54, discussing the majority reasons of the Alta. CA, substantially accepted by the SCC in *R. v. ARJD*. I must take care not to rely on preconceived assumptions, which divert the trier of fact from the actual evidence (*R. v. DR,* 2022 NLCA 2; *R. v. JC*, 2021 ONCA 131).

[41] As our Court of Appeal said in *R. v. Horne*, 2023 NSCA 64, para 50-51;

> [50] Courts are permitted—indeed encouraged—to use "common sense" when assessing evidence and, in particular, credibility. However, the application of common-sense inferences usually must be grounded in the evidence of the particular case at hand. Common sense must not be burdened by stereotypical reasoning. *R. v. Find*, 2001 SCC 32.

Also see *R. v. Al-Rawi*, 2021 NSCA 86, para 64-71.

[42] J.M. was careful in answering questions, on cross as well as direct examination. She made concessions where appropriate and did not try to rehabilitate her evidence or explain gaps or problems. It was largely internally consistent. In some respects, the independent evidence of D.C. supports her testimony, with respect to the rash, and the showering.

[43] Before making specific findings of fact, I turn to assessing the evidence of D.C. in accordance with the instruction of *W(D), supra.* I must assess evidence not in isolation (*R. v. GC*, 2021 ONCA 441). Indeed, the *W(D)* inquiry is applied not just to accused's evidence but to any defence evidence and to any potentially exculpatory evidence whether led by defence or crown (*R. v. Smith*, 2020 ONCA 782; *R. v. Boucher*, 2022 ONCA 40).

[44] D.C. testified in his defence at trial. The *W(D)* assessment instructs me, in the first instance, to consider whether I believe the accused's evidence, and if it is exculpatory, then he is entitled to be acquitted. I am also entitled to accept parts of a witness' evidence and reject other parts. I also emphasize that my task is not to choose between discrepant versions of events. That would amount to a credibility contest, and would constitute an evaluation of the evidence flawed at law. I do not do that. I consider D.C.'s evidence in its entirety, and in the context of the whole of the evidence that is before me. D.C.'s evidence on direct examination was relatively brief, and to the point. His testimony was at loggerheads with that of J.M. in many respects, but it was in accord on two key items, which he conceded in his examination-in-chief; these are before the Court in Exhibit 1 for the truth of their contents, with an admission of voluntariness, and maintained on cross-examination. Those are: that he showered with J.M. until she was 10 or 11 years old; that he applied nivea cream in and on her vagina up to the age of 10 or 11 years old. Additionally, it was his evidence that he shaved J.M.'s pubic region at about age 10 or 11 years. Under the *W(D)* analytical inquiry, if I believe his evidence on these points, I must consider whether it is exculpatory.

[45] Counsel are agreed, and I agree with them, that the inquiry I need make on this score is whether, if accepted, this evidence constitutes a violation of J.M.'s sexual integrity on an objective standard, the essential element of the actus of the s. 271 allegation. All of the evidence before me is externally consistent on these three points: the *viva voce* evidence of D.C.; the statement of D.C.; and where applicable, the *viva voce* evidence of J.M. It is also internally consistent considering each witness's evidence. I accept that these three incidents occurred, showering with J.M., shaving her pubic region, and applying nivea cream to her vagina. The evidence in relation to these incidents in undisputed by any other evidence before me – it is, in effect, uncontroverted. On page 21 of his statement, D.C. agreed that J.M. was getting too old for him to apply cream to her vagina and she was going to have to start doing it herself. On cross-examination, it was put to D.C. that he was putting cream on her vagina when she should have been doing it herself – his response was, "I have to agree with that".

[46] In his own evidence, D.C. confirms that J.M. was old enough at 10 or 11 years to wash her own body, and he only had to wash her hair. However, he also confirms that he would apply cream to her vaginal area when she would get out of the shower. Notably, with respect to the shaving of her pubic region, he agrees in his own statement, in evidence, that J.M. may have felt uncomfortable, though he did not consider it inappropriate. D.C. agreed that the rash on J.M. was visible without having to put his hands on it.

[47] As the Court said in *R. v. Trachy*, 2019, 379 CCC (3d) 51 (ONCA), even if a reasonable observer would not perceive a sexual purpose in the conduct, that is not dispositive of whether a sexual assault was committed. The sexual nature of the touching is determined by an objective standard. The question is whether a reasonable observer would perceive a sexual context to the touching, in light of all the circumstances. I find the *BJT* case instructive – at paragraph 46, "there was no instance where a father could apply cream to his daughter's vagina"…objectively, it would make no sense given the alternative solutions available to attend to personal care. D.C., on his own evidence, was alone with his 10 or 11-year-old daughter in the bathroom, while she was naked, touching her pubic region, when, on his own admission, there may be a subjective discomfort or inappropriate nature to the contact. With respect to the cream, he agrees that she should have been doing it herself. Considering the body parts touched, the situation in which it was done, the age of the child, the nature of the contact, D.C. was not protecting the sexual autonomy of his pubescent daughter by engaging in this conduct. The incidents of shaving her pubic hair and applying cream to her vagina constitute an objective violation of J.M.'s sexual integrity and the actus of the s. 271 is made out on these facts. Where available, consent forms a part of the *mens rea*. That defence is unavailable here, as both counsel acknowledge. To satisfy the mental element, the prosecution must prove that the accused intentionally touched the complainant. Again, this is satisfied on D.C.'s own evidence, in his admission of setting out to shave her pubic hair, and putting cream on her vagina when she exits the shower while confirming that she was old enough to be doing it herself, even noting in his evidence that his mother was too old to lean over the tub and attend to it. A conviction is recorded on the 271.

[48] With respect to the remaining incidents alleged by J.M. that D.C. denies, including the mutual masturbation, his masturbation on the toilet, the back rub, and the invitation to spit on and touch his penis, I return to the credibility assessment, and specifically, the *W(D)* inquiry in relation to D.C.'s evidence.

[49] As reviewed, D.C. made certain concessions in examination-in-chief. In this regard, there are some external consistencies with the *viva voce* evidence of J.M. However, the greater balance of his testimony was divergent from that of J.M. There are several problematic aspects of D.C.'s evidence. I agree with the Crown attorney that D.C.'s inability to recall his civic address for a place he lived for over a decade is curious. He was also unable to retrieve from his memory even the year of his mother's death, let alone the date certain. It does raise a reliability question, with respect to his ability for accurate recall. There were a number of internal consistency problems. Initially, D.C. adamantly denied ever masturbating in the

presence of J.M., but when challenged under cross examination, said it could be possible she could have seen him masturbating. Similarly, his initial *viva voce* evidence was that he had never had an erect penis while in the shower with J.M. Under cross-examination, he agrees he cannot say for certain that he has never had an erect penis against J.M.'s vagina. When questioned about putting his hands on J.M.'s vagina when inspecting the rash, and specifically, whether it was possible that he put his hands on her vagina when he did not need to, his response was he "can't see it. Anything is possible." I consider this to be an evasive response to a very clear question. There was a line of questioning on cross-examination about applying the nivea cream to the vaginal area of J.M. – when it was put to D.C. the suggestion that he knew J.M. could apply the cream herself, he became very defensive, even returning a question to the prosecution, quite beyond the bounds of propriety in the witness box. The convenience of some of his answers, not a categorical denial but leaving open a possibility, and the internal inconsistency between direct and cross-examination, give the court little comfort in believing his evidence denying the allegations of J.M. about the back rub incident, putting his erect penis between her legs in the shower, and the mutual masturbation. I do not accept all of D.C.'s evidence as it relates to these allegations, and on the first branch of *W(D),* I do not conclude that I must acquit on the sexual interference and invitation to sexual touching counts.

[50] I now move to the second stage of the *W(D)* inquiry. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt, he is entitled to the benefit of that doubt and to be acquitted of the charge. In other words, it is not enough to believe he is probably guilty of sexual interference and invitation to sexual touching. As it relates to these counts, counsel are united on the appropriate mental element; that is, a specific intent must be proven, and particularly, there must be a sexual purpose to the touching or interference, as applicable. The Crown's theory of the case vis-à-vis these allegations is that the court should reject the *viva voce* evidence of D.C. due primarily to its inconsistency over its course – for example, moving from an adamant denial of masturbation, to later, an admission of "it's possible" that the complainant could have seen him masturbating, or his erect penis could have touched her in the shower. The prosecution argues this is self-serving, and that it should lead to court to a wholesale acceptance of J.M.'s evidence and convictions on these counts. Mr. Kidston argues that while there are certain admissions made by D.C. with respect to his conduct with J.M., that in relation to the specific intent charges, there is no evidence that any of his actions were done for a sexual purpose, and this denial remained consistent throughout the piece.

[51] There is contrary evidence from the witnesses on the invitation to spit on and touch his penis, and on the back rub incidents, both of these situations which D.C. consistently disputed. With respect to the masturbation and erect penis in the shower allegations, while D.C. dithered somewhat between direct and cross, his concessions of "it may be possible" were in the context of admitting there is a remote possibility of almost anything, and he maintained his position that there was never a sexual purpose to his interaction with his daughter.

[52] I turn my mind to the analysis in *R. v. Redden*, 2021 BCCA 230, where the accused's testimony "cannot stand in light of cogency of other evidence". The judge in that case did not accept the appellant's denials primarily due to the strength of DNA evidence before the court, the proximity of clothing on scene, and certain evidence of timing. This is not one of those cases, in my view. D.C.'s evidence is fluctuant, it was infirm in many respects. However, D.C.'s consistent denials regarding certain of the alleged incidents, particularly with respect to the specific intent required for sexual interference and invitation to sexual touching, and the divergent testimony on what took place in that […] residence between 2008 and 2014 vis-à-vis those incidents, leave me with doubt at the second stage of the *W(D)* framework such that I cannot convict.

[53] It is therefore not necessary for me to consider the third step in the *W(D)* analysis; that is, if I am not left with a reasonable doubt by the evidence of the accused, then I must look at the totality of the evidence which I accept and, on that basis, determine whether the Crown has proved its case beyond a reasonable doubt. Acquittals are registered on the 151 and 152 counts.

[54] Your assistance throughout is valued, counsel, and I thank you.

Bronwyn Duffy, JPC