

**SUPREME COURT OF NOVA SCOTIA**

**Citation: *R. v. P.W.M.*, 2009 NSSC 423**

**Date:** 20091223

**Docket:** CRH No. 308250

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

P.W.M.

**Restriction on publication:** Section 486 C.C.C.

**Judge:** The Honourable Justice M. Heather Robertson.

**Heard:** December 14, 15, 16, 17 & 18, 2009, in Halifax, Nova Scotia

**Decision:** December 23, 2009 (**Orally**)

**Written Release:** June 11, 2010

**Counsel:** Paul Carver and Melanie Perry, for the plaintiff  
Brian Casey, for the defendant

**Robertson, J.: (Orally)**

[1] PWM is charged with five counts of sexual assault. After hearing the evidence of the complainant KE the Indictment was amended by consent of counsel to conform to her evidence.

[2] The charges now read that the accused:

1) that he between the 1<sup>st</sup> day of September 1980 and the 3<sup>rd</sup> day of January A.D. 1983 both dates inclusive at, or near Dartmouth, in the County of Halifax in the Province of Nova Scotia, did indecently assault KE, a female person contrary to Section 149 of the Criminal Code of Canada.

2) AND FURTHER THAT HE BETWEEN THE 4<sup>TH</sup> DAY OF JANUARY A.D. 1983 AND THE 31<sup>ST</sup> DAY OF DECEMBER A.D. 1987 BOTH DATES INCLUSIVE AT THE SAME PLACE AFORESAID, did commit a sexual on KE contrary to Section 246.1(1) of the Criminal Code of Canada.

3) AND FURTHER THAT HE BETWEEN THE 1<sup>ST</sup> DAY OF JANUARY A.D. 1988 AND THE 8<sup>TH</sup> DAY OF JUNE A.D. 1989 BOTH DATES INCLUSIVE AT THE SAME PLACE AFORESAID, did commit a sexual assault on KE, contrary to Section 271(1)(a) of the Criminal Code of Canada.

4) AND FURTHER THAT HE BETWEEN THE 1<sup>ST</sup> DAY OF MAY A.D. 1985 AND THE 31<sup>ST</sup> DAY OF MAY A.D. 1985 BOTH DATES INCLUSIVE AT THE SAME PLACE AFORESAID, did have sexual intercourse with KE, a female person not his wife, and under the age of fourteen years, contrary to Section 146(1) of the Criminal Code of Canada.

5) AND FURTHER THAT HE BETWEEN THE 1<sup>ST</sup> DAY OF JANUARY, A.D. 1988 AND THE 8<sup>TH</sup> DAY OF JUNE A.D. 1989 BOTH DATES INCLUSIVE AT THE SAME PLACE AFORESAID, being a person with KE, a young person, was in a relationship of dependency, did for a sexual purpose touch directly the body of KE, a young person, with a part of his body to wit: his penis, contrary to Section 153(1)(a) of the Criminal Code of Canada.

[3] KE testified that the sexual assaults by her stepfather, the accused, began when she was nine years of age and ended at about age 17 just before she left home. As her mother worked from Thursday to Sunday at \*'s Restaurant in Dartmouth from late afternoon until 2:00 a.m. her stepfather babysat her and her two younger siblings.

[4] She testified that at the age of nine when living at \* in Dartmouth she was snuggled up on the couch in a blanket and the accused joined her on the couch and stretched out. She was then lying in front of him on her right side as was he when the accused rubbed her legs, thigh and stomach over her clothes and in a soft and even affectionate manner. She testified that she got nervous and went out to play. She also testified that just before this it had become suddenly differently she felt than lying on a couch with her own dad because the accused then followed her breast line with his hand and it was then that she felt uncomfortable and went out to play.

[5] She remembered the accused saying to her that soon she was ready to bud. KE testified that the same incident was then repeated when she was lying on the couch watching television and he would be on the couch as well and would begin fondling and rubbing her beneath her clothes, culminating with the accused rubbing her vagina. On this second occasion she once again got up and left the room and went out to play.

[6] KE testified that these incidents occurred two or three times a week when her mother was working and soon escalated to when “he asked me to do this and that” and also that he penetrated her vagina with his fingers.

[7] The incidents all took place at \* . KE testified that she was nine or ten and probably in grade four which she also repeated. KE also testified that the accused called her into the master bedroom at \* where he was laying on the bed on his right side facing the wall, upon which he was projecting a pornographic movie and invited her to watch it. She recalls images of a dark-haired woman on the toilet masturbating. The accused had on a housecoat and was masturbating as well. She made a derogatory comment to him and left the room. KE’s evidence is that she told the resource teacher the next day that the accused showed her a dirty movie and that “P touched me.” KE described how her “face changed . . . she got angry . . . she was mean and she frightened me, I stopped talking then . . . I was in trouble with her and could tell by the tone of her voice.”

[8] KE testified that the result was that her mother had a meeting up in her bedroom with the accused who was crying and said, “No, she’s lying.” KE testified “the next thing I know I was going to counselling.”

[9] She has little recall about attending counselling. KE said she remembers getting off an elevator. She recalls a room with a window on the wall which was a two-way mirror and it being explained to her that she was being taped.

[10] Notes from the Atlantic Child Guidance Centre ('ACGC') reveal that she and her mother had attended there first in 1982, later in 1985 and lastly in 1989. She recalls her mother saying as they first went to the ACGC that "she'd find out if I was lying or not."

[11] Respecting the counsellors she testified "I was scared . . . I don't remember speaking to anyone really." KE can't in fact remember if she was ever there alone.

[12] KE testified that this first disclosure did not end the abuse by the accused. He said to her that "it was a silly thing for me to do as mom didn't have anyone else to take care of her." So while at \* KE says the sexual acts complained of were sexual touching and digital penetration.

[13] KE's testimony is that the family moved to \* for a half year and that her mother did not work during that period and was then pregnant awaiting the birth of brother M, the only child her mother and the accused had together. KE testified that there was no abuse while they were in \*.

[14] KE testified that once they returned to Dartmouth, then living at \*, the assaults began again on the sofa with rubbing, touching, digital penetration and next her clothes being taken off, mostly the pants off with her tops left on. The accused would be wearing his housecoat, and take his penis out for KE to touch. He would lick his hand and moisten her vagina.

[15] KE testified that she masturbated the accused and he ejaculated on her thigh or belly. KE believed she was age 11 or 12. KE described at this stage he was simulating sex with her, grinding his body against hers but not yet having intercourse; however, there were many instances of oral sex given and received.

[16] KE's brother M was born in March 1985, while the family lived at \*, which is \* housing. This was a small three bedroom house called a maisonette. The family applied for a bigger house and were next able to rent a four-bedroom house across the street at \*.

[17] KE testified that the first time she had intercourse was on or about moving day, when \* was empty and she was then shampooing rugs in her brother's bedroom and her mother was across the street setting up the new house.

[18] KE testified that the accused came in to congratulate her on having her period and becoming a woman. She testified "he hugged me and kissed me on the neck and the next thing I was on my back on the floor and he flipped me over and he had me on my knees and penetrated me from behind into my vagina. I was 13 or 14." She described how her jeans were completely off and his were down to his knees. She testified that the penetration was painful and that she lost her breath. She testified it was still daytime, just before dinner.

[19] Moving day to \* has been established as occurring on May 15, 1985.

[20] KE did not recall seeing any counsellors at all in 1985.

[21] While living at \*, KE testified that the sexual activity continued with the accused. She described how it progressed and was more steady, almost like a boyfriend/girlfriend with more touching, fondling, acts of oral sex. "He did it to me, then I had to do it to him." KE said that the accused never used force, but was persuasive and assertive.

[22] KE recalled that she was not getting along with her mother and that on an occasion when they were arguing she yelled "he's been fucking me my whole life, so don't ask him." KE testified she thinks her boyfriend SB was at the doorway of the kitchen when she made this disclosure to her mother. It was 1989. KE testified that later the accused came home and they had a meeting in the kitchen at the kitchen table with her mother and the accused and that the accused laid his head on the table and was crying. Her mother asked her to describe the birthmark on the accused. KE testified that she could not recall where the mark was, but that it reminded her of the shape of Nova Scotia. KE testified that the accused then jumped up and said "I've had enough of all of this, get the fuck out of my house." She testified that S took her by the hand and we went to \* Road where he lived. She remained there living with him for a few months until SB moved to \*. Although he said he would send for her, he did not. KE testified that she had to move home for a while.

[23] KE does not remember going to ACGC at this time. She testified she remembered going once for her records and there being three women there, one of whom got up and said “I don’t have time for this” and left the room. She believed that this was in 1988 or 1989. The ACGC records actually revealed that there were six meetings with KE and her family in 1982, up to three meetings in 1985 and as many as nine sessions in 1989.

[24] KE readily admits that her conduct was poor during this period from 1982 to 1989, describing herself as an “ignorant, nasty, foul-mouthed little girl” which could engender a poor response from these counsellors.

[25] KE described other instances and locations among the many acts of sex between she and the accused during her girlhood. She recalled incidents at the \* Campground in \*, when at times her mother commuted back to Dartmouth to do her job at \*’s. She testified to an incident in the accused’s 32 foot trailer (a replacement for the earlier hardtop tent trailer version), that the 32 foot trailer had a double bed at the end of the trailer and on that occasion she remembered fondling and oral sex, but not intercourse. She believed the time frame was the summer of 1986 or 1987 while living at \*, but before she told her mother what was going on.

[26] By the summer of 1988 she believes she stayed home at \* in Dartmouth, because she was working while the accused and her siblings lived at the campground. KE also described an incident of oral sex in a car where the accused asked her to perform this act upon him. She testified they were crossing the \* Bridge and were on their way to \* to the car club there. While on the bridge, beginning this act, KE says a tractor trailer pulled along side and could see down into their car so she refused to continue the act.

[27] She also recalled the accused driving her to a beach in the dark and asking her to perform oral sex on him. She recalls a large moose statue near the beach. They had been on their way to pick up her mother at work. Counsel and I agree that this locale would be at \*, where such a moose statute is located.

[28] KE also recalled an incident where the accused groped her in the car (a brown \*) and she was angry and kicked at the window shattering it into a spider web crack, requiring the replacement of the window.

[29] KE when asked if she received compensation for sexual acts testified that he gave her money for a little black dress for a teen town dance, after she had given him oral sex. He had said to her “You know what you have to do for the money.” She recalls on this occasion he was standing in the master bedroom between the bed and the dresser and remained standing while she performed the act.

[30] KE testified that she always saw his penis when it was erect and that he was circumcised. She did not recall ever seeing his penis flaccid.

[31] KE testified she did not use birth control as the accused had had a vasectomy shortly after his son M was born when they still lived at \* . She remembers his genital area being shaved then.

[32] When questioned about the position she took when they had intercourse , KE explained that she was so little, barely over 5 feet tall and 100 pounds, she would either be on top of the accused or on her knees so that he could enter her from behind. KE testified he always initiated the sex acts with smooth, sweet, soft talk, much like a spouse would, although she said she hated to make this comparison now.

[33] She testified that the accused her to tell her doctor that she had used a brush to break her cherry.

[34] On the issue of consent to these sexual acts from the age of nine through the teen years, KE testified that you could never say no. If you said no he'd just be more persuasive and more assertive telling her to “Come on - do this.” She testified, finally that it was just easier to give in. KE said she never actually consented to these acts.

[35] KE left home at the age of 17 and went to live with her second boyfriend and now husband, BE. They have a 14 year old son.

[36] The third final disclosure of the alleged sexual acts upon KE arose in August 2006 she testified. She was then age 35. The accused was separated from her mother in the fall of 1985, but he remained in touch with the family. KE described how her aunt S had been given a vibrator by the accused, which was accompanied by a note left in her mailbox. He had sent KE's other aunt the same gift.

[37] The family was in conversation over the strange behaviour and KE learned that the accused had threatened suicide and was on his way to \* in his camper where he would commit suicide. KE called her sister to tell her of the accused's behaviour. KE testified that her sister J revealed then that the accused had been molesting her all these years as well and that she, J, was sorry that she did not cover her back. KE said J was crying on the phone and was hard to understand.

[38] KE testified that she then called the accused and left a message on his cell phone and told him "I'll slit your throat from ear to ear for touching my little sister." She testified that she yelled into the phone about all of the abuse that she and now her sister had suffered until her husband said that was enough and wanted to take the phone from her. She eluded him and ran into the bedroom and continued to rant, but KE testified on cross-examination she had no idea if all of her conversation was recorded or whether the message service might have cut out.

[39] KE's compliant attitude as a child, at least in the acquiescence to the alleged sexual acts or her opposite and angry demeanor is at issue. KE testified that from the time the accused joined her family it was not a regular father/daughter relationship. She described keeping to herself, doing her own thing, being mean and arrogant and having nothing nice to say to anyone. She testified that the accused belittled her, called her a stupid skinny thing, ridiculed her size, appearance and small breasts. She testified he would call her stupid when trying to teach her math.

[40] KE testified there was always alcohol in the house, that the accused drank most nights, that she could not tell how much but he did not appear drunk. She testified her relationship with her mother was always strained; that she did not trust her, not since Grade 4, "when I told her of the abuse and she didn't believe me."

[41] KE felt she was stuck and abused and dealt with it finally like she had another personality and just blocked it out. KE said that after she left home relations with the accused were better and they would meet at family functions, Christmas, Thanksgiving, visits at grandparents. Things were finally normal. They took a family vacation to Disney after the accused promised her son that they would go.

[42] When asked if she ever confronted the accused about these assaults she testified that her brother M had called and complained of the accused drinking and



told her not to let her mother come home. KE testified she had had enough and went to see the accused. She testified that he was drunk and maudlin and said, “Remember how nice it was when you were all young kids.” She disagreed and asked him why did he do all the things to her when she was a child. KE testified that the accused said, “Don’t you remember you took my hand and put it on your vagina.” Her mother came home and this conversation ended. KE testified she told him to get out of her mother’s house because of all that had happened.

[43] She testified she did not speak at all to her little sister J about the sexual abuse and not much to her mother either, not in detail, although KE testified that her mother knew what had happened.

[44] There are inconsistencies in KE’s testimony vis a vis the business records from the ACGC shown as Exhibit 6 before the court and earlier written statements KE has made to the Halifax Police in 2006 and 2007.

[45] The defence urges the court to analyse these areas of conflict and conclude that these circumstances raise a reasonable doubt as to the occurrence of the alleged sexual assaults.

[46] First, I would like to deal with the notes as business records generated by the ACGC, which treated KE from 1982 to 1989. I have carefully reviewed all of the ACGC records and notes (Exhibit 6) and agree that they are admissible as a business record. These notes are also the subject of some agreement presented to the Court by counsel as advanced in an Agreed Statement of Facts, Exhibit 4. I have considered the authorities cited by counsel: *R. v. Wilcox*, [2001] N.S.J. No. 85; *R. v. Cluney*, 2009 CarswellOnt 2090; *R. v. S.L.J.* [1994] N.S.J. No. 413.

[47] A recent review of business records rules as they relate to medical records (albeit in a civil case) can be found in *Tingley v. Wellington Insurance*, 2008 NSSC 317. In *Tingley* certain doctors’ notes were admissible under the *Nova Scotia Evidence Act*, though not under the common law rule, because it was not established that the doctors were under a duty to make the notes.

[48] In *R. v. L.(C.)* (1999), 138 C.C.C. (3d) 356 (Ont. C.A.), the accused had been convicted of sexual offences against his sister-in-law, committed when he was 26 years of age. Among the hospital records entered as trial exhibits was a letter from a doctor to the hospital’s therapeutic abortion committee, in which the doctor

stated that the complainant's pregnancy resulted from a relationship with a 15 year old male. The Court of Appeal held that the trial judge erred in directing the jury to disregard the letter as hearsay. The doctor's letter, as well as the other hospital records, were admissible as a business record under Section 30 of the *Canada Evidence Act*.

[49] A succinct recent review of the principled approach to determining necessity and reliability can be found in *R. v. Clancy*, 2009 CarswellOnt 2009 (Ont.S.C.J.), where the hearsay evidence in question was a historic DNA sample. The accused claimed at para. 7 that ". . . there is not a sufficiently reliable chain of continuity relating to the 1988 D.N.A. sample." The trial judge held that both necessity and reliability were established.

[50] In *R. v. Kohli*, 2004 CarswellOnt 5680 (Ont. C.J.), the accused was charged in relation to a motor vehicle accident. The defence sought to admit a photocopy of the accused's hospital emergency room admission record for the truth of its contents, either under s. 30 of the *Canada Evidence Act* or under the common law test. The trial judge held that the hospital records were generally admissible as business records pursuant to the *Act*. Further, the document was not disqualified for admission, because it contained only part of the record. However, there were notations on the record that were clear and unequivocal, including brackets surrounding a description of the patient's leaving and returning, which were ambiguous as to whether the notation recorded what had already happened, or present observations. For the sake of clarity, and given the importance of the evidence, the missing parts of the documents would have to be adduced as well. The record could not pass the test of reliability, due to the ambiguous annotations and the record was therefore inadmissible for the truth of its contents.

[51] In this instance, these records relating to KE's visits to the ACGC are business records and are admissible in my view, not for the truth of their content, but the fact that certain statements were made and recorded in the cause of the counsellor's duty.

[52] First let me speak to these records in a general way. In 1982 and again in 1985, KE was seen by psychologist, CH at the ACGC. She was not seen alone. She was referred by the resource teacher, CW, as referenced by a referral sheet dated February 16, 1982. Her stepfather attended the first two sessions, March 11 and March 26, 1982. He attended again on June 30, 1982.

[53] From the general tenor of these notes I am satisfied that KE's parents presented her to the ACGC as a troublesome child and their impressions of KE dictated the attitude assumed by the counsellor.

[54] March 11, 1982, the notes read:

K.'s attitude is causing friction at home – lies, steals, is not co-operative with mother, gives mother and P a hard time – non compliant. Mother feels she has no authority with K.

[55] March 26, 1982, the notes read:

Described K. as an actress with a captive audience. Had P take action re: K. Playing with markers. Continued to stress to parents that they were more in charge.

[56] February 26, 1985:

**Parents' perception:**

K. is completely negative. She is doing poorly at school, has few friends and not involved in any activities. She is always arguing with her mother or with her step-father. She says she wants to live with her father. She is negative about herself.

[57] There seems to be a general reluctance on the part of the author of these notes to consider why K is acting out why and why she demonstrates such low self esteem.

[58] The notes make comment:

**Child's strengths**

K. presents as a sullen, argumentative child, who continually complains of mistreatment. She accuses her mother of many misdemeanors (sic) and is always blaming others for her situation. She shows resilience in withstanding the constant negativity from her mother.

**Mother**

Speaks in a continual rush about K. Sounds angry and negative. Continues to express feelings of guilt, but also states that she has had it with K. Many mixed messages. The stepfather was not seen. Mother reports that he is almost ready to give up as he has got nowhere with K. Has been given power to discipline her when mother is not home.

[59] In 1982, this counsellor ignored KE's bed wetting and ignored the complaints about the porn movie and deemed it an accident. I expect she ignored any mention of sexual touching, although clearly in the phone by CW to this counsellor reference is made to "boyfriend's sexual behaviour/activity."

[60] Even when KE's stepfather was not present at the ACGC, KE was there with her mother and siblings, hardly a conducive environment to openly and fully communicating with KE

[61] In March 1985, the notes reveal the same attitudes of coping with a wayward child prevail. "P feels that the main problem is between him and K and her not listening to him."

[62] In the context of KE's evidence the accused had been sexually assaulting her for three years, including mutual acts of oral sex, not then escalated to intercourse. This was in the spring of 1985 when KE was describing her life in testimony.

[63] Her mother was aware of the allegations since 1982 and chose the explanations provided by the accused and refused to accept that her husband's conduct had anything to do with KE's behavioural problems.

[64] ACGC notes reflect (in reference to the stepfather explaining the stresses he suffers on his job:

K is perhaps expressing that conflict at the same time K. is showing extremely obsessive behavior. I will do what I want to do and no one will stop me.  
Consistently, constantly oppositional and pseudo mature.

[65] Nothing is achieved in these 1985 sessions and the mother ends them.

[66] In 1989 MB sees KE and reviews her earlier history at the ACGC. The referral is made on June 8, 1989. The note says:

**Reason for Referral:**

K was claiming sexually abuse from 9-13years. This came out during an argument between mother and daughter about living with her boyfriend – mother wants to know if it's true – K is willing to come in.

**July 4, 1989**

K came to the office to see me and to talk about being sexually abused by her stepfather. K began the session by saying that she did not want to get her stepfather in trouble. She doesn't him to get sent to jail, as she wouldn't want to hurt his career. She said he has an important job. K also doesn't want to go to Court regarding abuse.

She said she hates her mother and stepfather and wants to move out on her own in her own apartment.

K blames herself for the abuse. She said “ – I liked having sex with P. I used to ask to give him a blowjob so I could get some money. I'll admit it, I am a selfish, spoiled little brat.

K was very vague in her description of what happened to her. She couldn't remember exactly when it started but thought she was 10 when she gave him a blowjob. She said her mother worked at nights at \*'s and they would have oral sex at least 3 nights a week.

When she was 12 P had intercourse with her. She said he had intercourse with her around 3 different times.

The second time was just after he had a vasectomy and she said he was shaved in the genital area.

The third time was also when she was 12, possibly 13. She said that when she was 13 she saw a show on TV about sexual abuse and the therapist said she could tell by looking at a girl whether she was being sexually abused. K said she felt dirty then and felt everyone could tell by looking at her what was going on. She refused to have sex with P and he didn't bother her anymore. K told her story with no embarrassment or apparent upset. She was quite flippant throughout the session and very crude in her language.

**July 11, 1989**

I wanted BH from Department of Community Services to talk to K with me. I am puzzled by this case. I have not seen anyone talk about their abuse in such a non-emotional, detached manner. K couldn't give me much description of events for example when, what grade, what time of year, how it got started, did he say anything to her, etc. I wanted a second opinion and she was agreeable to this during the session, gave a bit more information but still couldn't remember any specific times. B not sure either of whether or not K is making this up.

[67] Again the counsellor and her colleague are not receptive to the complaints and appear judgmental with respect to her demeanor no doubt communicated their lack of belief in KE's throughout the session.

[68] It is important to note that these impressions described in the notes are not supported by any direct evidence from the authors, who could apparently not recall any specifics of the interviews when approached by both Crown and defence counsel. These notes have not been adopted by KE in her testimony.

[69] In general these notes contain a lot of hearsay, largely the rendering of events according to KE's mother and stepfather, the accused and later even elude to a scenario where KE has a motive for alleging sexual abuse so she can receive welfare and live on her own.

[70] This last reference is an entry in the notes to which the Crown has raised objection, as the reference is to what a social assistance worker allegedly said to KE when KE inquired about assistance: "They would help her out only if she was being abused in her home." This is a third-hand description of a conversation to which the counsellor was not privy.

[71] Although I have admitted this note as a business record, I am of the view that it is not reliable and would make a very weak foundation for the defence being raised that KE had a reason to lie because she wanted to receive welfare and afford her own apartment.

[72] When considered together with the evidence of KE, her mother and stepfather, in my view the turmoil of KE's life is real and palpable and the allegations of abuse made by KE merit serious and open consideration unlike the closed and sceptical attitude shown by the staff of the ACGC.

[73] It is little wonder that KE was uncommunicative and did not speak in detail of the alleged abuse, when it is pretty obvious she was not being believed either by her mother or the counsellors.

[74] It did not occur to these same counsellors that KE might rightly express anger and a bad attitude in light of her mother choosing to believe her husband and disbelieve KE interestingly enough, the ACGC notes elude to the mother having some guilt, but this is never explored further.

[75] As well, KE's mother testified that on one occasion when she was coming out of her shower she entered the master bedroom and saw the accused and her daughter on the bed. The accused jumped up and may have been closing his housecoat. She said to them "What's going on here . . . you tell me . . . or do I have to call the police?" The accused, she said, was helping KE with her homework. My impression of KE's mother's evidence is that to this day she equivocates on the issue of believing that not one, but two of her daughters' allegations of sexual abuse versus believing in the accused.

[76] However, the notes do chronicle certain key dates when events are alleged to have occurred and in this respect they provide a basis for a challenge to some of KE's testimony. They make reference to KE saying there were only three instances of intercourse which ended in 1985. They reference KE giving oral sex to the accused as the price of him buying a pair of jeans, not the purchase of a black dress as referenced in her testimony, although it is possible that the reference to the jeans referred to incidents in 1982 and 1983 and the reference in her testimony was to her memory of the accused buying her a black dress, which happened at a later date.

[77] In KE's testimony she references the loss of her virginity in May 1985, moving day from \* to \*. The notes reference KE telling MB that the second incident of intercourse occurred while the accused was shaved for a vasectomy, when in fact the vasectomy procedure was in February or March 1984, before the accused's son M's birth and fully 14 months before moving day in mid-May 1985.

[78] These notes are contradicted by KE's testimony, both in the time line of the accounts of sexual intercourse and in the frequency and duration of the other sexual acts of abuse. KE testified that the abuse continued to the age of 17 when she finally left home, contrasted with a statement attributed to her in the 1989

ACGC notes "the accused did not bother me after 1984" when she would have been 13 or 14 years of age.

[79] There are other troubling inconsistencies about KE's testimony and statements made to the police. One handwritten statement, the second a typed and edited version of the first and two subsequent KGB statements given to the Halifax Police in 2007.

[80] In her handwritten account of the abuse provide to the Halifax Police she first indicated that "the accused picked me up and set me down on the bed" to view the pornographic movie. In her typewritten version she recounts that she stood at the door and the accused was lying on the bed with his back to her, although she could see that he was masturbating as he watched the porno film. She left the room, she testified.

[81] The ACGC notes, not adopted by KE, expressed that K was forced to watch the pornographic movie, although in her adult rendering of the version she merely left the room after calling him a jerk or words to that effect.

[82] With reference to the incident where she kicked out the windshield of the accused's car, her statement to the police said "I don't know if he was tickling me or grabbing me" when in testimony she alleged he was grabbing her at the legs, thigh and then the breasts and so she fought him off and kicked out the window. If this had been a mere tickling it would not have been a sexual assault.

[83] The evidence of KE's sister, who would have been age six at the time and was present in the family car when the incident occurred, cannot in my view offer much insight into the nature of the accused's actions, be it tickling or grabbing.

[84] The accused is uncircumcised and KE testified that the accused was circumcised, although she did testify that she only saw him in an erect state. The defence argues that if these sexual encounters took place as often as two or three times a week for a period of years, KE ought to have observed the accused in a flaccid state sometime and therefore would know he was uncircumcised. KE had no earlier sexual experience before the accused and it is possible therefore that she did not recognize the difference between a circumcised and an uncircumcised penis.



[85] KE told the police that the accused had a specific birth mark on the inner upper thigh, but could not remember the location of this mark on direct examination. Her mother's evidence was that the accused had no such mark on his inner upper thigh and certainly not one that looked like the shape of the province of Nova Scotia, as KE had testified.

[86] The Court was shown an appendix scar just below the accused's waist band and a mole on his left calf.

[87] The accused testified in this case. The accused makes an outright denial of the events and submits that KE was motivated in 1982 to make an accusation to prevent or postpone his imminent marriage to her mother; that in 1989 she made up these allegations so that she could receive social assistance and live on her own; and that in 2006 she threatened to cut his throat because she wrongly believed that he had molested her little sister.

[88] The accused portrays himself as a good provider and a good father who made no distinction between his wife's first two children and his natural son, M. It is important to note that he grew up in very difficult circumstances with four or five brothers remaining in the home of his abusive father, while his mother was forced to leave and could not afford to take the boys with her.

[89] He was 20 years of age when he met KE's mother, who was then 26. He had no experience of a parental nature and by this time was a trained able seaman who then rose through the ranks to become a petty officer and an instructor of recruits. Obeying orders was a mandatory aspect of his career.

[90] Having heard the evidence of KE, her mother and the accused, it is obvious that he was a powerful figure in the family and the source of economic stability. Because his wife worked Thursday through Sunday from 4:00 p.m. to 2:00 a.m., he assumed care giving responsibilities with his wife's two children and then their own son. He was the dominant force in the family, the sergeant major or naval equivalent. He testified he did tease the children. He admitted to the "itty bitty titty committee" in reference to the girls' development, as evidenced by J's evidence and KE's evidence of his attitude towards them.

[91] From his evidence I perceived that he was a man much less involved with these children than he would have the court believe, but he was ready to meet out

discipline or to render his opinions as to their abilities, whether it be their scholastic or vocational abilities. He struck me as a distant and unforgiving man with little insight into his parenting role or responsibilities.

[92] His testimony was to some degree self-serving. I believe he governed the agenda at the ACGC and helped convince the staff there that he and his wife were coping with a very troublesome child.

[93] Following the allegations advanced by KE in 1982 and 1989 he was able to deflect responsibility from himself and make his wife believe that KE was a liar. Some of his evidence belied his interest in portraying himself as a good family man.

[94] He testified he was never alone on the couch with KE and also that all the children, then aged 9, 6 and 3 had the same bed time at 7:00 or 7:30 p.m. Neither of these statements is very plausible. Most dads would sit on a couch with their children, any one of them or all of them and nine year olds do not often go to bed at the same time as infants.

[95] With respect to his viewing of a porno movie and K happening by the door to his bedroom to ask for a glass of water, it is curious that he would not report this incident to his wife when she returned from work, or even the next morning. Instead he waited for the shoe to drop and for the school to contact his wife after KE's disclosure.

[96] The accused appeared to have no consideration of the affect of such a film on young eyes and was nonchalant about having viewed and shared possession of four such pornographic movies.

[97] In an earlier statement, the accused told the police while at \* he had the children to himself most of the time as his wife was never there. In direct testimony he agreed she was home pregnant with M and did not work at the time; however, she did occasionally attend medical appointments in \*.

[98] With respect to having his windshield shattered, he was adamant in his police statement that there was no such incident and that he had never ever had a windshield shattered, broken or replaced.

[99] In his testimony before this court much time was spent on this evidence. The accused testified he only remembered the incident in 2007 after discussing it with his wife when she said, “Don’t you remember, it was outside the \* Medical Centre?” He also told the police that KE could not have done this, as she was so small, yet the accused appears to have achieved total recall in his evidence, as he could remember that KE was wearing hard soled shoes and did kick out his window.

[100] Further, when reporting the incident to his wife when she came out of the \* Medical Centre and saw the shattered windshield, he told her that the kids had been roughhousing, not that he had played any role in tickling KE.

[101] Frankly, I find this evidence of retrieved memory of this event just too convenient and tailor made to suit the evidence of the event that the accused heard from KE, J and their mother at this trial.

[102] With respect to when he told KE to get out of the house, there is a possibility which the accused wishes the court to accept, that KE had the big fight with her mother and confrontation with him in the kitchen, revealing all of the sexual abuse in June of 1989, after she returned home from 3 months of living with her boyfriend, SB. The proposition fits the accused’s defence that KE had reason to make up the allegations so she could get welfare and leave home and live on her own.

[103] From all of the evidence I have heard, I believe it was more likely that this disclosure took place at the end of 1988 or early January 1989, just before KE left the house that day with her boyfriend, SB.

[104] When confronted with her allegations “I screwed your husband” including a reference to a scar on his body, a question asked by his wife of KE, he interrupted the discussion and said “I’ve had enough of this, get the fuck out of my house.”

[105] In addition, the accused described how KE was not given any Christmas presents that year “because we just decided not to get her anything.” On cross-examination the accused agreed with Crown counsel that the earlier dates were in fact correct.

[106] The reference to this confrontation in the ACGC notes is dated June 1989, but this could easily be a review of the events that brought KE and her mother back to the ACGC in June when she had then returned home, after SB went to \*.

[107] Again, I tend to agree with Crown counsel that the accused tailor made his evidence to conform with defence theories.

[108] In addition the accused was clearly the dominating force in this family. He controlled his wife and he tried to control his children with shipboard discipline. In a statement to the police he said he did not control the money in the family, yet it is clear in his evidence at trial that he did. "I was the one with the money and if she needed something she had to come to me."

[109] The accused's so-called "suicide trip" to \* is also interesting evidence during which I believe the accused was well aware of the allegations that not one, but both daughters made against him. This is the evidence of KE's mother that while he kept in touch with her and she with him almost hourly by cell phone as he drove his campervan toward \*, they discussed KE's threatening telephone call to him; that the accused on the other hand testified that he only learned of these accusations being made by both his daughters when a nurse at the \* hospital told him the following day.

[110] KE's mother had received the assistance of the RCMP to find the accused at \* and take him to the \* hospital as he was a danger to himself.

[111] Even at this time, his wife seemed to be more concerned with his welfare than that of her daughters. I agree with the Crown that her attitude amounts to a willful blindness. The accused had a lot of control over his wife, even long after their separation.

[112] Although I realize he began this trip earlier in the day, before KE called his cell, I am of the belief that the accused knew of these accusations made against him and did discuss them on the phone with his wife.

[113] The email dated August 29, is not in my view a confession of the abuse of either girl, but an ambiguous reference to these allegations.

[114] From all of the accused's testimony and reference to prior statements, as well as the ACGC records, I can say that I have a lot of difficulty accepting the accused's version of events in this family.

[115] I see a highly dysfunctional family, a controlling husband and father, and a sexualized atmosphere in the home with respect to his treatment of the girls "the itty bitty titty committee" and other comments directed at them.

[116] Cases of this type are always difficult. The alleged sexual acts take place in private when the accused was alone with KE and the other children were out playing or sleeping. These alleged events occurred over 20 years ago. The court is left to decide the credibility of each of these witnesses. However, it is not merely a credibility contest – my acceptance of one version of events over another.

[117] The Crown must prove its case that the accused committed these offences, these sexual assaults contrary to the sections of the *Code* as articulated in the Indictment. The Crown must prove all of the elements of the events. It is agreed by counsel that the date, time and place of the alleged offences are not in issue and that the identity of the accused is not at issue. It is of course denied that the accused committed any of the alleged sexual assaults.

[118] The Crown must prove its case beyond a reasonable doubt. Reasonable doubt has been defined by the Supreme Court of Canada in *R. v. Lifchus*, [1997] S.C. J. No. 77. The often quoted language characterizing reasonable doubt is as follows:

- a reasonable doubt is not a doubt based on sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty – a judge or jury who concludes only that the accused is probably guilty must acquit;

[119] Proof beyond a reasonable doubt is closer to absolute certainty than it is to probable guilt.

[120] When the accused testifies the trial judge must instruct him or herself according to *R. v. W.(D.)*, (1991) 63 C.C.C. (3d) 397.

[121] The often quoted three part test:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[122] The challenge of course is to ensure that in weighing the critical issue of credibility of the complainant and the accused, as to these events, that the court not merely engage in a “he said – she said” analysis, leading to a version of events over the other thereby possibly shifting the burden to the accused that would ignore the required analysis of step two and step three of *W.D.*

[123] In addition to *W. D.*, I have considered *R. v. Tyrrell*, [2001] O.J. No. 10 and the other cases referenced by counsel with respect to the court’s required analysis of the evidence.

[124] At the end of this trial I remain concerned about the inconsistencies in the evidence of both KE and the accused. Generally I am sceptical of the accused’s evidence and his general denial of these allegations. I found the complainant KE’s evidence to be more cogent, more compelling and believable in its detail and description of life in this family.

[125] She was a child when these events occurred and allowance must be made for the time lines of events she recalled in evidence that were perhaps a year or so out, but nevertheless pretty accurate as she pinpointed her age and grade in school and family events that coincided with these alleged abuses.

[126] Nevertheless, I find myself explaining away some of the inconsistencies or gaps between KE's testimony and her previous statements and the time lines and implications of the ACGC record.

[127] Did the acts of sexual of abuse continue KE was 17 and left home, or did they end in 1984? Were there 3 acts of sexual intercourse or multiple acts of sexual intercourse? Was there an assault in the \* car or a mere tickling? Are KE's very detailed accounts of these events at age 35 accurate in light of her past reluctance or inability to discuss these events in the two private sessions she had with a counsellor at the ACGC. What consideration did KE receive for sexual acts? Could KE's vivid memory of the first act of intercourse, the loss of her virginity in mid-May 1985 be accurate in light of ACGC record where she recounts intercourse for the second time when he was shaved due to a vasectomy?

[128] The force or lack of force, or accidental event at \* when the accused was watching pornographic movies is of concern to me. The discrepancy between the statement, "The accused picked me up and laid me on a bed" or her testimony here in court. The issue of the birthmark on the upper inner thigh. These are problems for me.

[129] And while I do not accept the evidence of the accused as to his innocence in these matters, I am left with some unease and uncertainty about these matters that I have just itemized.

[130] While I believe that these sexual assaults likely occurred, while I can say I believe these sexual assaults probably occurred, I cannot say that I am satisfied that the case has been proved beyond a reasonable doubt.

[131] Accordingly, and I say this with some regret, I must acquit the accused of all of the charges contained in the Indictment.