

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. S.F.W.*, 2021 NSSC 360

Date: 20210325

Docket: CRH No. 485947

Registry: Halifax

Between:

Her Majesty the Queen

v.

S.F.W.

Restriction on Publication of any information that could identify the victim or witnesses: CCC s. 486.4 and s. 486.5

DECISION

Judge: The Honourable Justice C. Richard Coughlan

Heard: January 25, 26, 27, 28, 29, 2021, in Halifax, Nova Scotia

Oral Decision: March 25, 2021

Written Decision: January 27, 2022

Counsel: Katharine A. Lovett, for the Crown
Drew Rogers, 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Coughlan, J. (orally):

[1] S.F.W. is charged (a) that he sexually assaulted R.E.H. (b) for a sexual purpose, invited, counselled or incited R.E.H., a person under the age of sixteen years to touch directly a part of his body and (c) did for a sexual purpose touch R.E.H., a person under the age of sixteen years directly with a part of his body.

[2] The evidence is as follows:

R.E.H.

[3] The complainant, R.E.H., now 18 years old, testified. She was born in November 2002. Her parents separated when she was two or three years old.

[4] R.E.H., her mother and S.F.W. moved to [...], Nova Scotia when she was four, almost five, years old. They first lived in an apartment and then moved to a townhouse.

[5] When R.E.H. was in grade 1 the family, R.E.H., her mother, S.F.W. and [...] younger siblings, moved to a house – a duplex. R.E.H. had her own bedroom on the top floor, the younger children shared a bedroom as did S.F.W. and her mother. R.E.H., the younger children and her mother moved out of the house when her

mother and S.F.W. separated. R.E.H. thinks she was 11 years old and in grade six at the time of the separation.

[6] S.F.W. had a job dealing with technology and computers. R.E.H. and S.F.W. had a good relationship. They spent time together but not often. He wore a ring which was like braided silver. R.E.H. cannot remember on which finger he wore the ring.

[7] S.F.W. started to become different. The first time R.E.H. believes was in the morning. Her siblings were toddlers (babies) and her mother was tired a lot. R.E.H. was forced to lift S.F.W.'s bathrobe and see him without anything on. It was in the house. She believes she was in grade two and would have been seven or eight years old. They were in the living room, no one else was there. S.F.W. was wearing a dark robe – maybe green or gray. R.E.H. cannot remember what S.F.W. said. She did see his genitals. She cannot remember if his penis was erect. She was getting ready for school. He was sitting on the couch. She remembers him telling her to lift his robe. She felt uncomfortable.

[8] Another time R.E.H. remembers being in the basement of the house. She was forced to watch him expose his genitals. She cannot remember when it occurred, or the time of year – just R.E.H. and S.F.W. were present. They were playing a boardgame. She does not remember which game, it could have been Risk. She was sitting at a small table in the unfinished basement. R.E.H. does not remember if anyone else was home. S.F.W. masturbated in front of her. She told him she was scared. S.F.W. asked her to do it for him. She refused. So S.F.W. used his hands to masturbate himself. She thinks he was standing, then sitting. She cannot remember what he was sitting on. The basement was quite cluttered. R.E.H. went into a tent when he started to masturbate. His penis was erect. R.E.H. thinks he ejaculated. She does not know why she thinks that. She does not remember if he said anything when it was over. R.E.H. just went upstairs when it ended and tried to forget. He did not touch R.E.H. or she him.

[9] Things started to happen more often after the incident in the basement. S.F.W. and R.E.H. were on a couch in the living room and S.F.W. wanted her to touch him but had to stop as someone was at the door. He wanted R.E.H. to touch his genitals. There was a conversation but R.E.H. cannot remember it. She cannot remember what grade she was in.

[10] R.E.H. touched S.F.W.'s genitals with her hand and was made to rub them. It happened many times. It was a repetitive thing. It took place in other places in the house. On Thursday nights her mother went out. Upstairs in his bedroom he made

her touch his penis with her hand every Thursday night since grade two until they moved out.

[11] It took a long time for him to convince R.E.H. to go along with it. Lights were on when he made her touch his penis. The younger siblings would be asleep. It also happened other times when her mother was not home. He wore regular clothes, sometimes dressed, sometimes undressed. Sometimes he removed his pants, sometimes all his clothes. S.F.W. was either sitting or laying down on a bed. His penis was erect. He told her how much he liked her. That she was pretty and they were not doing anything wrong.

[12] S.F.W. would watch when R.E.H. put her hands on his penis. It would end when he ejaculated. She remembers semen going on him or her hand. Afterwards, R.E.H. would go back to her room – she felt awful.

[13] S.F.W. made R.E.H. touch his penis with her hand many times. She stopped counting – it would happen at least once a week maybe twice. S.F.W. said he would give R.E.H. things or tell her mother things about her which were not true. He sometimes, but not often, gave her money. R.E.H. was scared what would happen if she did not do it. He usually threatened to tell her mother things about her that were not true.

[14] S.F.W. showed R.E.H. pornographic videos and images of what he wanted done. She does not remember what grade she was in. It was in the basement of the house. S.F.W. showed her videos on his laptop. It was a gray Dell laptop. The videos and images involved women giving men oral sex. He showed R.E.H. more than once maybe twice. There was more than one video and image. They were sort of an instructional tool to show her what to do.

[15] When S.F.W. showed R.E.H. the video he had her perform oral sex on him. She was made to touch his penis with her hand and mouth. S.F.W. told here what to do and to look at him. She looked up and S.F.W. was looking down at her. It happened in the bedroom and basement multiple times. R.E.H. cannot remember what grade she was in. Sometimes on Thursday night when her mother was out and the kids were in bed. Usually in the evening S.F.W. was wearing casual clothes – tee shirt and pants. He sometimes took his clothes off. He usually just took his pants and underwear off. R.E.H.'s clothing was not removed at that time.

[16] In the basement, S.F.W. was standing when R.E.H. put his penis in her mouth. She was usually sitting on the floor. In the bedroom R.E.H. would be sitting or lying on the bed close to S.F.W. His penis was erect when she put it in her mouth. It ended

when he ejaculated. He would remove his penis before he ejaculated. He would get dressed. Sometimes S.F.W. would thank her and she would pretend it never happened. It was disgusting when S.F.W. put his penis in her mouth. He put his penis in her mouth more than ten times.

[17] It ended when R.E.H. and her family moved out, in she thinks grade six. R.E.H. estimates it was about three years of S.F.W. putting his penis in her mouth. The incidents with her mouth were after she touched his penis with her hand.

[18] Sometimes when S.F.W. and R.E.H. were alone in the car, S.F.W. would threaten to pull over and do it, when driving to a store or Girl Guides. R.E.H. was in the girl guide movement from primary to grade five. She went once a week from approximately 6 to 8 p.m. They had a red van. S.F.W. talked about it but never did pull over. It occurred usually after Girl Guides. S.F.W. said it most times but only when they were alone.

[19] Toward the end of those three or four years S.F.W. made R.E.H. lie on her back and he would rub his penis against her vagina. Probably in grade five. The first time she was laying on the bed in his bedroom. He took his clothes off and told her to take her clothes off. His penis was erect and exposed when he rubbed against her. Her vagina was exposed. R.E.H.'s legs were up resting against his torso. S.F.W. told R.E.H. to get in that position. She was in that position when he rubbed his penis against her vagina.

[20] Sometimes S.F.W. touched R.E.H.'s thighs and legs. It would end when S.F.W. ejaculated. R.E.H. was uncomfortable. She would clean herself up in the bathroom, taking the "stuff" off of herself and go back to normal. S.F.W. did it at least three times when her mother was out on Thursday night and the kids asleep, once when she was in grade five and the other times between grade five and when they left the house. On other occasions S.F.W. was still making her put his penis in her mouth at times.

[21] Sometimes S.F.W. made R.E.H. kiss him when she did not want to. They would be in a room alone. It started not long after the first robe incident. Once in the kitchen he showed her his erection through his sweatpants and said it was her fault. It made R.E.H. uncomfortable.

[22] S.F.W. made her kiss him more than once. More than once he made R.E.H. kiss him after an incident. Once in the living room he made R.E.H. kiss him on the lips with the toddlers present. Sometimes she had to kiss S.F.W. more than once.

She does not remember if S.F.W. made her kiss a part of his body other than his mouth.

[23] On occasion, more than once but less than 10 times, S.F.W. came into R.E.H.'s bedroom or the bathroom without knocking when she was changing. Once she was getting dressed after being in the pool, changing in or out of her bathing suit, and S.F.W. came in. R.E.H. did not want him there and she was embarrassed. At the time she was ten or eleven years old.

[24] Most often S.F.W. had pubic hair. Sometimes he did not.

[25] S.F.W. ejaculated every time he made R.E.H. touch his penis with her hand or mouth except if they were interrupted. It happened every Thursday night and sometimes more often. No one ever came into the room when something was happening.

[26] It happened more frequently in the last years. In grades two to four maybe once every two or three weeks. In grades four to six it started to happen once or twice a week.

[27] In grade four her mother started going out more frequently. R.E.H. and S.F.W. would be alone on Thursday nights. R.E.H.'s mother would go out for one or two hours. Her mother left around 7 or 8 p.m. By 9 p.m., R.E.H. was in bed. It happened every time her mother was gone unless there was a problem with the kids not sleeping. The first few times in the basement her mother was home but thought they were playing boardgames. Almost every time her mother was out and the kids were in bed S.F.W. would either do something or at least talk about it.

[28] After R.E.H. and her family moved out of the house she remembers S.F.W. bringing a boardgame over and he asked R.E.H. to do something. She does not remember what. She said no. The kids were asleep and R.E.H. was at the kitchen table.

[29] On one occasion when S.F.W. was rubbing himself against R.E.H., he tried to put his hands on her vagina. She tried to push him away saying she did not want to do it. On one occasion S.F.W. touched R.E.H.'s vagina under her clothes. She does not know if his hand or penis entered her vagina.

[30] R.E.H. never heard it happened to anyone else.

[31] In 2018, R.E.H. told her mother what happened. She thinks she was 15 years old. S.F.W. was around children the age she was when it happened. It was

embarrassing. She thought it was her fault and she would not be believed. She went through the loss of her grandfather and felt he would have wanted her to say something. She cried because she told someone. Then R.E.H. spoke to the police.

[32] On cross-examination R.E.H. testified she did not tell the police about the bathrobe incident. She did not mention it until the trial preparation in January 2021.

[33] Her mother generally stayed home. In 2013 her mother took a photography course.

[34] The basement of the house was unfinished. It was messy with old furniture, a few bookcases, a small table and chairs. R.E.H. believes the table had metal legs, she did not know what the top was made of. The table was about the size of a school desk. There was a purple and green child's play tent set up in the middle of the basement. The tent had something to do with a cartoon and was taken down.

[35] R.E.H. was nervous and did not mention specific details to the police. She did not mention the incident in the basement with Risk.

[36] One of R.E.H.'s motivations to tell of the incidents was concern for her siblings as around the time she told of S.F.W.'s actions he regained access to the children. Sometimes R.E.H. was jealous of her siblings relationship with S.F.W., but not at the time she disclosed his actions.

[37] When she gave her statement, R.E.H. said he put his hand on her crotch. She testified at trial she did not believe he touched her at that time.

[38] There was a small pool in the backyard as well as a tire swing, slide and swing set. A few times kids from the neighbourhood came to play. The pool was two and a half feet deep. R.E.H. was probably nine or ten at the time of the pool incident.

[39] Between touching S.F.W. with her hand and using her mouth was a few months and maybe a year or two before R.E.H. rubbed his genitals against her.

[40] R.E.H. told the police officer S.F.W. tried to kiss her but she would pull away. R.E.H. testified S.F.W. did kiss her on the lips but it was not every time S.F.W. kissed her.

[41] Risk is a complicated boardgame. R.E.H. was playing it in grade two. It could have been simplified. The table in the basement was large enough for the game.

[42] When speaking to the police R.E.H. went into details of being asked to put a security camera down her pants. She did not put it down her pants. The camera was

smaller than a mobile phone, they were rectangular with the lens in front. She did not remember that incident while giving her direct evidence. The exhibit she was shown did not look like the camera she was asked to put down her pants by S.F.W. She forgot about the camera incident because she had a lot to think of.

[43] R.E.H. remembers S.F.W. had a Dell computer which she believes was his personal computer. There was a desktop computer and R.E.H. believes he had a work laptop.

[44] S.F.W. would show R.E.H. stuff in the basement. Once halfway down the stairs from the kitchen people could see what was going on. There was a futon as well as an inflatable tent in the basement.

[45] In grade two R.E.H. knew S.F.W.'s job was in computers. She believes he had something to do with technology. He worked in [...] and he may have been on parental leave for her brother.

[46] R.E.H. did not see S.F.W. in his bathrobe often.

[47] The photography course was toward the end of the relationship between R.E.H.'s mother and S.F.W. Before the course her mother met with friends on Thursday night. R.E.H. disagreed the photography course was the only thing that took her mother out of the house. Between grades two and five, her mother was home most of the time. Sometimes the incidents happened in the basement when her mother was home. The basement was not the most private place. R.E.H. did not call out to her mother because she thought her mother would be mad at her.

[48] R.E.H. believed S.F.W. had a birth mark around his knee and a scar on his lower torso. It did not come up until she was asked about it on cross-examination. She did not mention it to the police.

[49] S.F.W. gave R.E.H. treats and toys as well as bribes, including Lego.

[50] For a time S.F.W. worked shifts from 5 a.m. to 3 p.m. Every few weeks he worked 4 p.m. to 5 a.m. Some Thursday nights he was working. It was an exaggeration the incidents happened every week.

[51] Although at the time of the offence R.E.H. was under five feet tall, she was able to reach S.F.W.'s penis if standing on her knees.

[52] R.E.H.'s mother went out between 6 and 7 p.m. and returned by 9 p.m. The kids went to bed between 6:30 and 7:00 p.m. Her mother could have come home but the door was locked. It was risky as S.F.W. could have been discovered.

[53] The first time R.E.H. said S.F.W. rubbed his penis against her vagina was in January 2021. When the police asked if his penis was inside of her she said no. R.E.H. agreed it was unlikely he penetrated her vagina.

[54] In the statement to police R.E.H. was asked if semen ever got on her. She said it never got on her. That was not true – she said it because she was embarrassed. Later R.E.H. told the police semen got on her hand.

[55] R.E.H. did not want to disclose the name of her perpetrator. Her mother asked if it was S.F.W.

[56] R.E.H.'s mother did not go out often except to photography class or to visit friends.

[57] R.E.H. did not tell the police of the incident of kissing S.F.W. when he had an erection. The first time she mentioned it was on direct examination. The more R.E.H. thinks about the incidents, details come to her.

[58] R.E.H.'s mother and S.F.W. had a bad split. S.F.W. was seeing someone else. Her mother threw him out for a month while she was looking for another place. R.E.H. disagrees that she had no contact with S.F.W. at the apartment after the breakup.

[59] On redirect examination R.E.H. testified the police did not ask about specific incidents but rather about the situation as a whole. She was so embarrassed she did not offer to go into detail. S.F.W. asked R.E.H. to put a security camera down her pants. She did not. If R.E.H. was in the basement she could hear the kitchen door opening and the top of the stairs creaking. Ever since R.E.H. gave her statement to the police, she has been thinking more about the incidents and her memory becomes clearer. Before giving her statement R.E.H. tried to push the incidents out of her mind, but after telling her mother she has thought about it more.

K.E.

[60] K.E., R.E.H.'s mother, testified. When R.E.H. was around five years old, K.E. and S.F.W. commenced cohabitating. In November 2009 the family moved into a duplex.

[61] The basement was not finished. It contained a lot of computer stuff, books, computers, a murphy bed which S.F.W. made and a couple of tables with stuff on it. There was a door to the laundry room, K.E. only went to the basement if doing laundry. R.E.H. sometimes had Lego there. S.F.W. had a small table in the basement where he and R.E.H. played Risk. R.E.H. would have been six or seven years old. K.E. did not go to the basement as she was taking care of the younger children who did not spend time in the basement; they played in the living room where their toys were located.

[62] S.F.W. taught computer courses. Later he worked shift work getting up early in the morning and getting home between 3 or 4 p.m. S.F.W. was also in a band.

[63] S.F.W. and R.E.H. got along fine. He taught her how to play chess and Risk. K.E. and S.F.W. separated at the end of May 2013.

[64] K.E. was at home taking care of the children. After the youngest child was born K.E. got a digital camera, took a photography course and reconnected with a high school friend. The photography course was for ten weeks in the winter of 2011 – 2012. Homework was to take at least 30 pictures. K.E. usually did her homework on the weekends. The children were with S.F.W. while K.E. did her homework. K.E. left for the course around 6:15 p.m. and got home around 9:45 or 10:00 p.m. When she got home she assumed the children were in bed. She did not check on R.E.H.

[65] K.E. and her high school friend got together twice a month at the friend's house probably on Saturday night. K.E. got home around 11:00 p.m. The visits started about six months before the photography course and lasted a few months after the course.

[66] Starting around 2010, K.E. went once a week on Thursday nights to a meeting of Adult Children of Alcoholics (ACA). She attended the meetings until the separation in 2013. K.E. left for the meeting at 6:15 p.m. and got home around 9:30 p.m. R.E.H. would have been in bed.

[67] When they moved into the duplex R.E.H. was in Sparks, a part of Brownies, for children aged seven and eight. Meetings were held weekly with summers off. K.E. took R.E.H. to Sparks once or twice but S.F.W. usually took her. R.E.H. was not in Brownies.

[68] Almost a year after they moved into the house R.E.H. started biting her nails, hygiene became an issue and R.E.H.'s room was a mess.

[69] K.E. never noticed any behaviour by S.F.W. toward R.E.H. which caused concern.

[70] When K.E. and S.F.W. separated, S.F.W. moved out of the house. In July 2013 K.E. and the children moved to an apartment and S.F.W. moved back into the house. S.F.W. came to the apartment to help K.E. put bunk beds together and pick up his children.

[71] On May 31, 2018, R.E.H. told K.E. something about S.F.W. The next day K.E. visited R.E.H.'s school and the RCMP were called. The following day K.E. went to the RCMP.

[72] On cross-examination K.E. stated she did not remember chairs in the basement of the house. S.F.W. did not get R.E.H. ready for school. K.E. was home during the day and night when S.F.W. was present. K.E. gave S.F.W. a dark bathrobe which was green or blue. K.E. had a red bathrobe. S.F.W. paid for the photography course K.E. took. K.E. started attending the ACA meetings in 2010. Her friend did not start her going to the ACA meetings. K.E. was pretty sure the ACA meetings were on Thursday.

[73] K.E. knew S.F.W. and R.E.H. played Risk in the basement. A table was set up for it. She saw them both sitting there at least once. K.E. never heard anything in the basement which caused her concern.

[74] S.F.W. suggested K.E. spend time with her friend and take the photography course. He thought K.E. was suffering from postpartum depression.

[75] After the separation in May 2013, S.F.W. was not alone with R.E.H. again.

[76] If home in the evenings K.E. would be in the living room, dining room and kitchen with the three children. Often S.F.W. would get the groceries. K.E. does not remember S.F.W. going shopping with R.E.H.

[77] If R.E.H. was in Girl Guides it was not for long. She did go overnight camping. K.E. does not remember S.F.W. driving R.E.H. and her friend to meetings of Sparks or Brownies.

[78] K.E. does not recall S.F.W.'s pubic hair being shaved. She did not know the recommended age for Risk.

[79] K.E. asked R.E.H. once for details of the incidents, R.E.H. did not give details and K.E. did not probe for them. K.E. was not told Risk was in the details. K.E. remembers S.F.W. helping R.E.H. play chess at the dining room table.

[80] There was both a larger pool and a smaller plastic pool in the backyard. K.E. thinks at some time they had both.

[81] K.E. thinks S.F.W. had a Dell laptop. She did not know if it was his or a work laptop. There was a desktop computer.

[82] K.E. is sure R.E.H. and S.F.W. would hug each other and got along well. If R.E.H. did not listen to K.E. and S.F.W. told her to go to her room R.E.H. would immediately obey.

[83] At the apartment S.F.W. assembled the bunk beds. The bunk beds were never one on top of the other.

[84] At one time they had a larger pool and her youngest daughter fell into it and they got a wading pool for the smaller children. The incident happened at the duplex.

[85] In a statement she gave to the police, K.E. discussed her conversation with R.E.H. when told of the allegations. K.E. stated “the only person I can think of was S.F.W., and then she (R.E.H.) immediately nodded, and I said, “what did he do to you?” and she said, “he used to make me do things to him sexually” and that was all I needed to know because I didn’t want to push her. And later in the statement “and I said “(to R.E.H.)” did he ever do anything to you and she said, “no but he had tried”.

[86] I found K.E. gave her evidence in a balanced, forthright manner attempting to be accurate. I give great weight to her evidence.

S.F.W.

[87] S.F.W. testified he is 50 years old. He and K.E. were in high school together. They reconnected again via Facebook in 2007. In June 2007 they saw each other again in person. At the same time S.F.W. met R.E.H.

[88] In January 2008 K.E. told S.F.W. she was pregnant and K.E. and R.E.H. moved into S.F.W.’s apartment. They moved to a townhouse on March 1, 2008. K.E. and S.F.W.’s daughter was born in September 2008. In November 2009 the family moved into a house, another child, K.E. and S.F.W.’s son was born.

[89] S.F.W. testified he treated R.E.H. like one of his children. She was very accepting. There was a bit of jealousy when their daughter and son were born. R.E.H. was probably jealous of the attention the children were getting. R.E.H. was his first parental role.

[90] The house was a three-storey duplex. It had an unfinished basement with a concrete wall, a wooden wall, laundry and stairs. At first R.E.H. had a small bedroom, after a while she complained it was too small and she moved to a middle sized bedroom. R.E.H. was in grade two when they moved into the duplex.

[91] They installed security cameras in the babies' room. The cameras were roughly three or four inches in height. R.E.H. was a slight child who just turned seven when the cameras were installed. S.F.W. testified he was five foot nine inches tall and R.E.H., if standing, may have come up to his ribs. He said it made no sense to ask R.E.H. to put a camera down her pants as the focal point for the camera is three or four feet or more.

[92] S.F.W. was given a bathrobe by K.E. for Christmas. He very seldom wore the robe and never wore it in the living room. He just wore the robe to go to the bathroom. If he was up he was dressed.

[93] When they moved into the duplex S.F.W. took parental leave, which lasted only a couple of months. When the leave ended his job was eliminated. For a couple of months he did contract work for his old employer. Then he obtained employment in which his shift was from 5 a.m. to 3 p.m., four days a week, Monday to Thursday. S.F.W. worked that shift for six weeks and every seventh week he worked a day shift. He worked that schedule from August 2010 until after he and K.E. separated. During that period S.F.W. did not get R.E.H. ready for school except a fifty-fifty chance one day a week.

[94] S.F.W. denied he had R.E.H. lift his bathrobe as she described. He did not get R.E.H. to touch his genitals. It did not happen.

[95] The back of the basement was a utility room containing a heater, washer, dryer, oil tank and wood stove there. The rest of the basement was used for storage. It had a concrete floor. At some point S.F.W. bought interlocking foam tiles and tiled the floor and made a play area for the children in the house and neighbourhood. He made a murphy bed as his sister would sometimes come over. There was always storage stuff. No furnishings as such. There may have been some area available on two planks which were there, but S.F.W. did not think there was area to play boardgames. There was not much space in the basement.

[96] S.F.W. remembers using the Risk game and Risk pieces on the floor, but Risk was not a game he would play with a child.

[97] S.F.W. is a Lego fanatic. His children are into Lego. R.E.H. was enthusiastic about Lego. He would play Lego with R.E.H. in the dining room or in her bedroom. Once floor mats went in R.E.H. played downstairs. The basement was not heated. It was not a place the kids spent a lot of time.

[98] Nothing untoward happened. He did not talk about masturbation. S.F.W. did not do what R.E.H. alleged.

[99] K.E. was interested in Facebook and a little bit in photography. Her friends were virtual, she did not have friends. When a high school friend came on the scene, K.E. was excited. Her friend came over a few times, perhaps half a dozen S.F.W. was aware of. K.E. might go for coffee at suppertime. She only had one friend. K.E. went out very little.

[100] S.F.W. paid for the photography course K.E. took and got her a camera for the course. When S.F.W. met K.E. in 2007 she was taking medication for depression. She had a depression issue. After their son was born K.E. had depression. She was in her bathrobe for days. When she went off her medication her personality changed. K.E.'s father gave her a camera and S.F.W. obtained a camera from his sister and gave it to K.E. The photography course was for eight to ten weeks and lasted about two hours. S.F.W. was home with the kids. There was no downtime. After supper he would get the children ready for bed. If the babies were good, he would get them down by 8:00 or 8:30 p.m. At the time of the course R.E.H.'s bedtime would be 9:00 p.m. and she could read until 9:30 p.m.

[101] There was no manual, oral or body to body sex between S.F.W. and R.E.H.

[102] K.E. received a recommendation to attend sessions of a group for adult children of alcoholics. It was not a regular weekly meeting. K.E. went to more than five but less than ten of the meetings over the last year of their relationship.

[103] K.E. was not out of the house much. S.F.W. usually did the grocery shopping. Very seldom would S.F.W. and R.E.H. go shopping. S.F.W. and R.E.H. would go cycling.

[104] R.E.H. was involved in Girl Guides. S.F.W. drove her to the meetings more than 90 percent of the time. S.F.W. does not think there was anyone else in the car with them. On one occasion he drove R.E.H. and a friend to, or back, from a camp.

S.F.W. thinks the friend came home from the camp with them as her parents were away. S.F.W. denies he made the comments in the car to R.E.H. as suggested.

[105] It would be an exception if K.E. was out with her friend until 11 p.m. S.F.W. does not recall that happening. S.F.W. was home alone with R.E.H. very few times: for example, the photography course, the occasional meeting of the adult children of alcoholics, K.E. going to Value Village for perhaps half an hour and going to the thrift store which could last 10 minutes or longer. S.F.W. would never walk in on R.E.H. without knocking.

[106] They had a small plastic splash pool. After K.E. left, S.F.W. did have a ring pool in the backyard. S.F.W. does not recall any incident with their daughter in the pool in their backyard. He does recall K.E. telling him about an incident with their daughter in a pool at K.E.'s residence after they separated.

[107] The basement was not private as there were no coverings on the windows and people could look in from the backyard. The soundproofing in the house was bad. The unfinished basement had open jousts. What was said in the basement could be heard upstairs. It was not a big house. If anything happened in a bedroom it would be discoverable.

[108] S.F.W. played in a band from 2000 to 2015. Every week, most often on Wednesday night, there would be a jam session and S.F.W. would not get home until after midnight. On Thursday night S.F.W. would be running on empty and go to bed early. S.F.W. denied committing the sexual abuse alleged on Thursday nights.

[109] At his home S.F.W. had various computer equipment including two monitors, docking stations and laptop. His laptop was an IBM ThinkPad and other computer devices. His only laptop was a work laptop which had filters to prevent access to certain sites. S.F.W. denied showing the pornography mentioned to R.E.H. K.E. had a laptop. S.F.W. denied he showed R.E.H. inappropriate materials on K.E.'s laptop. Any affection S.F.W. showed R.E.H. was typical parental affection, nothing inappropriate.

[110] The futon in the duplex was in the babies' room. The futon was never in the basement in the duplex but had been in the basement of the townhouse.

[111] At the time K.E. and S.F.W. separated their relationship was adversarial. After K.E. moved to an apartment S.F.W. picked his children up there. He thinks he helped K.E. set up a pair of bunk beds one on top of the other. He was never in the apartment in a babysitting role. He was never alone with R.E.H. at the apartment.

[112] If S.F.W. was playing something with R.E.H. most often it would be in the dining room. Very infrequently did he play with R.E.H. in the basement – it was cold in the winter.

[113] S.F.W. first became aware of the allegations on June 1, 2018. Two employees of Department of Children Services and the RCMP came to his home. He was ordered to leave the property or his two children and two stepchildren would be taken away. He left and stayed at a friend's house.

[114] The son and daughter he had with K.E. were with him every weekend – the last weekend was in May 2018 and the next visit was Father's Day 2019. It returned to every weekend in the summer and in October or November 2019 it changed to every second weekend as long as supervised. Criminal conditions remain in place. There is no involvement with Children Services with the family.

[115] S.F.W.'s pubic hair is generally natural. Sometimes he trims it above belt line. He did not shave it when R.E.H. was between grades two and six.

[116] S.F.W. did not make R.E.H. touch his genitals with her hand, mouth nor did he touch her body with his genitals. He was not sexually interested in R.E.H. S.F.W.'s relationship with R.E.H. was parental.

[117] In cross-examination S.F.W. confirmed he now has five children, and including his wife's children, acts as a parent for seven children.

[118] Although K.E. and S.F.W. were not married they wore silver rings with a pattern, but S.F.W. did not think the ring was braided. He wore the ring on his ring finger.

[119] S.F.W. has a scar on his lower torso. He trims his pubic hair on occasion. Not often maybe twice a year, or not – it varies. He did not trim it once while living in the duplex. S.F.W. trimmed it with scissors but disagreed it looked different than untrimmed.

[120] When they moved to the duplex R.E.H. continued in her old school for the rest of the school year. S.F.W. was on parental leave. Her mother and S.F.W. would drive her to school depending on the day. From November 2009 to Spring 2010 S.F.W. was driving R.E.H. to school. While on parental leave he drove R.E.H. back and forth to school 95 percent of the time. He would be interacting with R.E.H. at home before school. K.E. had given birth in November and would be looking after the children when S.F.W. took R.E.H. to school.

[121] S.F.W. took a lot of photographs which he uploaded to his computer when his device was full. He uploaded photographs at least on a yearly basis. The device's timestamp is not always accurate. The timestamp on Exhibit 2, photograph 21, is not accurate. It is not known if the timestamps are accurate. Most photographs in evidence of their family were taken by S.F.W. or K.E.

[122] Photographs 187, 188 and 189 of Exhibit 2 show R.E.H. with wet clothes, playing around the pool. S.F.W. disputed he and R.E.H. are in the pool. He stated R.E.H. was not playing with the pool, her clothing was wet from water obtained from the pool. His son and daughter were in the pool. He was playing with his daughter. R.E.H., with wet clothes, would at some point have to change out of the clothes.

[123] There were two beige couches. One a futon without arms which had a seam. The other couch had arms. The futon was first in the living room of the duplex and then moved to the babies' room. Neither the futon nor the other beige couch, which was thrown out, was in the basement of the duplex.

[124] R.E.H. was not playing in the pool shown in photographs 187 to 192 of Exhibit 2. When using a water gun with pool water R.E.H. got wet. S.F.W. vaguely remembers the day the photographs were taken. At no time that day did R.E.H. play in the pool. She did not play in the pool. Then S.F.W. agreed he could not say R.E.H. did not enter the pool any other time that day.

[125] The basement of the duplex was a messy place used for storage. Nobody spent any significant time in it. S.F.W. believes there was one bookcase, milk crates which may have belonged to him. S.F.W. had technology stuff in crates and boxes in the basement. There were filing boxes with three planks set across them. Computers were on the planks. The murphy bed was on the wall between the utility and storage sides. The desktop on the planks was used to host websites. A server was connected to the internet. The desktop could run the Apache website. The server was a utilization server not a web browser.

[126] Sometimes S.F.W.'s sister slept in the murphy bed. She may have stayed twice a month or once every two months. She stayed more than six times in the murphy bed – six, eight or ten times. Then his quesstimation was maybe less than six times. When S.F.W. built the murphy bed he cleared up and organized the basement to give his sister a private space, that is, private not open to children running through it. It was not a private space. There will be less interruptions from children. It was an open space, but it was not in the main area of the house, in that respect more private for her. The basement was more secure than upstairs. S.F.W. disagreed the basement

was more private than the living room. He then agreed the basement might have a small degree more privacy than the living room as there was a door at the top of the basement stairs and no door in the living room.

[127] You could hear people in the basement upstairs. Clothes drying in the dryer could be heard upstairs. If one of the children was in the basement the sound would be carried to every room of the house. S.F.W. did not know how often he went into the basement. His tools were there. He would go to the basement a lot to get tools. If S.F.W. was at his tools in the basement and K.E. asked him in a normal voice to come up he could hear her. Any noise carried through the house.

[128] Within the last few months of his relationship with K.E., S.F.W. installed the interlocking tiles to make a play area for the children to store toys which were overtaking the living room. The children continued to play throughout the house. They infrequently played in the basement despite the presence of the play area. The children wanted to be where their parents were. The basement was cold and that is why he put the tiles down.

[129] Photographs one, two and three of Exhibit 2 show the child's tent which belonged to R.E.H.

[130] S.F.W. was on parental leave for six to eight weeks, he cannot recall when it ended. After the leave he worked as a part-time instructor. S.F.W. might teach three, four or five days depending on demand. During the parental leave S.F.W. was home.

[131] When S.F.W. got his new job in August 2010 there was a fifty-fifty chance he was up on Friday's when R.E.H. got ready for school. The babies often got up early in the morning. Every 14 weeks S.F.W. had two weeks of night shift.

[132] S.F.W. had a number of vehicles, including a red van.

[133] K.E. looked after the children when S.F.W. was at work, cycling or with his band. S.F.W. stated K.E. was not busy with the children. Her time was not exclusively looking after the children. Her role was drinking tea or on Facebook while the children were fenced in the living room. S.F.W. disagreed K.E.'s day was determined by taking care of the children. K.E. breastfed both younger children. The children did not get up every night. It was unpredictable when a child wanted to be breastfed.

[134] S.F.W. spent time with children when not doing other things such as working, playing with his band, mountain biking.

[135] He played Legos with R.E.H. He did not specifically buy R.E.H. Legos although he told the police "I used to buy R.E.H. Lego sets". He meant he and K.E. bought her Lego sets. They probably bought Ninjago as that was her favorite set. If S.F.W. played Legos with R.E.H. it was to build something difficult. He did not help R.E.H. if she built a Lego from a set and not the builder's own creation. R.E.H. primarily played Lego at the dining room table. It would be rare for R.E.H. to have Legos in the basement. R.E.H. never played Legos in the basement until the foam tiles were installed. It would have been unusual for R.E.H. to play with Legos in the basement. S.F.W. agreed he could not say that with certainty.

[136] S.F.W. owned the boardgame Risk. It usually takes a long time to play, typically two hours. It would be impractical to leave it set up. It depends if the children could get at it. S.F.W. never played Risk in the basement as it is intended to be played. He remembers times he played Risk with R.E.H., not as it is intended to be played, in the basement, living room, dining room and R.E.H.'s bedroom. There was no table in the basement. There was one office chair in the basement by the computer equipment. S.F.W. taught R.E.H. how to play chess, "Battleship" boardgame, "Trouble" boardgame and he may have played cards with her such as "Crazy Eights" and "Go Fish".

[137] Photograph 129 of Exhibit 2 showed a chair which looks to be beige. S.F.W. disagreed the chair looked like a pine chair with metal legs, he thought it was a plastic chair from the shed. S.F.W. agreed wood used for furniture is treated and it is a bad idea to put treated wood in a fire as it releases chemicals. S.F.W. put the arms of the chair in an airtight wood stove.

[138] If R.E.H. was not listening to her mother she would listen to S.F.W.

[139] When wearing his dark green bathrobe, K.E. purchased for him, S.F.W. would have his clothes on under it or at least his underwear. He wore his underwear when sleeping. He would put sweatpants on rather than the bathrobe. S.F.W. testified he never wore the bathrobe without something on. He took his clothes into the bathroom. S.F.W. would not normally wear a robe into the living room. At the very least he would have underwear on under the bathrobe. When he said he never wore the bathrobe in the living room, he cannot say that with certainty.

[140] S.F.W. encouraged K.E. to develop hobbies as he was concerned with the amount of time she spent at home. The photography course, S.F.W. thinks it was in 2013, lasted eight or ten weeks possibly longer. K.E. was always interested in photography. Her father gave her a high-end used professional-grade camera, more likely a Nikon S.F.W. thinks. He thinks she used the camera he purchased from his

sister in the course. The photography class was in the evening between 6 and 8 p.m. or 7 to 9 p.m. S.F.W. does not know where the course was held. K.E. drove herself to the class. She was gone from 6:15 p.m. to shortly after 9:00 p.m. K.E. would get home shortly after 9:00 or 9:30, maybe as late as 9:45 but not as late as 10:00 p.m. There were also outings on Saturday or Sunday. S.F.W. took care of the children.

[141] When K.E. was out S.F.W. would wrap up dinner. R.E.H. went to bed at 9:00 p.m. with lights out at 9:30 p.m. at the time of the photography course. In 2007 or 2008 R.E.H.'s bedtime was 7:30 to 8:00 p.m. The process of getting his son to bed on a good day took an hour and on a bad day two hours. Bedtime may start at 7:30 with the objective of bedtime at 8:00 p.m. S.F.W. was awake when K.E. got home and he went to bed after K.E. He would try to get to bed by 11 p.m.

[142] If K.E. visited her friend, S.F.W. was with the children. Although S.F.W. did not know how often K.E. visited her friend, he disagrees she went to her friend's place on Saturday evening on a regular basis until 11 p.m. or later. He does not have a recollection of everything.

[143] S.F.W. does not know when the ACA meetings started. He believes it was after his son was born. The meetings appeared to be random. The meetings were in the early evening like the photography course. K.E. would leave early and be back a couple of hours later. S.F.W. looked after the children.

[144] R.E.H. went to Guides once a week except when there were school breaks. S.F.W. drove her 90 percent of the time. He drove her alone. Sparks lasted an hour, Brownies maybe ninety minutes and Girl Guides two hours or ninety minutes. Quite possibly S.F.W. drove a red van at the time or a dark green van.

[145] At the duplex there was only S.F.W.'s work laptop, an IBM ThinkPad, a used Acer, used Dell and Toshiba computers but K.E. only had one at a time. Four separate laptops were used. S.F.W. does not know what happened to the Dell laptop. He thinks K.E. took it when she left. S.F.W. never tried to repair a broken laptop. He did not use K.E.'s laptop independently of her. S.F.W. did not have multiple devices. He did not have a household laptop. He told the police, "there was a household laptop". Although he told the police there was a household laptop, there was not. He was referring to K.E.'s laptop or her mother's laptop when she was with them. He guesses that is what he meant. S.F.W. looked at K.E.'s laptop as part of the household. His access to K.E.'s laptop was limited. There was no separate household laptop. He used his work laptop for personal use. Before he went on parental leave S.F.W. had a Dell laptop. He returned it when he went on leave. When

he was working as an independent contractor, S.F.W. did not have a personal laptop and his access to K.E.'s laptop was limited because of her possessiveness.

[146] S.F.W. was archiving photographs to a hard drive. He plugged the hard drive into a computer. He used many different computers. When he did not have a laptop, he used K.E.'s laptop. It was K.E.'s laptop for her personal use. S.F.W. agreed using K.E.'s laptop to upload photographs is personal use. From November 2009 to August 2010 S.F.W. did not have a personal laptop.

[147] S.F.W. admitted to police he watched pornography on his work tablet he received in approximately August 2010. It did not have restricted access as other work devices. He had the tablet for his own use from August 2010 until after he and K.E. separated. He transferred pornography from his phone to a DVD using K.E.'s laptop.

[148] S.F.W. purchased security cameras shortly after they moved to the duplex. He cannot remember when they were purchased or installed. He intended to use them in his chicken coop, but he did not install electricity in the coop. He stored them in his IT storage. S.F.W. does not throw things out – he keeps stuff some over 20 years. He set the cameras up over each crib. When the babies were moved to a different bedroom S.F.W. moved the cameras. He does not know who was present but surmises K.E. was looking after the children. The cameras transmit images onto other devices. S.F.W. owned a webcam and other necessary equipment. The images from the security cameras went to the television in the living room. S.F.W. kept the devices in Rubbermaid containers which he kept in the house. The security cameras are not very big, about six inches. It is not impossible a six-inch camera could be put down a child's pants. R.E.H. did not put a security camera in her pants.

[149] S.F.W. never tested boundaries with R.E.H. He did not masturbate in front of her. He did not tell her to masturbate him. He did not show adult pornography to R.E.H. S.F.W. did not get R.E.H. to put his penis in her mouth. They did not do these things when K.E. was out. S.F.W. did not tell R.E.H. he would tell her mother she did things.

[150] When K.E. moved to the apartment after she and S.F.W. separated, he helped her move some furniture. He cannot remember what and when the items were moved. This was separate from the bunk bed incident.

[151] Subsequently, when he picked up his children he did not have direct contact with R.E.H. At first K.E. would meet him at different locations with the children. Between July 2013 and March 2014 he did not see the children including R.E.H. In

his statement to the police, S.F.W. said “I know that when K.E. and I first split up the first few times that I had visitations, [...] and [...] (children) come over, that R.E.H. was included and would come over to the house and visit at the same time as [...] and [...] did.” He did not recall making the statement. He did not remember R.E.H. coming to the house. If the statement is in his statement to the police, he testified he must have said it. He recalls R.E.H. being included with visits to playgrounds, he must have been thinking of the visits at parks but said house. R.E.H. was never at the house after her mother moved out. Since K.E. moved out of town, R.E.H. was present when S.F.W. picked up his children. There may have been incidental contact between R.E.H. and S.F.W.

[152] On redirect S.F.W. testified he did not recall how long his parental leave lasted. After placing photographs in the archives he did not change the dates. In photograph 195 of Exhibit 2 R.E.H. appears to be a normal happy child who does not appear to have been crying.

Analysis

[153] The Crown must prove all essential elements of each offence beyond a reasonable doubt.

[154] The test as to how a court is to deal with credibility in a situation in which an accused person testifies was set out by Cory J. in giving the majority judgment in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 at page 757:

A trial judge might well instruct the jury on the question of credibility along these lines:

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.

[155] In *R. v. N.M.*, 2019 NSCA 4, Bourgeois J.A. in giving the Court’s judgment explained the modification of the *W.D.* steps by *R. v. J.H.S.*, 2008 SCC 30, stating at paragraph 23:

I agree with the appellant’s view of the import of *J.H.S.* In *R. v. P.D.B.*, 2014 NBQB 213, Justice Ferguson helpfully explains the modification of *W. (D.)*:

[67] The test outlined by Cory J. in *W. (D.)* is as follows, although I have incorporated the second assessment element arising from *J.H.S.* that was not part of the original three *W.D.* credibility evaluation guidelines:

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

Secondly, if you do not know whether to believe the accused or a competing witness, you must acquit.

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

Fourthly, even if you are not left in doubt by the evidence of the accused, that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused. (Emphasis in original).

[156] I have problems with the evidence given by S.F.W. Examples of the problem areas include:

1. He consistently attempted to minimize the time K.E. was out of the house. For example, although K.E. testified she started attending the ACA meetings about 2010 going once a week until she separated from S.F.W. in 2013, S.F.W. testified the meetings were not regular rather they appeared to be random. Also, K.E. testified she and her high school friend got together at the friend's house approximately twice a month, probably on Saturday night, with K.E. getting home around 11 p.m. The visits started about six months before the photography course and continued for a few months after the course finished. S.F.W. did not know how often K.E. visited her friend but disagreed K.E. went to her friend's house on Saturday evenings or on a regular basis until 11 p.m. or later for socializing.
2. He minimized K.E.'s involvement with their two young children testifying K.E. was not busy with the children. He disagreed K.E.'s day was governed by taking care of the children born in September 2008 and November 2009. K.E. would have been busy with the children.
3. On direct examination S.F.W. testified he never wore his bathrobe in the living room and then backtracked during cross-examination testifying he would not normally wear the bathrobe in the living room and at the very least would be wearing underclothes under the robe.
4. In his statement to police S.F.W. stated "there was a household laptop" but testified there was not a household laptop but he was referring to

K.E.'s laptop or her mother's laptop when she was with them, although he testified he did not use K.E.'s laptop independently of her and that access to K.E.'s laptop was limited because of her possessiveness. That this man who worked in the computer industry, who was a computer instructor and who kept all his computer devices and other computer "stuff" in the basement would not have a laptop from November 2009 to August 2010 is unbelievable.

5. When testifying about R.E.H.'s activities in the pool shown in photographs 187 to 194 of Exhibit 2, S.F.W. was adamant R.E.H. was not playing in or with the pool. She was using a water gun with pool water. Clearly R.E.H. was playing with the pool, and in photograph 194 sitting in the pool.
6. In his statement to police, S.F.W. stated "I know that when K.E. and I first split up the first few times that I had visitations, [...] and [...] come over, that R.E.H. was included and would come over to the house and visit at the same time as [...] and [...]." Maintaining that R.E.H. never visited the house in a visitation after he and K.E. split up, S.F.W. tried to explain his statement by testifying perhaps he was thinking of visits to playgrounds which included R.E.H. and not visits to the house although he did not mention visits to playgrounds in the statement.
7. S.F.W. testified he installed a murphy bed in the basement to give his sister a private space when she stayed with them. As that did not align with his position that the basement was not private, he had to backtrack and disagreed the basement was more private than the living room and finally settling the basement may have a small degree more privacy than the living room.
8. S.F.W. attempted to minimize the time he spent with R.E.H. in the basement. He testified she would never play Legos in the basement until the interlocking tiles were installed. Then backtracked to it would have been unusual for R.E.H. to play with Legos in the basement. Then he could not say that with certainty. He testified there was no table in the basement on which to play boardgames such as Risk.

[157] The defence raised issues about and inconsistencies in R.E.H.'s evidence at trial and statements she gave earlier:

1. The first time R.E.H. mentioned the robe incident was during trial preparation in January 2021.

2. She did not mention the incident with the boardgame Risk to police. R.E.H. said she was nervous and did not mention specific details.
3. R.E.H. disclosed the allegations around the time S.F.W. regained access to the children he had with K.E.
4. In her statement to police R.E.H. said S.F.W. put his hand on her crotch. She testified she now does not think S.F.W. touched her at the time.
5. She told the police S.F.W. tried to kiss her but she would pull away. R.E.H. testified he did kiss her on the lips.
6. R.E.H. told the police in detail about S.F.W. wanting to put the security camera down her pants but did not mention it in her direct examination. She said she did not remember the incident when giving her direct examination as she had a lot to think about.
7. R.E.H. agreed she exaggerated when she testified the incidents with S.F.W. happened every week.
8. In her statement to police, R.E.H. said S.F.W. tried to rub his private parts on her. For the first time in January 2021 she said he rubbed his penis against her vagina.
9. In her police statement, R.E.H. told the police S.F.W.'s penis was not inside her vagina. In her direct evidence she said she did not know if he penetrated her or not.
10. In her police statement, R.E.H. said semen never got on her. In her direct evidence she said it did get on her. R.E.H. testified what she told the police was not true as she was embarrassed. Later she did tell the police it got on her hand.
11. In her police statement, R.E.H. did not tell the police about S.F.W. kissing her when he had an erection. The first time she mentioned it was during her direct examination. R.E.H. testified the more she thinks about the incidents she remembers details.
12. When disclosing the allegations to her mother, R.E.H. in response to a question from her mother "the only person I can think of was S.F.W." and then she (R.E.H.) immediately nodded, and K.E. said "what did he do to you?" and R.E.H. said "he used to make me do things to him sexually" and later in an answer to the question from K.E. "did he ever do anything to you", R.E.H. said "No, but he had, he tried".

[158] The credibility of witnesses is a critical determination in a criminal trial. The Supreme Court of Canada has given direction as to how a court should assess credibility when dealing with the evidence of children or adults testifying as to events which occurred when the witness was a child. In giving the Court's judgment in *R. v. W. (R.)*, [1992] 2 S.C.R. 122, McLachlin J., as she then was, stated at paragraphs 25 to 27:

25 The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. Wilson J. recognized this in *R. v. B. (G.)*, [1990] 2 S.C.R. 30, 77 C.R. (3d) 347, 56 C.C.C. (3d) 200, 111 N.R. 31, 86 Sask. R. 111, at pp. 54-55 [S.C.R.], when, in referring to submissions regarding the Court of Appeal judge's treatment of the evidence of the complainant, she said that:

[I]t seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the 'reasonable adult' is not necessarily appropriate in assessing the credibility of young children.

26 As Wilson J. emphasized in *B. (G.)*, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J called a "common sense" basis, taking into account the

strengths and weaknesses which characterize the evidence offered in the particular case.

27 It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards – to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[159] The Supreme Court has also directed courts that myths and stereotypes about sexual assault victims have no place in a rational and just system of law: *R. v. Lacombe*, 2019 ONCA 938 at para. 31. Lack of avoidance behaviour, delayed disclosure or other stereotypical conduct are not proper bases for a credibility assessment: *R. v. A.R.D.*, 2017 ABCA 237, at paras. 39 to 48; *R. v. D. (D.)*, 2000 SCC 43, at paras. 63 and 65. In paragraph 65 of *R. v. D. (D.)*, Major J. in giving the majority judgment described some of the reasons for delayed disclosure as "embarrassment, fear, guilt or a lack of understanding and knowledge".

[160] I find the following facts have been established by the evidence:

1. There was a small table in the basement of the duplex on which S.F.W. and R.E.H. played some form of the boardgame Risk.
2. S.F.W. helped R.E.H. to play chess on the dining room table.
3. There was a child's play tent in the basement of the duplex.
4. S.F.W. had a dark green bathrobe which was given to him by K.E. as a Christmas gift.
5. S.F.W. suggested that K.E. take a photography course and that K.E. socialize with her high school friend. S.F.W. paid the fee for the photography course.
6. K.E. attended the meetings of the Adult Children of Alcoholics group (ACA) regularly from around 2010 until she and S.F.W. broke up in May 2013. The meetings of the group were held weekly. K.E. left the

house around 6:15 and got home around 9:30 p.m. S.F.W. looked after the children while K.E. was at the meetings.

7. K.E. attended a photography course once a week for ten weeks in the winter of 2011-2012. The course was in the evening from 7 to 9 p.m. K.E. left the house around 6:15 p.m. and got home around 9:45 or 10:00 p.m. S.F.W. looked after the children while K.E. attended the course. K.E. also did homework for the course on the weekend.
8. K.E. and her high school friend got together twice a month at her friend's house usually on a weekend night. K.E. got home from the visits around 11 p.m. The visits started about six months before the photography course and continued for a few months after the course ended.
9. S.F.W. drove R.E.H. to the meetings of the various groups in the Girl Guides organization 90 percent of the time.
10. While on parental leave S.F.W. drove R.E.H. to school 95 percent of the time.
11. At one point S.F.W. owned a red van.
12. S.F.W. gave R.E.H. Legos.
13. S.F.W. did not throw out computer equipment including devices, rather he stored computer equipment in the basement.
14. Prior to being on parental leave, S.F.W. had a Dell laptop.
15. S.F.W. had pornography on a computer device he used and told the police he watched it by himself.
16. About a year after they moved into the duplex, R.E.H. started biting her nails, hygiene was an issue and her room was a mess. Her room got worse with garbage and other stuff on the floor. The problem is not as bad now.
17. S.F.W. wore a silver ring which had a pattern.
18. S.F.W. has a scar on his lower torso.
19. S.F.W. trims his pubic hair on occasion.
20. If R.E.H. was not listening to her mother, she would immediately obey S.F.W.
21. The incident involving S.F.W. and K.E.'s daughter in the pool occurred in the backyard of the duplex property.

[161] S.F.W. is charged with offences pursuant to section 271 (sexual assault), section 152 (invitation to sexual touching) and section 151 (sexual interference) of the *Criminal Code*.

[162] Section 150.1 of the *Code* provides, *inter alia*, that where an accused is charged under sections 151, 152 or 271 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject matter of the charge. The charges against S.F.W. are alleged to have occurred between November 1, 2008 and April 1, 2013. At all material times R.E.H. was between five and ten years old. Therefore, pursuant to section 150.1 of the *Code*, R.E.H. could not have consented to any sexual activity with S.F.W.

[163] The complainant R.E.H. testified when she gave her statement to the police they did not ask about specific incidents but rather about the situation as a whole. She was so embarrassed and nervous she did not offer to go into details such as having semen on her hand. The more she thought about the incidents she remembered more details.

[164] In this case the charges involve events which are alleged to have occurred when R.E.H. was between five and ten years old. It is not surprising she would remember various incidents and details of them at different times. There were inconsistencies, or differences between, what R.E.H. stated to the police and her evidence at trial referred to above which are attributable to the fact R.E.H. was giving evidence about events which occurred when she was a child. I find the differences and inconsistencies do not detract from the strength of her evidence. The facts I found, set out above, are consistent with R.E.H.'s evidence.

[165] In her evidence R.E.H. exaggerated when she testified the incidents between herself and S.F.W. happened every week. Of course, such events would be very traumatic to a child. R.E.H.'s evidence including of the incidents of manual (hand) masturbation and oral sex was consistent. I accept R.E.H.'s evidence that the events she described took place although not as often as she testified.

[166] Applying the test in *R. v. W. (D.)* and *R. v. N.M.*, *supra*, I find:

[167] Count 1 – S.F.W. is charged:

That he between the 1st day of November, 2008 and 1st day of April, 2013 at, or near [...] in the Province of Nova Scotia, did unlawfully commit a sexual assault on R.E.H., contrary to Section 271 of the *Criminal Code*.

[168] I find the Crown has proved beyond a reasonable doubt that S.F.W. between November 1, 2008 and April 1, 2013 at [...], Nova Scotia, intentionally applied force to R.E.H. Consent is not an issue because of R.E.H.'s age. The force intentionally applied was of a sexual nature (manual masturbation and oral sex). The Crown having proved all essential elements of the offence beyond a reasonable doubt, I find S.F.W. guilty of Count 1 of the indictment.

[169] Count 2 – S.F.W. is charged:

AND FURTHER that he at the same time and place aforesaid, for a sexual purpose, invite, counsels or incites R.E.H., a person under the age of sixteen years, to touch directly a part of his body, the body of S.F.W., contrary to Section 152 of the *Criminal Code*.

[170] I find the Crown has proved beyond a reasonable doubt that S.F.W. between November 1, 2008 and April 1, 2013 at [...], Nova Scotia invited, counselled or incited R.E.H., a person under sixteen years of age to touch his body for a sexual purpose. The Crown having proved all essential elements of the offence beyond a reasonable doubt, I find S.F.W. guilty of Count 2 of the indictment.

[171] Count 3 – S.F.W. is charged:

AND FURTHER that he at the same time and place aforesaid, did for a sexual purpose touch R.E.H., a person under the age of sixteen years directly with a part of his body, contrary to Section 151 of the *Criminal Code*.

[172] I find the Crown has proved beyond a reasonable doubt that S.F.W. between November 1, 2008 and April 1, 2013 at [...], Nova Scotia touched R.E.H. a person under sixteen years of age at the time, for a sexual purpose. The Crown having proved all essential elements of the offence beyond a reasonable doubt, I find S.F.W. guilty of Count 3 of the indictment.

[173] I will deal with any *Kienapple* issue on sentencing.

Coughlan, J.