

CANADA / JUDGMENT

R v MAM

2025 NSPC 1

COURT

Nova Scotia Provincial Court

DECIDED

14 January 2025

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R v MAM

Court

Provincial Court

Date

2025-01-14

Citation

2025 NSPC 1

Docket

8582904, 8582905

Judge/Registrar/Adjudicator

Atwood, Del W. (Honourable Judge)

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Decision Content

YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: R v MAM, 2025 NSPC 1

Date: 20250114

Docket: 8582904, 8582905

Registry: Pictou

Between:

His Majesty the King

v.

MAM

TRIAL DECISION

Restriction on Publication: Section 110 of the Youth Criminal Justice Act; and Section 486.4 of the Criminal Code

Judge:

The Honourable Judge Del W. Atwood

Heard:

2024: 17 October, 10 December 2025: 14 January Pictou, Nova Scotia

Charge:

Sections 152 and 271 of the Criminal Code

Counsel:

Bill Gorman for the Nova Scotia Public Prosecution Service Jennifer L MacDonald for MAM

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE: Section 110 (1) and s. 111(1) OF THE YOUTH CRIMINAL JUSTICE ACT, S.C. 2002, c. 1 APPLY AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

110. (1) – Identity of young person not to be published – Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

Mandatory order on application

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

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

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

By the Court:[1]

Synopsis

[1] MAM is charged as a young person in information 840426 with:

- sexually assaulting CM, contrary to § 271 of the Criminal Code [Code] (case 8582904); and
- for a sexual purpose, inviting CM, a person under the age of sixteen, to touch directly with a part of his [sic] body the penis of MAM, contrary to § 152 of the Code (case 8582904).

[2] Both offences are alleged to have occurred in the Town of Stellarton, Nova Scotia, between 8 April 2021 and 13 June 2021.

[3] The prosecution elected an indictable process; MAM pleaded not guilty.

[4] MAM and CM were classmates at school.

[5] The theory of the prosecution is that MAM and CM met on three occasions, once at a dead end of a roadway, then at the home of a friend, and finally in recreational camper owned by the parents of MAM. Each time, MAM engaged in sexual activity with CM without her having communicated her consent to those acts. Additionally, the theory of the prosecution is that there is no air of reality to MAM having an honest but mistaken belief in consent.

[6] Although there are some subtleties to it, the basic theory of the defence is that the alleged acts that underlay the § 152 count did not happen.

[7] With respect to the § 271 count, the theory is that CM initiated and invited sexual activity with MAM, and communicated her consent to MAM. Furthermore, the defence asserts that MAM sought to intermittently verify with CM that her communicated consent was continuing as their sexual activity continued. Alternatively, the position of the defence is that MAM held an honest but mistaken belief in CM having communicated her consent to their sexual activity in question; this was based on MAM having taken reasonable steps, in

the circumstances known to him at the time, to ascertain that CM was consenting.

- [8] For the reasons that follow, I find the testimony of CM and MAM to have been of equivalent credibility and reliability; both offer accounts that are worthy of belief. In the result, as I believe the evidence of MAM, the Court shall record an acquittal on each count.

Inventory of evidence

- [9] The Court heard from the following witnesses:

Name of witness

Party calling: P=Prosecution D=Defence

Brief summary of testimony

CM

P

Direct examination:

CM is the complainant.

She was a 15-year-old female at the time of the alleged offences.

She attended the same school and was in the same math class as MAM.

CM began having contact with MAM in December 2020.

Their initial contact was through social media, which progressed to video calling; eventually, CM would be in MAM's physical presence in the same place.

Their communication trailed off at one point, but they resumed contact around 17 January 2021.

CM described having two in-person encounters with MAM when he invited her to engage in sexual activity with her without her consent. These allegations form the basis of the § 152 charge.

The first was at a dead end of a roadway in Stellarton; it was the evening of 16, 17 or 18 April 2020. CM was with some friends; they had been drinking beverage alcohol. CM described herself as "having a buzz on, but was awake."

CM and her friends were on a walk, and encountered MAM, who was out with his family's dog. CM left her group of friends and walked around Stellarton with MAM. They lay down on the grass at a roadway dead end that had a bunch of houses nearby.

MAM propped CM up on top of him. MAM grabbed CM's face and kissed her. CM was not expecting kissing, but wasn't alarmed.

CM described MAM grabbing her hand and pressing it down on his crotch. She pulled her hand away and MAM kept pulling it back. It happened 5-6 times, over MAM's clothes.

CM told MAM she was cold. They then walked back to the home of a friend, J.

The second in-person encounter that CM had with MAM that led to an unwanted invitation to sexual conduct occurred late at night at the home of her friend, J, some time after the incident at the dead end. CM was unsure of the exact date.

CM had been drinking, and described her level of sobriety as a 5 on a 1-to-10 scale.

Around 1030-11:00 pm, MAM showed up. CM did not want to be alone with him. J went out of the house and left MAM and CM alone in a basement bedroom. CM and MAM sat on a bed.

MAM began kissing CM, and she reciprocated.

MAM then began grabbing CM's hand and placing it on his crotch. As at the dead end, CM kept pulling her hand away. This happened about 7 times over a few hours. They continued kissing while this was happening.

J returned home and was intoxicated. It was late, MAM had to leave, and CM was tired. MAM went home.

It is important to observe at this point that, regarding the physical contact that occurred between MAM and CM at the dead end and at the home of J, the prosecution asserted in closing argument that what constituted the subject matter of the § 152 offence was MAM grabbing CM's hand and pressing it against his crotch.

CM described the events that underlay the § 271 charge.

After the evening at J's, CM and MAM grew apart.

CM made a plan to end it with MAM. They texted, and MAM agreed to talk.

Around 12 June 2021, CM went to the home of her friend, J. She drank vodka coolers. CM described her level of intoxication as "an 8 or 9" on a 1-to-10 scale.

CM met MAM halfway between his house and J's. It was raining.

They walked to MAM's family home. There was a camper trailer in the back yard.

CM and MAM went inside the camper. MAM took CM's smartphone.

There was some kind of bedding and mattresses.

MAM started getting his hands on CM's hips and butt; he kissed her cheeks and tried to kiss her lips. MAM lifted CM's clothes up over her.

CM was sitting on the end of a bed, and MAM was standing in front of her.

MAM unbuckled his pants and then pulled down CM's leggings. MAM started with CM's underwear, and CM just pulled them off. MAM said that he wanted to see CM's boobs. MAM got out of his clothes really fast. MAM got CM on her back with her knees up, and placed his penis in her vagina. CM just wanted to go home. MAM was going back and forth. It hurt CM a lot. CM felt MAM could tell that she was not having it whatsoever, and so he just stopped.

CM stated that MAM wasn't able to finish, he wasn't able to come. MAM wanted oral sex. MAM wanted CM to perform oral sex on him, but CM didn't know how. MAM forced his penis in CM's mouth.

MAM then put his index finger and middle finger in CM's vagina.

CM lay like a corpse. MAM licked CM's vagina. CM felt angry, sad and disgusted.

CM lay on the bed briefly, then threw on her leggings, pullover, shirt and underwear; she then got her phone. MAM also got dressed.

MAM walked CM to a stop sign across the road.

CM believed that she was two and a half hours in the camper, from beginning to end. CM went back to J's. She felt she was a 6 or 5 on the 10-point impairment scale at that point.

CM tried to wake of J, but she had been drinking and was in no mood to get up.

CM called a friend and told the friend what MAM had done to her. Eventually, she went to police.

Cross examination:

CM agreed that she gave a statement to police in April 2022.

She agreed that she had wanted to be MAM's girlfriend.

CM acknowledged that she had heard through the grapevine that MAM was talking to another girl.

CM agreed that she had found out in December 2020 that MAM had resumed a relationship with a female peer, B; she agreed that MAM had contacted her about wanting to end their relationship and had said in a message, "It's not there for me."

CM agreed that she had told police that MAM only wanted to see her when she was drunk, but acknowledged that MAM had never told her that.

CM agreed after looking at her police statement that she had given 8 April 2021 as the date of her encounter with MAM at the dead end.

CM agreed that she had consumed alcohol and weed on 8 April. She had used shatter pens.

CM wanted to keep MAM from her friends because they would get weird.

CM agreed that the kisses with MAM at the dead end were consensual. She agreed that she climbed on top of MAM and was seated on his crotch. CM stated that, although “my private area was on his belt buckle . . . he could still slide my hand underneath.”

Regarding what occurred at J’s house, CM agreed that it was she who had invited MAM over—MAM didn’t just show up on his own.

CM agreed that she and MAM were making out and kissing passionately—that much was consensual.

CM stated that MAM would try putting her hand on his crotch when they were sitting next to each other.

CM agreed that she was consenting to all of it except having her hand on MAM’s crotch.

CM agreed that on 12 June 2021, her friends were celebrating the end of school and there was a lot of booze, but no drugs.

CM was confident that MAM locked the camper and that the camper had a lock.

CM agreed that, after MAM had pulled her leggings, she took them off. She took off her panties herself.

CM acknowledged telling police that MAM had said she looked hot. CM agreed that she then took off her bra.

CM acknowledged not telling police about MAM wanting oral sex, but she remembered it happening.

CM agreed that she must have had her phone in the camper at some point, because she later found in her Snapchat memory a photo she had taken. She and MAM were in the photo.

CM agreed that some parts of what happened were hard to remember, but other parts were easy.

CM agreed that she had been friends with J, but came to believe that she was very toxic.

CM agreed telling police not to talk to J.

CM agreed that she had met a female age peer, B, at a party. They put dates together and realized that MAM had been talking to both of them at the same time, and it crushed them.

CM agreed that she had told police she had tried to call MAM from B’s phone, but no longer had a memory of doing it.

CM agreed that MAM blocked her on social media; she then blocked him. She testified that it did not bother her.

CM stated that she could not recall sending a text message to MAM calling him a “fucking cunt” and a “momma’s boy” after finding out he had blocked her.

CM denied that she had consented to sexual activity with MAM on June 12-13, 2021, and denied bringing a condom with her when she went to meet MAM. She denied grabbing MAM's penis and performing oral sex. She denied that MAM asked her if she "was sure" or that he said that they could stop at any time. CM could not recall telling MAM that it hurt, or that he told her that they didn't need to do it at all. CM denied that she insisted that MAM try again. CM denied that it was her idea that MAM perform oral sex on her.

CM acknowledged developing a friendship with B and Z. Their friendship bloomed out of a discussion of their relationships with MAM. CM knew that Z was going to give a statement to police.

Sgt Paul Veenhuis

P

Sgt Veenhuis is the investigator.

Direct examination

Sgt Veenhuis took over the investigation from another officer who had been seconded to the RCMP.

The officer formulated grounds for the charges involving CM. On 30 June 2022, he contacted CM; he met with CM and his parents at police headquarters, and released him on process.

Issues arose with respect to the evidence given by Sgt Veenhuis on direct examination, which will be analyzed later in this decision under the subject matter of narrative evidence.

Cross examination:

Sgt Veenhuis acknowledged that CM had asked him not to interview her friend, J. The officer did not interview J.

MAM

D

MAM is the young person who is on trial.

Direct examination:

MAM was a 15-year-old male at the time of the alleged offences.

MAM agreed that he had had intimate contact with CM on the three occasions she had described in her testimony.

However, he denied ever trying to guide CM's hand toward his crotch, either at the dead end or in the bedroom at J's home.

He agreed that he had had sexual intercourse with CM in his parent's camper; however, it was CM who had brought a condom. He was surprised by it.

MAM stated that he wanted to talk with CM, but CM said, “something to the extent of maybe more than just that.”

MAM agreed that at that point, he thought there was a good chance of having sexual intercourse.

MAM described getting in the camper with CM and taking off their wet clothes. The door did not lock; the lock mechanism was broken.

MAM and CM talked. They both still had their shirts and pants on.

The talk became more in depth. CM referred to MAM’s penis as his “Johnstone”, a term that a friend had used.

MAM was surprised and excited.

CM asked if she could give MAM oral sex. MAM asked if she was sure, and CM said “yeah”. CM performed oral sex on MAM. It lasted for minutes.

CM still had her underwear and sweater on.

CM took the condom and held it in the air. MAM asked CM if she was ready to do that, as he was unsure—he was only 15.

CM said, “Yes, I’m sure.” MAM asked a couple more times, and CM said she was fine with it.

MAM put on the condom, and CM removed her panties and sweater.

MAM and CM had sexual intercourse. MAM told CM they could stop if she wanted to stop or if she was uncomfortable.

MAM testified that the sex wasn’t working out too well. CM brought up that a friend told her that, if MAM gave her oral sex, it would help. MAM performed oral sex on CM; it lasted for minutes.

After that, MAM was able to penetrate CM. CM said that it hurt, and MAM stopped. He removed the condom and took it outside. MAM tried to make CM feel better.

CM wanted to get back to J’s before they locked the door.

MAM and CM got dressed. They walked to the road, and then parted.

MAM recalled CM taking a picture while they were lying down.

MAM denied forcing CM into any sexual acts.

MAM agreed that he had blocked CM on social media. He received a text from CM afterward. It read: “Fucking removing me? Fucking pussy what a mommas boy you fucking cunt you’re a goddamn disappointment.” This was marked as Defence Exhibit No 1.

Cross examination:

MAM acknowledged talking with his mother about his sexual activity with CM.

MAM agreed that he was prepared to see where things would go with CM.

MAM was cross examined at some length on points that were not controversial, as much of his evidence coincided with the testimony of CM. MAM and CM gave consistent accounts of the circumstances surrounding their getting together at the dead end, later at J's home, and after that in the camper.

MAM agreed that he was interested in CM and thought that she was attractive. He agreed that he might have had an erection during their interaction at the dead end. However, he denied moving CM's hand toward his crotch

MAM stated that it was a mutual decision "to kiss and stuff" while he was in the bedroom with CM at J's house. He agreed that he was excited with what was happening. He was content with kissing, and held no hope that it might lead to something else.

MAM agreed that, between April 2021 and June 2021, things had cooled off. But when he heard from CM on 12 June, he thought "this might be going somewhere."

MAM agreed that he had sexual intercourse with CM in the camper, but remained consistent on cross examination that it was CM who had brought a condom, oral sex had been her suggestion, and he checked with her intermittently whether she was still comfortable with what they were doing. He agreed with the suggestion put to him by the prosecutor that he had been the voice of reason.

Exhibits

Exhibit No

Tendered by:

Description

1

Defence

A screen shot of a text message received by MAM, allegedly sent by CM

Nature of the police investigation

[10] At the request of CM, police did not interview her friend J. The Court can appreciate that CM did not want to get a friend involved in a criminal investigation; however, that does not explain why police complied with the request. J was with CM just before and just after each alleged offence. She could very well have had circumstantially important evidence to offer. Complainants are vital justice-system participants; however, they do not—or at least should not—control the course of an investigation.

[11] There was another investigative omission.

- [12] Notwithstanding the fact that there was approximately a 10-month gap between the alleged § 271 offence and CM talking to police, important metrics could have been collected through an inspection of the camper; arguably, it was the most important site. Police did not conduct photography or collect scene data there.
- [13] The significance of the failure to properly document an alleged crime scene was addressed in *R v Jacklyn-Smith*, 2013 NSPC 71 at ¶ 20. Alleged crime scenes contain information; when that information is not recorded and documented, access to it can be gained only through fallible human memory. A contrasting case is *R v Thomas*, 2024 NSPC 46, which had the benefit of a full photographic workup done by police; while it was not determinative of the outcome, it helped speed witnesses through descriptions of pertinent locations, and promoted the efficient use of court time.

Charging issues

- [14] The laying of duplicative § 151/152 and 271 charges is a practice that was discouraged in *R v RV*, 2021 SCC 10 at ¶ 78-79 [RV] for the very simple reason that it unnecessarily complicates the adjudication project. Information 840426 was laid over a year after that decision was published. See also *R v Cowan*, 2021 SCC 45 at ¶ 91; *R v Akhi*, 2022 ONCA 264 at ¶ 13.
- [15] As the trial developed, the duplicative-count issue was addressed effectively by the prosecution: the § 152 count against MAM deals with the alleged offences at the dead end, and then later at the home of CM's friend, J. The theory of liability advanced by the prosecution is that, on both occasions, MAM grabbed CM's hand and place it on his crotch.
- [16] The § 271 count captures the occurrence in the camper. The theory of liability is that MAM had vaginal intercourse with CM, forced his penis into her mouth, digitally penetrated her, and placed his mouth on her vagina; all of these acts were done without CM consenting to them.
- [17] Based on these theories of liability, there is a supportable reason for the prosecution proceeding with § 152 and § 271 charges in the same information; they are not duplicative.
- [18] However, that distinction leads to another issue, in that the evidence led by the prosecution from CM in support of the § 152 count appears to describe occurrences of touching for a sexual purpose (as comprehended in § 151 of the Code) rather than an invitation to sexual touching. Recall that CM's evidence was that MAM grabbed her hand and placed it on his crotch. The Court raised this point during closing argument; the position taken by the prosecution is that the act of MAM guiding the hand of CM should be taken as an invitation to sexual touching.
- [19] Invitation to sexual touching—unlike the offences of sexual assault or touching for a sexual purpose—has been described as an offence of communication, not of assault: *R v Legare*, 2008 ABCA 138 at ¶ 36 [Legare], *aff'd* on other grounds, 2009 SCC 56, [2009] 3 SCR 551; *R v Sheppard*, 2023 ABCA 381 at ¶ 287; and see *R v Carbone*, 2020 ONCA 394 at ¶ 61.

- [20] Given the broad interpretation of “invitation” that was adopted in *Legare*—which would include indirect invitations and non-verbal conduct—the position advanced by the prosecution is sustainable. However, § 151 would have been the more appropriate charging provision in these circumstances, as the evidence put before the Court by the prosecution was of actual touching. Had the prosecutor sought to amend the § 152 count, the Court would likely have granted it, as I do not believe that amending it to a § 151 offence would have prejudiced MAM. The fair-notice principles in *R v Groot*, 1998 CanLII 2151 (ONCA) ¶ 25, *aff’d* 1999 CanLII 672, [1993] 3 SCR 664, and *R v Pickton*, 2010 SCC 32 at ¶ 21 would certainly have applied, but would not have been violated by changing the § 152 charge to a § 151. The prosecution’s theory of liability would not have changed.
- [21] Finally, the Court will amend the § 152 count (case 8582905) to correct what appears to be a typographical error: it alleges that MAM did “for a sexual purpose invite a person under the age of 16 years to touch directly with part of his [sic] body the penis of MAM.” This will be amended to the following: “for a sexual purpose invite a person under the age of 16 years to touch directly with a part of her body the penis of MAM.” This amendment conforms to the evidence, as CM is female, and is permitted under § 601(2) of the Code.
- [22] Perfection is not expected in charge drafting; however, this information exhibited a greater-than-average number of problems.

Separate charges to be evaluated separately

- [23] Given the decision by the prosecution to have the § 152 count deal with the alleged offences at the dead end and at the home of J, and to have the § 271 count deal with the alleged offence in MAM’s family’s camper, the Court must exercise caution in evaluating the evidence. This is because, in a trial involving multiple counts, the court must guard against propensity or bad-conduct reasoning. These terms describe a type of heuristic that would have a trier treat proof of one count as supporting convictions for other counts.
- [24] As the prosecution has not sought count-to-count reception of similar-fact evidence, the court must treat each count as a separate indictment: *R v RTH*, 2007 NSCA 18 at ¶ 93; *R v DR*, 2021 ONCA 460 at ¶ 25. Nevertheless, the court may apply credibility findings across all the counts, provided that the court explain why it is doing so: *R v PEC*, 2005 SCC 19 at ¶ 1; *R v RAG*, 2008 ONCA 829 at ¶ 13; *R v Wright*, 2019 BCCA 234 at ¶ 57-58; *R v Barker*, 2023 NSPC 18 at ¶ 97-110.
- [25] I found both CM and MAM to be credible witnesses, and I apply these credibility findings across all counts.
- [26] These are my reasons for doing so.
- [27] While their evidence diverged on the key matters concerning the presence or absence of physical force and consent, neither one described events that could be characterized as fantastic or implausible. CM offered reasonable explanations for the differences between

her in-court testimony and what she had told police. MAM was not confronted with any sort of prior statements or utterances that were contradictory of his in-court testimony. He was unshaken in his assertion that he had never grabbed CM's hand and placed it on his crotch, and that his sexual contact with CM in the camper was at her invitation and was entirely consensual.

Narrative and the need for precaution

- [28] The evidence of Sgt Veenhuis was problematic. In spite of the need for precaution raised by the Court that the examination of the officer remain focussed on the charges actually the subject of this trial, the officer persisted in referring to extraneous allegations against and investigations of MAM.
- [29] The common-law rule relating to the admissibility of evidence is that the party seeking to admit evidence must establish on the balance of probabilities precedent matters governing the use of that evidence: *R v Carter*, 1982 CanLII 35, [1982] 1 SCR 938 at 947-48; *R v Evans*, 1993 CanLII 86, [1993] 3 SCR 653 at 668; and *R v Arp*, 1998 CanLII 769 at ¶ 70, [1998] 3 SCR 339 at 378.
- [30] The proposition that evidence such as was offered by Sgt Veenhuis would be admissible as narrative is not supportable using the balance-of-probability criterion.
- [31] First, extraneous-discreditable-conduct evidence is presumptively inadmissible: *R v Taweel*, 2015 NSCA 107 at ¶ 68-69; *R v ZWC*, 2021 ONCA 116 at ¶ 121-125[ZWC].
- [32] Second, the fact that MAM might have been the target of other investigations or allegations does not assist the Court in understanding the steps taken by police in investigating the charges that are the subject of this trial.
- [33] It would have been within the bounds of permissible narrative for the prosecution to have led from the officer the fact and timing of CM's complaint to police—see *R v AJD*, 2022 ONCA 867 at ¶ 71, referring to *R v Dinardo*, 2008 SCC 24, [2008] 1 SCR 78 at ¶ 38. However, there appears to be no relevant or material information to be gained from the Court knowing that MAM was the target of other investigations.
- [34] As observed in *ZWC* at ¶ 122:

Vague terms, such as "narrative", "context" and "background", cannot be permitted to serve as a substitute for a careful assessment of how the evidence will assist the jury in understanding other admissible evidence, what inferences the jury may properly draw from the evidence, and how impermissible reasoning can be prevented.

- [35] In my experience, extravagant resort to “narrative” for dubious purposes occurs frequently enough in criminal proceedings, such that the use of the term has become a red flag. Even in judge-alone trials, the admission of impermissible narrative should be curtailed, if for no other reason than economy: if proposed evidence will not assist a trier in grappling with live issues, precious time should not be consumed hearing it.

The effect of alcohol consumption on the reliability of CM’s evidence

- [36] CB had consumed significant quantities of beverage alcohol immediately prior to each of the alleged offences; by her own admission, she was substantially impaired during the time she was in the camper with MAM. In my view, this impacts the reliability of her evidence.
- [37] The jurisprudence is undecided whether the effect of ingested alcohol on human memory or cognition can be the subject of judicial notice: see eg *R v Hoffner*, 2005 CanLII 32924 at ¶ 65-68 (ONCS); *R v Shyshkin*, 2007 CanLII 16444 (ONSC) at ¶ 149; but see *R v DL*, 2022 MBQB 127 at ¶ 51.
- [38] That issue does not arise here, as CM acknowledged in cross examination that some parts of what had happened to her were hard to remember. Others seemed to her to be clear. CM did not elaborate much on which part of her testimony was rendered with clarity of memory. While this does not render her evidence entirely unreliable, it does diminish its reliability in a limited way.

Stereotypical reasoning and generalized assumptions

- [39] The adjudication project requires that trial judges be alive to authentic legal controversies, and be prepared to grapple with evidentiary conflicts when they might have a bearing on ultimate issues. In trials involving allegations of sexual violence, the controversies that tend to gain the most traction involve assumptions about human behaviour; it is a subject matter that has been the focus of substantial intermediate-appellate and apex analysis.
- [40] Judges are permitted to rely on logic, reason and common sense in assessing witness credibility: *R v ARD*, 2017 ABCA 237 at ¶ 8-9, aff’d 2018 SCC 6; cited with approval in *R v Kruk*, 2024 SCC 7 at ¶ 186 ; while there are constraints on appellate review regarding trial-level generalizations about human behaviour made in a judgment—generalizations that fall short of relying on prohibited myths—this does not eliminate the need for trial judges to exercise caution, as unrestrained assumptions about human behaviour may lead to palpable and overriding error: *Kruk* at ¶ 3 and 52. The key point in *Kruk* is that trial courts should avoid drawing extravagant inferences from ambiguous, uncontroversial or neutral facts.

- [41] MAM acknowledged on cross examination that he was interested in CM and felt excitement and sexual stimulation during their three encounters. That he would experience these emotions seems consistent with fair assumptions about human behaviour. What is problematic is the generalization urged on the Court by the prosecution that, as an adolescent experiencing this excitement and these emotions, MAM would have been unable to control himself.

Cross examination on prior statements

- [42] A statement made by a witness prior to trial may be the subject of cross-examination under either § 10 or 11 of the Canada Evidence Act [CEA].
- [43] Section 10 permits cross-examination on any written or recorded statement “relative to the subject matter of the case”; note that the statement need not be inconsistent with the testimony of the witness. However, the statement must have been written or recorded.
- [44] Section 11 allows for cross-examination on any statement “inconsistent with . . . [the] present testimony” of the witness. The statement need not have been written or recorded.
- [45] Neither provision is a memory-refreshing mechanism, and so not constrained by the requirements of, say, *R v Fliss*, 2002 SCC 16; an opponent’s witness does not have to acknowledge being in need of memory refreshing as a condition precedent to counsel pursuing a § 10 or 11 CEA cross-examination.
- [46] Should a witness admit making an earlier statement inconsistent with in-court testimony, the earlier statement does not become proof of the truth of what was said unless the witness should go on to adopt the statement: *R v Livermore*, [1995] 4 SCR 123 at ¶ 54; *R v Mauger*, 2018 NSCA 41 at ¶ 29. A statement is considered to have been adopted only if the witness (1) admits making the statement, and (2) acknowledges its truth based on present memory: *R v Layne*, 2024 ONCA 435 at ¶ 51; *R v Abdulle*, 2020 ONCA 106 at ¶ 136; leave to appeal to SCC refused, [2020] SCCA No 156. If adopted, the prior statement gets incorporated into the testimony of the witness; if unadopted, the statement may be used to assess credibility only.
- [47] In this case, CM was cross examined by defence counsel regarding a statement given to police, and a text message she had allegedly sent to MAM.
- [48] I would observe that the cross examination of CM by defence counsel was exemplary: it was economical, efficient, directed to specific objectives, and conducted in a way to achieve those objectives. Cross examination should not be a voyage of discovery; it should focus on known vulnerabilities and seek to reveal them. It can and should be done respectfully and humanely. All of those criteria were met by defence counsel in this case.

- [49] CM acknowledged that she had not told police about oral sex in the camper. But she insisted that it had happened. Not mentioning something when giving a statement to police is not the same as saying that the thing never happened. Furthermore, with the usual one-and-done method of statement-taking by police—which appears to have been the practice followed with CM in this case—complainants are not afforded the opportunity for reflection or correction, and giving clarifying statements.
- [50] Defence counsel confronted CM about what was tendered later as Exhibit No 1. This was the text CM had allegedly sent to MAM (calling him a “fucking pussy”, among other things); defence counsel read the precise words of the text to CM. This fulfills the calling-the-witness’-attention prerequisite in § 10 of the CEA. CM could not recall sending the text to MAM.
- [51] It is asserted sometimes that, if a witness does not admit making a statement, the cross-examiner must show the statement to the witness as a memory-refreshing exercise—see eg Matthew Gourlay et al, *Modern Criminal Evidence* (Toronto: Emond Montgomery Publications Limited, 2022) at 376. I do not believe that this is correct: counsel might not wish to refresh the memory of the witness of an opponent, or give that witness an opportunity to explain away a prior statement that is inconsistent with in-court testimony. Fairness principles are achieved in such cases through redirect examination. Furthermore, the supposed requirement that an opponent’s witness be shown a prior impeaching statement is contradicted by the very words of § 10 of the CEA: “a witness may be cross-examined as to previous statements . . . without the writing being shown to the witness”. [Emphasis added].
- [52] Defence counsel did not seek to prove that CM had sent the text until MAM was on the witness stand. This is in accordance with the practice approved in *R v Eisenhauer*, 1998 NSCA 60, [1998] NSJ No 28 at ¶ 64 (CA), and *R v Trecartin*, 2018 NBCA 49 at ¶ 18: when a witness does not distinctly admit making a statement, authentication of it should be offered as part of the case of the party seeking to prove it.
- [53] I found Exhibit 1 to have been sufficiently proven through MAM; he was the recipient of it and so could offer evidence on when and how he received it, and some circumstantial evidence on CM’s authorship of it. MAM was not challenged about it on cross examination; further, much as in *R v MacNeil*, 2024 NSPC 40 at ¶ 67, it would certainly have been open to the prosecutor to have asked MAM if he still had the text on his phone and to show it to the Court if he did.
- [54] In any event, Exhibit No 1 was not relevant as a truth statement; rather, it seemed to be offered show that, because of the name-calling content of the text, CM might have had an animus against MAM. Given that the Court was presented with one text only, I would regard the effect of Exhibit No 1 as ambiguous.

Testimonial congruency on non-controversial matters

- [55] MAM was cross examined extensively on non-controversial matters—essentially, the prosecution sought to have MAM confirm points on which his testimony and CM’s converged.
- [56] I did not find this cross examination informative, as it was clear from the direct examination of MAM that these points of convergence were not controversial. The Court was not presented with any new information.
- [57] Although the prosecution did not advance the argument in closing, this tactic is deployed frequently in support of the proposition that, when the evidence of an accused supports the evidence of a complainant on non-controversial points, that congruency lifts the entirety of the complainant’s evidence, even the parts that are contentious.
- [58] As addressed effectively by my colleague Hatt J in *R v RDH* (27 March 2024), JEIN case 8584388 (NSPC), this argument is based on an entirely faulty premise:

The Crown argued that [the complainant’s] testimony is more credible and reliable, with [the accused] confirming that uncontroversial aspects of [the complainant’s] testimony were true. This is offered as one argument in support of preferring her evidence where their testimony diverges. The fact that [the accused] agreed with many of the aspects of [the complainant’s] testimony, does not mean that where they diverge [the complainant] is more credible. First, it is not a credibility contest. Secondly, the accused has the presumption of innocence and is not compelled to testify in his defense. He has no burden. If he so chooses to testify, then trial fairness and procedure dictate this will be sometime after the Crown has called its witnesses and closed its case. The fact [the complainant] testified to information first, with the accused later confirming uncontroversial aspects of her testimony, is unhelpful in determining credibility in general or on contested matters. *R v MPH*, 2022 BCCA 216 at ¶ 53 confirmed that consistencies on uncontroversial matters are neutral considerations and not enhancements to the complainant’s credibility.

- [59] Evidence must be material, relevant, and probative, yes. But prior to all this, it must be informative: David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law Inc, 2020) at 45. The repetitive regurgitation of facts that are not controversial does not fulfil this criterion.

Delayed reporting

- [60] CM did not give a statement to police until April 2022; this would have been about 10 months after the alleged offence in the camper. What is the effect of a complainant waiting to go to police?

- [61] The doctrine of recent complaint was a court-created stereotype that required a complainant to immediately report a sexual assault or face an adverse inference regarding credibility: *Kribs et al v The Queen*, 1960 CanLII 7 (SCC), [1960] SCR 400 at 405. This myth was abrogated statutorily by SC 1980-81-82-83, c 125, s 19, found now in § 275 of the Code.
- [62] The failure of a complainant to immediately report being sexually assaulted cannot be treated as an automatic credibility deficit or as the basis for an adverse inference: *R v DD*, 2000 SCC 43, [2000] 2 SCR 275 at ¶ 63 [DD]. There is no inviolable rule on how people who are the victims of trauma, such as sexual assault, will behave: *DD* at ¶ 65; *R v Koge*, 2022 NSPC 37 at ¶ 86. Some might report being sexually assaulted immediately; others might wait, for a wide variety of reasons. Waiting might have to do with knowing that the trial process can be humiliating and degrading for victims of sexual violence and members of their families: *R v JJ*, 2022 SCC 28 at ¶ 1; *R v Mills*, 1999 CanLII 637 (SCC), [1999] 3 SCR 668 at ¶ 119.

W(D)

- [63] *R v W(D)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 at 758 [W(D)] is said to be the prototype case on analyzing evidence in a criminal trial. According to the treatment counter on CanLII.org, it has been cited in written decisions over fourteen thousand times.
- [64] In my view, recitation of W(D) principles is neither necessary nor sufficient: unnecessary, as judges are presumed to know the law—*R v Hodgson*, 2024 SCC 25 at ¶ 68—and not sufficient as recitation of the principles without the proper application of them may constitute an error of law— see, eg, *R v REM*, 2007 BCCA 154 at ¶ 61.
- [65] It is important to recall that intended audience for W(D) is the lay jury; further, the precise formulation of the W(D) questions is not beyond criticism—the SCC said so itself: *R v JHS*, 2008 SCC 30, [2008] 2 SCR 152 at ¶ 9-13.
- [66] What is more important than the lockstep application of the W(D) formula is the proper application of its underlying values.

Sexual assault—external elements

- [67] Section 271 of the Code states:

271 Everyone who commits a sexual assault is guilty of

- (a) an indictable offence . . .

. . . .

- [68] Section 265 of the Code states:

265 (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

....

[69] The external elements of sexual assault are:

- an accused person having voluntary physical contact with the complainant;
- the objectively sexual nature of the physical contact; and
- the absence of the complainant's consent.

R v Chase, 1987 CanLII 23 at ¶ 11-13, [1987] 2 SCR 293 at 302; R v Ewanchuk, 1999 CanLII 711, [1991] 1 SCR 330 at ¶ 25 [Ewanchuk]; R v GF, 2021 SCC 20 at ¶ 25; R v Al-Rawi, 2021 NSCA 86 at ¶ 89.

[70] Under the external-element heading, consent is determined by whether the complainant subjectively wanted the sexual contact to take place: Ewanchuk at ¶ 48; R v Barton, 2019 SCC 33 at ¶ 89 [Barton]. Any perception harboured by an accused person about the state of mind of the complainant is irrelevant in the external-element analysis; there is no need to inquire into it: R v Kirkpatrick, 2022 SCC 33 at ¶ 28 [Kirkpatrick]; Barton at ¶ 87-89; Ewanchuk at ¶ 30; R v BC, 2024, BCPC 138 at ¶ 10-16.

[71] Subjective consent is defined in § 273.1 of the Code as “the voluntary agreement of the complainant to engage in the sexual activity in question.”

[72] What will constitute the sexual activity in question is tied to context, and relates to particular behaviours and actions; it will be defined by the evidence and the allegations of the complainant: Kirkpatrick at ¶ 40; Barton at ¶ 88.

[73] Consent must be present at the time the sexual activity in question takes place: § 273(1.1).

[74] Ongoing consent is required for the duration of the sexual activity in question, and a person cannot give advance consent to sexual activity that is expected to happen later: ¶ 273.1(2) (a.1). Furthermore, consent to one type of sexual activity does not constitute consent to any type of sexual activity.

[75] There is no such thing as implied consent arising from a prior relationship or a complainant's passivity—and so there is no defence of implied consent: Ewanchuk at ¶ 31. Consent cannot be implied from a complainant's silence, passivity or ambiguous conduct: Barton at ¶ 98; Kruk at ¶ 36; Ewanchuk at ¶ 31.

[76] A complainant is not required to have offered some minimal word or gesture of objection: R v M (ML), 1994 CanLII 77 (SCC), [1994] 2 SCR 3, rev'g 1992 CanLII 4822, 117 NSR (2d) 74 (AD).

Sexual assault and assault—the fault element

[77] There are two fault elements inherent in sexual assault and assault:

- the intention of the accused person to have physical contact with the complainant; and,

- the knowledge of the complainant's lack of consent, or a wilful blindness or recklessness about it.

Barton at ¶ 87; Kirkpatrick at ¶ 28; Ewanchuk at ¶ 42.

[78] Wilful blindness exists when an accused person's suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries: *R v Briscoe*, 2010 SCC 13 at ¶ 21.

[79] Recklessness refers to the state of mind of a person who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk: *Sansregret v The Queen*, 1985 CanLII 79, [1985] 1 SCR 570 at 582.

[80] If the Court were to find that CM had consented to the specific physical contact MAM had with her, or if the Court were left in a reasonable doubt about it, then the only legal outcome would be an acquittal.

[81] However, if the Court were to find beyond a reasonable doubt that CM had not consented to the contact, the Court would then—and only then—have to determine whether the evidence negatives beyond a reasonable doubt the existence in MAM's mind of an honest but mistaken belief in communicated consent: Barton at ¶ 95. Section 273.2 of the Code imposes clear limits on the access to the defence of honest but mistaken belief in consent:

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from
 - (i) the accused's self-induced intoxication,
 - (ii) the accused's recklessness or wilful blindness, or
 - (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
- (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[82] Although CM was only 15 years of age at the time of the alleged offences, and unable to consent legally to engaging in sexual activity with MAM, there exist close-in-age exceptions, which I shall review later.

Elements of the offence of invitation to sexual touching

[83] The external elements of invitation to sexual touching, canvassed in Legare, are:

- A communicated invitation;
- which invites an action by a person under 16 years of age; and
- the invited action must involve touching, directly or indirectly, the body of any person and the body of the person under 16 years of age.

[84] As discussed above under the heading of “Charging Issues”, the intermediate-appellate interpretation of “invitation” admits of non-verbal gestures.

Invitation to sexual touching—fault element

[85] Section 152 describes a specific-intent offence. The prosecution must prove that the accused person intended that a person under 16 years of age receive the communication as an invitation to perform a sexual touch: Legare at ¶ 41.

Consent when a complainant is under 16 years of age and the close-in-age exemption

[86] There is no controversy that CM was 15 years of age at the times of the alleged offences.

[87] Section 150.1(1) of the Code states:

150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 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.

[88] However, the section provides for a close-in-age exception:

Exception — complainant aged 14 or 15

(2.1) If an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

- (a) is less than five years older than the complainant; and
- (b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

[89] The exception is accessible to MAM; in fact, he was younger than CM.

Analysis of the evidence and findings of fact

- [90] As stated earlier, I found both CM and MAM to be credible witnesses, in that they appeared to be trying to describe events accurately as they remembered them. Courts can be presented with equally believable—or unbelievable—accounts: Kruk at ¶ 62; R v Patel, 2024 NSCA 40 at ¶ 33, 47 and 74.
- [91] In reaching the conclusion that I found the evidence of MAM to be believable, and as that evidence is exculpatory, I am able to make the following findings of fact:
- In April 2021, MAM and CM engaged in sexual activity at the dead end and in the bedroom at J's home; as CM and MAM offered accounts of equivalent credibility, I am unable to determine, to a proof-beyond-a-reasonable-standard, whether MAM took CM's and placed it on his crotch.
 - This finding leads the Court to conclude that the external element of MAM having invited CM to engage in sexual touching remains unproven. As the act of invitation has not been proven, the Court is not required to address the issue of whether CM consented to it.
 - On June 12-13, 2021, MAM engaged in sexual intercourse and oral sex. Although CM stated that she did not subjectively consent to it, I find as likely that she did bring a condom to the camper and that she suggested to MAM that they engage in oral sex; I also believe MAM's evidence that, before engaging in sexual intercourse and oral sex with CM, he checked with her to make sure she wanted to go ahead, and told her he would stop at any time.
- [92] The prosecution acknowledged in closing that, if the Court were to believe the evidence of MAM, acquittals would be in order.
- [93] I believe the evidence of CM that she did not subjectively consent to the acts of MAM that form the subject matter of the § 271 count. But belief in the testimony of a witness will not always meet the proof-beyond-a-reasonable-doubt standard. This is because I accept also the equally believable evidence of MAM that CM appeared to him to be inviting the sexual activity that they later engaged in. I also accept the evidence of MAM that he made continuing inquiries of CM that she wanted to continue, and that he stopped when CM said that it hurt.
- [94] As I believe that evidence of MAM, I find that there remains a reasonable doubt whether CM did not subjectively consent to the acts in the camper. In the alternative, I find that there exists an air of reality to MAM holding an honest but mistaken belief in communicated consent, to the standard required in R v Esau, 1997 CanLII 312, [1997] 2 SCR 777 at ¶ 63: CM bringing a condom to the camper, asking MAM to engage in oral sex, and saying that she was sure about intercourse was more than a mere situation of ambiguity—it was strongly indicative of circumstances that would have led MAM to believe reasonably that CM was subjectively consenting to their sexual activity. Further, MAM's belief was not based on any of the forbidden criteria in 273.2; rather, it was based on him having believably made antecedent and ongoing inquiries of CM whether she was consenting to the sexual activity

in question.

- [95] To be clear, I do not accept the characterization proposed by the prosecution that MAM's evidence would require the Court to consider CM as the sexual aggressor. That was not the evidence of MAM. Nor was it the evidence of MAM that he was a reluctant participant.
- [96] Rather, he described CM as the one who invited him to have sexual contact. As that contact seemed to escalate in intensity, MAM repeatedly asked CM whether she wished to continue, and he received a positive response. And so not a "reluctant participant"—a descriptor proposed by the prosecution—but a careful one.
- [97] The proposition that MAM would not, at 15 years of age, "in the throes of this situation", have made the inquiries of CM that he testified he did, would call upon the Court to make stereotypical assumptions about human behaviour, outside the record and not based on any recognized body of judicial notice, as would be subject to substantial challenge based on the binding authority of Kruk.
- [98] I believe the evidence of MAM,
- [99] His evidence is exculpatory.
- [100] It raises a reasonable doubt about whether the acts that that form the basis of the § 152 charge occurred at all.
- [101] It raises a reasonable doubt about whether CM had not consented to the sexual activity in the camper.
- [102] It supports a defence of honest but mistaken belief in CM having given her actual communicated consent to the specific sexual activities which form the subject matter of the § 271 charge, which has not been negated beyond a reasonable doubt by the prosecution.
- [103] The Court will record acquittals on each count.
- [104] The Court is indebted to counsel for their skillful conduct of this trial.

Atwood, PCJ

- [1] Portions of this judgment were read into the record on 14 January 2025. Counsel were advised that full written reasons would be released at a later date. This decision constitutes the full judgment of the Court. This follows the practice adopted in *R v MacIntosh*, 2024 NSPC 18.

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Prepared on 28 October 2026 · Esheria