

CANADA / JUDGMENT

R. v. 32992

2024 BCSC 2073

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2024 BCSC 2073 R. v. 32992

IN THE SUPREME COURT OF BRITISH COLUMBIA

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32992

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Before: The Honourable Mr. Justice Crerar

Oral Reasons for Judgment

(s. 724 Factual Findings for Sentencing)

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Place and Date of Hearing:

Vancouver

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Table of Contents

Paragraph Range

I. INTRODUCTION

[1] - [4]

II. FACTS

[5] - [6]

III. LAW

[7] - [10]

IV. ISSUES IN THIS CASE

[11] - [12]

V. POSITIONS OF THE PARTIES

[13] - [16]

a. Crown position

[13] - [14]

b. Defence position

[15] - [16]

VI. SUMMARY OF EVIDENCE CITED BY DEFENCE

[17] - [51]

a. The accused's testimony

[17] - [17]

b. The complainant's testimony: general issues

[18] - [36]

c. The alleged assaults: specific evidentiary issues

[37] - [51]

VII. DISCUSSION AND DECISION

[52] - [82]

a. Introduction

[52] - [59]

b. Finding facts for sentence in the face of reasonable doubt

[60] - [76]

c. Decision and discussion

[77] - [82]

VIII. THE SINGLE COUNT SENTENCING CONUNDRUM

[83] - [94]

I. Introduction

[1] On June 1, 2024, after roughly a day of deliberations,[1] the jury found the accused guilty of sexual assault. The single-count indictment alleged that the accused sexually assaulted the complainant, with whom he was in a monogamous intimate relationship from June 2016 to December 2017, on multiple occasions during a subset of that period:

.[the accused], on or between September 1, 2016 and November 30, 2017, at or near [location] did sexually assault [the complainant], contrary to Section 271 of the Criminal Code.

[2] The complainant, who presented as a sympathetic, intelligent, and articulate witness, testified that the accused sexually assaulted her approximately 21 times. The alleged sexual assaults can be grouped into five categories:

- a) A specific but undated September 2016 assault, where she awoke to find the accused on top of her, with his penis pushing inside her vagina. He was not wearing a condom. She believed that he climaxed, at which point he stopped;
- b) Roughly 19 other undated instances of inherently non-consensual night time sexual contact, divided into three categories:
 - i. some where she awoke to find the accused having sex with her, similar to the first incident;

- ii. some where she awoke to find the accused having sex with her, but where she feigned sleep through the experience; and
 - iii. some, the occurrence of which she inferred after she woke up missing underpants and other clothing.
- c) A specific but undated November 2017 assault, where the accused came home at lunch, closed the kitchen blinds, pushed her against the countertop facing away from him, pulled down her pants, and forced penile-vaginal intercourse upon her.
- [3] The accused testified that none of these incidents occurred.
- [4] The complainant confirmed that apart from these alleged incidents, all other sexual activity in the relationship had been consensual.

II. Facts

- [5] The background facts, such as the timing and history of the parties' relationship, were generally not controversial and were largely established through the evidence of the complainant herself:
- a) At the time of the events in question, the accused was an assistant professor at a British Columbia university. He has two children, each under the age of five during the events in question. The accused served as the primary caregiver for his children. The children's mother suffered from a mental illness and was involuntarily hospitalised for several weeks around April 2017;
 - b) The complainant was a former PhD student in a different faculty at the university. In summer 2014, she came to Canada from her native Central America country with her son, to start her PhD programme. Her son, from a previous relationship, was aged around nine during the events in question;
 - c) In May 2016, after meeting on an online app, the complainant and the accused began dating;
 - d) The complainant became pregnant early in the relationship. In late June 2016, she aborted the pregnancy, at the strong urging of the accused;
 - e) The abortion caused her immediate and long-term physical and psychological conditions, and emotional pain and guilt;
 - f) She placed a framed photograph of the ultrasound of the embryo on her bedside table in their bedroom. On the back of the picture she wrote a letter to her aborted baby, saying that she was "sorry" and that she "should have protected" her;

- g) The abortion also contributed heavily to the end of their relationship. She accused him of pressuring her to have the abortion, and of not caring sufficiently about the pain it inflicted on her. He asked her to take down the framed ultrasound of the aborted embryo from the bedroom. She felt lingering antipathy towards the accused because of the abortion;
- h) The complainant suffered from depression and anxiety, for which she took considerable medication. At trial, she stated that "I've been quite open about my struggles and my needs for mental health care. I'm not ashamed of it";[2]
- i) The complainant testified that from approximately November 2016 through 2017 she was taking prescriptions for her migraine headaches and sinus pain, as well as for anxiety and sleeping issues. She said that some of these pharmaceuticals made her very sleepy. For his part, the accused stated that he was only aware that the complainant was taking migraine medication. He was not aware of any particular drowsy effects, or of any special plan to ensure care of the children in case she could not be awoken. He never observed her to be drowsy, or "out of it", or unable to awaken;
- j) During the relationship the complainant engaged in self-cutting behaviour. When her doctor asked about the cuts, she told him that they were not self-inflicted, but were from laboratory rats;
- k) Around October 2016 the accused and complainant moved in together, with the three children, into a larger university townhouse residence. The complainant believed that the living arrangement would bring stability to herself and her son. The complainant hoped that their families would become one;
- l) The complainant was very close to the accused's children. She was very sad that the end of the relationship with the accused also ended her relationship (and her child's relationship) with his children. At trial she wept when she recounted dancing, painting, and other activities with the children. She promised the accused's children that she "would not leave them behind." She stated that she did not want to "break her own son's family up again";
- m) Both the accused and the complainant agreed that the relationship had significant ups and downs throughout its term. The couple frequently had arguments, with "heavy emotions", to use the complainant's phrase. The abortion and the accused's ex-partner were focal points of many disagreements. The complainant acknowledged that she may have said that it would be better if the accused's ex-partner were dead. The couple also argued about child care and domestic arrangements;
- n) There were separations during the relationship. Around May 2017 the complainant sublet another residence for a few months; the complainant and the accused took turns staying there. In November 2017, she bought a larger mattress for her son, so that she could occasionally sleep with him rather than the accused;

- o) Despite the tumultuous relationship, around July 2017, they became engaged. The complainant testified that the accused apologised at that time for not being supportive enough with respect to the abortion;
- p) Despite the engagement, the relationship continued to have difficulties. By around Halloween 2017, however, the complainant described the relationship as "okay";
- q) The complainant testified that after the alleged November 2017 kitchen assault, the relationship lasted for a few more weeks. They sometimes slept in the same bed during this period. The complainant said that she avoided speaking to the accused in the period leading up to and after the alleged assault, only discussing logistics of picking up children and the like;
- r) They agreed that the relationship ended in December 2017, and that it ended on reasonably amicable terms. The accused and his children moved out of the residence while the complainant was away in her home country with her son. They dealt effectively with one another to unspool their relationship, including the return of personal effects, and the transfer of their shared car to the complainant. They communicated civilly by email and text for one or two months after the end of the relationship;
- s) The accused testified that the complainant later suddenly became unfriendly and angry towards him. In response to this, the accused dropped off some baked goods at the complainant's residence, when she was not present. He testified that it was a "peace offering";
- t) At some point (they disagreed about whether it came before or after the baked goods incident), the complainant asked the accused to stop communicating with her. She believes that they entered into a formal non-contact agreement through a university agency. He states that he voluntarily stopped communication with her, after she so requested;
- u) The complainant testified that in 2018 and 2019 she encountered the accused on the university campus on a few occasions. She believed that he knew that she was nearby, but did not assert that he was following her. For his part, the accused stated that by coincidence he bumped into the complainant at a campus grocery store a few times;
- v) At some later point, the complainant filed a university human rights complaint against the accused. The complaint was not directly related to any alleged sexual assault, but arose from contact such as at the grocery store;
- w) The complainant reported the sexual assaults to the police almost four years after the end of their relationship: in October 2021. This led to a police statement and an interview on October 30, 2021;

- x) At trial, the complainant explained that she did not report to the police earlier, as it took her time to gather strength, and to recover from the experience, both of which she did through the assistance of therapy: " it took me a long time, with a lot of therapy, and a lot of work on myself to be able to process what had happened to me, and my lived experiences ".
- [6] The Court generally accepts the facts above as not in dispute. The accused and complainant differ on the relatively minor issues set out in items (i) and (t), above. For the reasons set out below, the Court finds that the Crown has not proven the complainant's version of those events on a balance of probabilities.

III. Law

- [7] The Crown and defence largely agree on the applicable law.
- [8] Section 724 sets out the obligations of the sentencing judge after a guilty verdict by the jury:

Information accepted

724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

Jury

- (2) Where the court is composed of a judge and jury, the court
- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

Disputed facts

- (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
- (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
- (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[emphasis added]

- [9] In *R. v. Azim*, 2023 BCSC 482, Mr Justice Basran helpfully summarises the law governing the findings of fact by the sentencing judge:

- [9] The governing principles applicable to the task of a sentencing judge required by s. 724(2) of the Code are set out in *R. v. Ferguson*, 2008 SCC 6 at paras. 16-18, where Chief Justice McLachlin, writing for the Supreme Court of Canada, considered an appeal regarding the appropriateness of a sentence:
- [16] This poses a difficulty in a case such as this, since, unlike a judge sitting alone, who has a duty to give reasons, the jury gives only its ultimate verdict. The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.
- [17] Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (Criminal Code, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown*; *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).
- [18] Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: (ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.
- [10] The rules to apply following a jury verdict were succinctly described by the Nova Scotia Court of Appeal in *R. v. Landry*, 2016 NSCA 53 at paras. 48-49:
- [48] Both before and after the 1996 Criminal Code amendments and the decision of the Supreme Court of Canada in *R. v. Ferguson*, the law was fairly clear: following a jury verdict, an accused is not entitled to be sentenced according to the most lenient view of the circumstances of the offence consistent with the jury verdict. A trial judge must determine the facts for the purpose of imposing sentence guided by two fundamental principles: a trial judge must be satisfied that the evidence establishes aggravating facts beyond a reasonable doubt, and the facts must not be inconsistent with the jury's verdict (in addition to *Brown* and *Ferguson*, see: *R. v. Gauthier* (1996), 78 B.C.A.C. 85 (B.C. C.A.) at paras. 23-24; *R. v. E. (A.)*,

[1998] N.B.J. No. 150 (N.B. C.A.); R. v. Roncaioli, 2011 ONCA 378 (Ont. C.A.) at paras. 58-61).

[49] I would distill the rules for a court to follow as:

1. The sentencing judge shall accept as proven all facts, express or implied, that are essential for the jury's guilty verdict.
2. When the jury finding is ambiguous, the sentencing judge should not attempt to follow the logic of the jury. Instead, he or she must make their own independent determination as to the relevant facts.
3. The sentencing judge should only find those facts necessary to permit the proper sentence to be imposed.
4. The sentencing judge may not find as fact things that were rejected by the jury's verdict.
5. For any aggravating fact, the sentencing judge must be satisfied that the evidence is sufficiently cogent to enable her to find it proved beyond a reasonable doubt.

[11] In R. v. Ward, 2009 BCCA 409 at para. 14, the B.C. Court of Appeal stated that the sentencing judge "does not have to arrive at a complete theory of the facts, but only needs to find sufficient facts in order to impose a sentence".

[12] Finally, Mr. Azim testified during the trial and, as a result, I am aware that in considering the meaning of reasonable doubt in the context of conflicting testimonial accounts, I must be guided by the formula provided in R. v. W.(D.), [1991] 1 S.C.R. 742.

[emphasis added throughout]

[10] Specifically, in considering whether aggravating circumstances have been proven beyond a reasonable doubt in the present exercise, the court must be guided by the W(D) principles, as expanded in R. v. JHS, 2008 SCC 30 at paras 9 and 12 (substituting "reject the aggravating factor" for "acquit" in the present sentencing context):

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.

[Fourth, if,] after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit.

IV. Issues in this case

- [11] As mandated by Ferguson, "[t]he judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues": para. 18.
- [12] The relevant sentencing issues that this Court must determine concern the overall facts of the case, as well as potential aggravating factors. This Court's independent factual findings on the following aggravating factors in particular will weigh heavily in the determination of a fit sentence:
- a) Was there a single sexual assault or multiple repeated sexual assaults? ;
 - b) Did any of the sexual assaults involve penetration? ;
 - c) Were one or more sexual assaults committed on the complainant while sleeping: a particular betrayal of trust and an act of violence on a vulnerable person? ;
 - d) Did the overt and rough kitchen sexual assault occur?

V. Positions of the parties

a. Crown position

- [13] The Crown argued that the complainant was a credible witness: clear, specific, and responsive to all questions asked of her, including during cross-examination. She was fair and thoughtful. She conceded many points with regard to her recollection. She did not demonise the accused, and she recognised his strengths as a partner and father. She offered some details of the September 2016 sleep assault and the November 2017 kitchen assault. The Crown argued that the jury clearly accepted the complainant's testimony in its entirety, and rejected that of the accused.
- [14] The Crown conceded, before the sentencing court, as before the jury at trial, that there may exist reasonable doubt about the category of sleep sexual assaults that she was only able to infer after she woke up with clothing missing. That said, the Crown urged the Court to accept the complainant's testimony in its entirety: specifically, that the accused sexually assaulted her multiple times during the period as claimed, such that those assaults are proven beyond a reasonable doubt. Alternatively, the Crown argued that the Court should accept as proven beyond a reasonable doubt at least the occurrence and details of the specific September 2016 sleep and November 2017 kitchen sexual assaults.

b. Defence position

- [15] The defence argued that while those conclusions are open to the sentencing judge, s.724 does not require the Court to accept the complainant's evidence so broadly. The verdict of sexual assault only requires the Court to find, as a minimum, but perhaps as a maximum, that the essential elements of sexual assault--non-consensual intentional sexual touching--occurred on one occasion during the period in the indictment. Beyond that, the sentencing judge, tasked with an independent determination of facts based on his own assessment of

the trial evidence, may in the end conclude that the details or occurrences of sexual assault, as alleged by the complainant, fall short of being proven beyond a reasonable doubt.

- [16] The defence argued that many aspects of the complainant's own evidence raise reasonable doubts about the general reliability of her perception and her recall of the alleged events, as well as those allegations themselves. That evidence is summarised in the next section.

VI. Summary of evidence cited by defence

a. The accused's testimony

- [17] At trial, and in this hearing, the defence noted that the accused presented as a forthright and measured witness, whose testimony was not undermined in any manner in cross-examination.

b. The complainant's testimony: general issues

- [18] While not in itself inherently undermining of her credibility or reliability, but instead serving simply as "one circumstance to consider in the factual mosaic of a particular case" (see *R. v. DD*, 2000 SCC 43 at paras. 60-69; and *R. v. SG*, 2022 ONCA 727 at para. 43, and, generally, *R. v. Kruk*, 2024 SCC 7 at para. 65), and as a circumstance that must be treated guardedly as a potential stereotype, the complainant did not report the sexual assaults to the police until almost four years after the end of their relationship: in October 2021. Again, the complaint explained that she did not report to the police earlier, as it took her some time to gather strength to call the police, and to recover from the experience, both of which she did through the assistance of therapy. The defence noted the complainant's explanation that the therapy involved a reconstruction and reformulation of the events of four years previous, in order to recall and understand them. The delay in reporting thus undermines not only the credibility but the reliability of the evidence.
- [19] The defence also noted that the complainant's testimony was not supported by any corroborative contemporaneous evidence. In her testimony, the complainant did refer to some contemporaneous documents that could potentially have corroborated to some extent her account: an online query about whether the sleep sex might constitute sexual assault in Canadian law and culture, as well as a diary, poetry, and other items that she wrote during their period of the alleged assaults. None of these documents were tendered as exhibits at trial.
- [20] In fact, the only contemporaneous documentary evidence adduced at trial directly undermined the complainant's reliability and affirmed that of the accused. In her police statement, the complainant claimed that the accused had not told her anything about a German academic conference at which he was presenting:

In mid-November 2017, I remember very clearly because I was writing things down . He told me he had bought three tickets for his trip to Germany. And I was surprised because I said "You never mention things to me." He said, I was lying and twisting things, because he w[ould] have never agreed to go to that conference if I wasn't okay. But I know he didn't tell me anything, because I was writing everything in my diary. And so he said that I said that it was no problem at all. And I never said that

[May 28, 2024 2:47pm]

- [21] Despite her adamance on this point in her police statement, two later disclosed emails showed that the accused had in fact told the complainant about the German conference, not once but twice, and that she had responded positively. Her insistent assertion to the police was dead wrong, at the very time she was trying to convince the police that she had been sexually assaulted. It was dead wrong, as her own selected illustration of the accused's lack of consideration towards her, of his truth-twisting manipulation of her, and of her superior reliability--in both memory and perception of reality--vis-à-vis that of the accused.
- [22] The complainant acknowledged that other aspects of her police interview were inaccurate or incomplete. She denied being under the influence of any medication during the alleged assaults, in response to the officer's specific question. In contrast, at trial, she testified, at some length, about her prescriptions for medications that apparently left her in a sedated state, as an explanation of sorts for not waking during some of the sleep sexual assaults.
- [23] In her police interview, the complainant did not simply recount her story from memory. To prepare for that interview, she drafted a document setting out details of her relationship with the accused, and the alleged assaults. She prepared three different versions of that document: one 17 pages; one 19 pages; and one 15 pages--the likely final version. She relied heavily on her written document in her police interview. In cross, she acknowledged that she may have looked at her document in her police interview (the video of which was viewed by defence counsel) over 70 times. The transcript of that almost two-hour police interview indicates that for the most part the complainant was speaking almost continuously, with few interjections by the officer.
- [24] The first page of each draft document set out a "Positionality statement", which acknowledges that the assertions therein reflected "my reality" and were based on "my recollections" of my "emotional experiences", and may reflect personal subjective biases, perceptions, and interests:

Before I present my story, I acknowledge that the contents of this letter reflect my reality and emotional experiences and are based on my recollections of the facts. However, I describe them with as much detail as I can and to the best of my ability. I unquestionably believe that all the events that I present here are true and have significantly impacted my mental and physical health.

[3]

[as in original, in the 17-page version]

[25] In cross, she agreed that she included the positionality statement as there was "a possibility, unintentionally, that there are details or facts that are factually inaccurate but that you are being honest: you're doing your best" (May 28, 2024 10:11 am).

[26] In that document the complainant recorded that both the accused and herself were having doubts about her accurate perception of reality during the relationship:

But I was writing it all because he was making me doubt my own reality. The "I didn't say that" or "you tergiversate my words" was used very often when I would be offended by the things he said. To the extent I would really doubt myself and believed him.[4]

[27] The defence argued that the contradictions and omissions in the police statement were symptomatic of the significant reliability concerns with the complainant's testimony. These concerns arise in part from her own words and testimony. The defence pointed to the complainant's self-consciously subjective references to "her reality", and her "lived experience". The defence noted that she required the assistance of therapy, four years after the events, to determine what actually had happened, and to understand it. The defence noted that she admitted her fears during the relationship that she was perhaps "twisting reality", misremembering events, or even "losing her mind." [5]

[28] For example, the complainant herself, in her October 2021 police statement, admitted that she was questioning her own perception of reality during the period:

.he said that I was twisting what he said, that the only thing he wanted is for [son's name] to have an adventure. And then things started to make no sense to me. Like, the things that will be, like, true at the beginning started to be very, like, make no sense, so I started diary because I was feeling like a lot of these was patterns and it was kept on happening. So I started writing everything right away because also I didn't believe that - - well, maybe he's saying truth, maybe I am not telling the truth. Maybe I'm twisting reality, maybe I'm not listening well. Maybe I'm losing my mind. So I started writing out everything right away when it will happen .

[emphasis added]

[29] The defence explored this passage on cross:

Defence: And that describes some part of you processing events with [the accused], that you, internally in your mind, wondered if you were misunderstanding or misperceiving him?

Complainant: I was confronting the reality that I might be wrong or as I said in my positionality statement, I am willing to believe that I make mistakes.

D: Yes.

C: And we believe that the people that we love, so I would believe him when he say I did not say that, and when I was having a living experience about something happening and he would contradict that and say that he did not say that.

D: Yes.

C: That would make me wonder, if which of us, there is clearly somebody that is wrong and I'm willing to accept that I'm wrong.

D: Yes.

C: But when it happens so much and I am firmly believe that certain things are happening.

D: Yes.

C: That is becomes distressing.

D: I understand that.

C: Yes.

D: So we're clear here, I'm not suggesting that you don't honestly believe the things, I think you used the word "living experience"?

C: Lived experience.

D: I'm sorry I missed that, what does it mean by your lived experience?

C: Lived experience is like, each of us inhabited our bodies, and our own, each person has his own lived experiences, like the mental processes that happened: they are unique to the person and each one of us here in this room has their own lived experiences of these experience right? It's not the same from person to person.

D: So tell me if I have this right, you are stepping back to say, I have a lived experience that I believe in, but I recognize that there is a different description, a very different description from [the accused].

C: Yes that's correct.

D: And internally, instead of saying "well he's lying through his teeth" at that time.

C: Yes.

D: You're saying "well I don't know, I don't know. I might be the one making a mistake here".

C: It might be me, it might be him, and I did not want to believe that he was lying to me.

D: Yes.

C: Because when we love people and we trust people, we don't think those things right away. That's my belief.

D: Yes, at the time you did, at the time of the relationship you did love and trust [the accused].

C: That's right.

D: But now you've come to distrust him and you believe he was lying.

C: I believe that in some parts he was lying. Yeah that's right. I don't know to the extent. I can interpret some of the things to be lies and those I'll never know whether my intuition, what I think, is true or not because yeah, I don't know.

D: And with some of these things it may be impossible to know.

C: Yeah.

[emphasis added; May 28, 2024 from 10:17am]

[30] In the police interview, she also described herself as suffering from "derealisation"; "disassociation" ("It's feeling like, I am, in my body, but I'm feeling far away, from, I'm having a slower time to respond to the world outside me ."); "depersonalization" ("for me with, feeling like, looking in the mirror and like seeing this face all tired, and feeling like, I don't, I don't recognize that is like why I look this old and why do I look so tired .").

[31] The defence canvassed her use of these terms in the police interview, and the existence of those psychological conditions at the time of the alleged sexual contact:

Defence: Is it, is it sort of a detachment, a sense of distance from your observation versus your thinking? Is that one way to--

Complainant: It's--I'm trying to think about it. Not seeing what I was used to expect to see.

D: Are these things you've done work on through the course of therapy?

C: I, uh, some of them yeah, to be in my body, to not. Yes.

D: Um, what about derealization disorder?

C: I don't know. I know I've probably used it, I don't know exactly. For me, kind of the same, I don't know exactly.

D: In your statement to the police, say your interview, you've used the word "dissociated" many times, do you agree with that?

C: Yeah, dissociated yes. The other ones, I probably used them, I just don't know if I, right now it doesn't, I don't know the definition between.

.

D: When you speak about some of these terms--dissociation, depersonalization, derealization--do you recognize that your memory and perception is sometimes dissociated or detached from reactions and the behaviour?

C: It is still there, it's just that I am not feeling the parts of my body. If that makes sense.

D: So you're not drawing on the--it's not, um--it's not drawing on the same input that you wrote. Is that one way to put it?

C: It's like, it takes me longer to process things, I experience it when I'm stressed here for a few times, for example. I am stressed, and I don't feel totally in my body.

D: You accept that the dissociation can have an impact on your perception and memory?

C: And the speed of it, yeah.

D: When you did experience dissociation in the time you were together with [the accused], am I right to say that that often aligned when you were having sexual contact with him?

C: Yes, at times. Yes, correct.

[emphasis added; May 28, 2024 from 2:26]

[32] The complainant described how the stresses of the relationship (not specifically the alleged sexual assaults) made things feel "unreal":

Defence: You were resistant to getting help because you didn't want to be labelled with anything?

Complainant: That's not right. I've been quite open about my struggles and my needs for mental health care. I'm not ashamed of it and I'm not--I wasn't at the time and I was spending a lot of time in bed because I was suffering from a lot of migraines, as you can see by the amount of medication that I was receiving. I was also receiving a lot of - having a lot of sinus infection and sinus pain. So, that's right.

D: Um--you engaged in cutting behaviour?

C: That's correct.

D: Tell us about that.

C: I was struggling a lot with the relationship, um, and I was going through what I told--what you heard from the document that, um, I would feel like I would--something would happen and then I was told that it wasn't happening. Um, I was having anxiety for sure and I was having panic attacks and I've been quite open about that. Um, the relationship was bad and it was a lot of arguments and it was a lot of, um, heavy emotions and a lot of putting me down, um, and I felt like that was real. That that was real. The pain was real. And nobody like - it would feel real, and honestly like, I know that it felt real but I cannot relate to that emotion anymore. So I--that's the best as I can describe it.

D: Um, so when you say the cutting is real --

C: The feeling --

D: Meaning--tell me if you agree or disagree--at that point, there are a number of things that you were struggling to figure out, am I right or am I wrong, is this real, but the cutting inarguably is real, it's immediate.

C: The feeling of it, yes.

D: Things felt unreal at that point.

C: Some of the things felt like I didn't know what was going on. Yeah.

[emphasis added; May 28, 2024 from 12:04 pm]

[33] While self-harm, dissociation, and disconnection from one's body can be associated with trauma, including trauma from sexual assault, they also pose evidentiary challenges with respect to reliability.[6] In this case, these experiences arise in the context of testimony which has been shown unreliable through the corroborative contemporaneous evidence. They demonstrate, not that the complainant failed to remember details as a stereotypical "perfect victim" might, but rather that the complainant's capacity to accurately perceive, interpret, process, and recall events was imperfect, and may be inaccurate, by her own acknowledgement. These experiences and descriptions thus serve as one factor among many that collectively undermine the complainant's testimony.

[34] Further, and in any case, these concerns about the complainant's perception of reality cannot be wholly or hypothetically attributed to sexual assault trauma. The complainant confirmed that her fears about losing her mind and twisting reality pre-dated the alleged sexual assaults, and persisted throughout the entire relationship:

I know that it happened throughout the relationship. It happened earlier but again I gave the benefit of the doubt that I perhaps made mistakes. It became more salient towards the end of the relationship towards the fall of 2017: I believe so.

[35] While the timing of her psychological distress was not specifically linked to her abortion, at the accused's strong urging, early in their relationship, it is clear from her own evidence, surveyed above, that the abortion inflicted psychological trauma on her, and fostered resentment towards the accused that lingered for years after the end of the relationship. The complainant brought to the police interview her ultrasound of her embryo, which she had framed and kept on the couple's bedside table, leading to arguments. She acknowledged that at the outset of her first call to the police in October 2021, she may have emphasised two items: first, that she wanted to report a historical sexual assault against the accused; and, second, that the accused had coerced her into getting an abortion. The post-abortion issues thus raised concerns both with respect to reliability and motivation.

[36] In this, as a final minor aside, the defence raised an unrelated incident, to posit that the complainant viewed the world in a black-and-white manner that sometimes prompted her to react in an extreme manner not fully aligned with reality. In cross, the complainant acknowledged an incident where she had accused a senior pediatrician, who had treated her son, of racism, in a series of inflammatory online posts. While evidence was limited, those posts would appear to have been unwarranted, disproportionate, and vindictive.

c. The alleged assaults: specific evidentiary issues

- [37] The defence also noted general and specific problems with the individual asserted instances of sexual assault.
- [38] The complainant admitted that her memories of even the first sleep sexual assault were vague: "I have an image [of the accused] but it's vague. I can't for sure say. I'm not 100% sure. I am not entirely sure I could see him. I don't know."
- [39] The complainant testified that she believed that there were roughly 19 other incidents of sleep assault between September 2016 and November 2017. She repeatedly acknowledged that she could provide no precise details of these incidents, and that her memory was vague on most aspects.
- [40] The defence also highlighted the logistical implausibility of the alleged sleep assaults. The defence questioned how anyone could repeatedly sleep through repeated acts of penetrative sexual intercourse. The complainant had no memory of ever waking up to find the accused removing her clothing, or repositioning her legs, or lifting the duvet. The complainant could not explain how the accused removed her pants and underwear, and repositioned her limbs, without waking her up, over these multiple occurrences.
- [41] At trial, in direct, she offered what was perhaps a form of explanation: that she was taking strong medication, for migraines, sleep disorders, anxiety, and other conditions, that made her drowsy. But she only started taking Tylenol 3 as of November or December 2016, and did not start taking clonazepam or amitriptyline until February 2017: months after the start of the alleged sleep assaults. And, as mentioned above, the complainant's statements about her medications differed significantly between her police interview and trial.
- [42] Her account of the first incident of sleep sexual assault suffered from specific problems. At trial, she stated that her vagina felt dry when she awoke, to find him penetrating her. She did not provide this detail in any of her police or Crown interviews in 2022 and 2023. She accepted in cross that it was possible that her memory of discomfort was incorrect.
- [43] Apart from the trial mention of dryness, she did not testify about any physical injury, or chafing, or discomfort, or other effects from any of the alleged incidents of sleep assault.
- [44] Other corroborative evidence was also lacking. For the first sleep assault, the complainant believed that the accused reached climax, and that he was not wearing a condom: he did not generally wear a condom as they relied on her inter-uterine device for birth control. Despite this, she did not recall any semen or other post-coital mess or sensation after the first or any of the alleged incidents of sleep assault.
- [45] While not determinative, and only one of many factors in considering the totality of the evidence, and as a circumstance that must be treated guardedly as a potential stereotype,[7] the complainant never told the accused to stop, generally or specifically, either during or after, any of the sleep assault incidents, over the 14 months of their alleged occurrences.

- [46] In direct, the complainant said that she discussed the sleep sexual assaults with the accused (without saying that she asked him to stop such assaults in future). In direct, she provided vivid detail of these conversations, claiming that the accused had explained that he was also asleep during the incidents, and that he had previously engaged in somnolent sex acts with others before their relationship. On cross, however, she conceded that it was possible that she never in fact discussed these incidents with the accused, and that her direct testimony may be erroneous in this regard.
- [47] For his part, the accused denied that the sleep assaults occurred, and that it was ever raised or discussed as a topic.[8]
- [48] Finally, the defence noted that the complainant moved in with the accused one month after the first alleged sleep assault, and then became engaged to him after a year of suffering such assaults. While cautioning against stereotypes of what a typical sexual assault victim would do, the defence questioned whether this voluntary progression of the relationship would be consistent with the allegations of repeated ongoing sexual assault.[9]
- [49] There were also difficulties with the complainant's testimony about the kitchen assault. She admitted that she had no specific recall of the accused removing her pants. She could not recall how long the incident lasted, or what she did afterwards. In direct, she stated that at the end of the assault, the accused said words to the effect of "you like it rough" and then went upstairs. In cross, she acknowledged that she could not be sure that he said those words at that time, or at any time.
- [50] Again, while not determinative, and a factor to be treated with caution, she did not tell the accused to stop during or after the incident. For the remaining difficult weeks of their relationship, and thereafter, she never raised the kitchen incident at all with the accused. Although she confirmed that she understood the kitchen incident to constitute sexual assault under Canadian law, she never accused the accused of rape during their time together, or even at or after their break-up, or even after their post-break-up relationship had become strained.
- [51] In conclusion, the defence argued that there were many different ways in which reasonable doubt arose, with respect to the verdict, and with respect to the s.724 findings. In my independent s.724 assessment of the facts as sentencing judge, informed by my own view of the witnesses and evidence during the trial, I agree.

VII. Discussion and decision

a. Introduction

- [52] The Court's present task is particularly difficult for two reasons.
- [53] First, as set out in the recital above, the considerable compelling evidence, viewed in totality, and subjected to the W(D) analysis, raised concerns well beyond a reasonable doubt. This reasonable doubt did not solely concern the allegations, but cast an overarching doubt

about the reliability of all of the complainant's evidence. The complainant herself not only acknowledged that her memory could possibly be inaccurate about the events four years past, but also acknowledged potential limitations on her ability to perceive reality at the time of the alleged incidents and throughout the relationship. This undermining of competence in perception and recall arose largely from the testimony of the complainant herself.

- [54] Second, as noted by Justice J. Williams in *R. v. Adams*, 2022 BCSC 1519 at para. 5, ordinarily, with a single count alleging a single criminal incident, the facts underlying the jury's one-word guilty verdict will be apparent. Where, as there and as here, the charges allege multiple sexual assaults over multiple months, it is not clear which incident or incidents the jury accepted as proven beyond a reasonable doubt:
- [8] [T]he findings of guilt were made by a jury in its deliberations. Because those deliberations are shrouded in secrecy, as a trial judge, I do not know which specific transactions were proven to the jury's satisfaction. All I can say with certainty is that for each of the time periods alleged in Counts 2 and 3, the jury was satisfied beyond a reasonable doubt that at least one of the sexual contacts was proven.
- [9] In fact, in my charge to the jury, I specifically directed that, in order to return a verdict of guilty in respect of any counts, all of the jurors would have to agree unanimously that at least one specific alleged transaction had been proven beyond a reasonable doubt. By imposing that requirement for unanimity, the Court could be confident that at least one transaction had been proven to that standard for the entire jury.
- [55] My charge to the jury similarly emphasised that the Crown need not prove all 21 incidents, but that the jury could convict if collectively they were convinced beyond a reasonable doubt that one instance of sexual assault had occurred, even if the jurors did not agree on which specific incident or incidents:
- [103] I have touched on the requirement for unanimity earlier and will discuss it again at the end, but will also tell you here that in order to convict the accused of this count, you must be unanimous in your verdict; that is, you must be unanimous in concluding that the Crown has proven beyond a reasonable doubt that the accused committed sexual assault at some point during the time frame set out in the indictment.
- [104] The requirement that you be unanimous in your verdict does not require you to be unanimous on which act or acts the Crown has proven to be a sexual assault. In other words, there is no requirement that all of you agree as to which of the 21 alleged instances has been proven. If each of you is satisfied beyond a reasonable doubt that at least one of the alleged sexual occurrences has been proven, then Count 1 will require a guilty verdict.
- [56] Williams J noted at para. 18 of *Adams* that "[f]rankly, the Court's task in this regard is not an easy one." I will return to the difficulties of a single-count indictment at the end of these reasons.

- [57] In *Adams*, as here, the Crown urged the Court to find that all of the allegations had been proven, as it was not plausible that the jury would find some of them proven but not all: para. 14. For his part, Mr Adams urged the Court to find that certain incidents had been proven, but others not: paras. 15-17.
- [58] Williams J rejected the Crown's urged approach. That said, ultimately, he noted that he, as trial judge, had personally observed at length the complainant's testimony. He found the complainant to have been credible. He concluded that the accused had sexually assaulted and interfered with the complainant, while a child, on multiple occasions, in multiple manners, as alleged. In the end, the Court was thus able to make independent factual findings wholly consistent with the jury verdict.
- [59] In *R. v. AHK*, 2022 BCSC 1563, another case of childhood sexual abuse, Madam Justice Ker similarly was able to make factual findings after a jury convicted the accused of incest, sexual assault, and assault against his daughter, over a twelve-year span. The primary s.724 issue was the number of instances of such behaviour. The Court ultimately did not have to definitively determine this ambiguity: the trial evidence established a long-term course of sexual abuse of a minor by her own father, so inherently aggravating that the specific number of incidents was irrelevant: para. 37.
- b. Finding facts for sentence in the face of reasonable doubt
- [60] In other cases, sentencing judges undertaking the independent s.724 inquiry harboured reasonable doubt about aspects of the allegations, and found facts for the purpose of sentencing less aggravating than those urged by the Crown.
- [61] In *R. v. Cadman*, 2016 BCSC 474, aff'd 2018 BCCA 100, the jury convicted the offender on both counts, each alleging multiple sexual assaults over a four-year span: the first alleging assaults at UBC and Calgary, and the second alleging sexual assaults in Whistler and Calgary. The Crown led evidence of eight or nine total incidents. On sentencing, the Crown contended that "since the offender testified and yet was convicted of both counts on the indictment" the jury should be accepted to have found that "all the incidents as described by the complainant occurred" (para. 32). The defence contended that "the only facts that can be found for the purposes of sentencing are that one incident as described by [the complainant] occurred at each of UBC and Whistler" (para. 33).
- [62] Mr Justice Abrioux, then of this Court, found the jury's verdict to be ambiguous, flowing from the form of the Crown's indictment:
- [36] In my view, this is one of those situations where the basis of the jury's verdict is unclear. The Crown could have set out different counts relating to the alleged separate incidents alleged in the indictment, but it chose not to proceed in this fashion.

- [37] Accordingly, applying the principles I have referred to, I am not to speculate as to the basis of the jury's verdicts. Rather, I am to make my own independent determination of the facts required for sentencing that remain consistent with the jury's verdict.
- [63] Considering the specific difficulties in the evidence, Abrioux J could not find all of the alleged incidents proven beyond a reasonable doubt:
- [38] I have concluded for the purposes of sentencing that the offender committed one act of sexual assault that involved masturbating B.R.S. at UBC and a second act of sexual assault that involved masturbating B.R.S. at Whistler. This is consistent with the jury's verdicts of guilt on each of counts one and two on the indictment.
- [39] The Crown, in my view, has not established for the purposes of sentencing, that the alleged sexual assault at Whistler which included fellatio occurred. B.R.S.'s evidence was that he went to sleep in his sleeping bag and awoke to find the offender performing fellatio on him. No evidence was led that B.R.S. got out of his sleeping bag for any reason to then lie down outside his sleeping bag. There was also no evidence that his sleeping bag had a zipper and that it was undone during the night.
- [40] Accordingly, based on the evidence at the trial, I am unable to find as the Crown would have me find, that the alleged sexual assault at Whistler that included fellatio occurred. It would not have been possible for the offender to insert himself head first into B.R.S.'s sleeping bag to perform this act.
- [64] In *R. v. Reynolds*, 2020 BCSC 143, the jury found Mr Reynolds, among other counts, guilty of attempting to defraud the provincial and federal governments of money in excess of five thousand dollars, by claiming false losses on his 2007 and 2008 income tax returns, contrary to s. 380(1)(a) of the Criminal Code.
- [65] At sentencing, the Crown argued that the only logical inference from the guilty verdict on that count, was that the jury found Mr Reynolds became a resident in Canada for income tax purposes in January 2006 and, that, therefore, the jury had inferentially found that he failed to report, or underreported, his income in each of the years, by each of the modes, and in the significant amounts alleged at trial: potential aggravating factors.
- [66] Mr Justice G.C. Weatherill found that the Court had no way of determining the basis upon which the jury reached that conclusion, given the multiple plausible pathways to a guilty verdict. Given the manner in which that count was drafted, and the evidence at trial, the only independent determination the sentencing judge could reach beyond a reasonable doubt was the bare minimum conclusion that Mr Reynolds was guilty of "attempting to defraud the governments of money in excess of \$5,000" (para. 44). That language mirrored the exact language of count 3 on the indictment, with the minimum dollar amount.

- [67] In *R. v. Murphy*, 2011 NLCA 16, the Newfoundland Court of Appeal set aside the sentencing judge's aggravating findings that the offender had during the sexual assault choked and punched the complainant. The Court of Appeal held that the sentencing judge erred in accepting the complainant's entire version of the assault, as presented to the jury, without grappling with the considerable problems in her testimony (recited at para. 13), in order to determine whether or not each aggravating fact had been proven beyond a reasonable doubt:
- [14] It was, of course, open to the trial judge to accept the complainant's testimony that she was punched in the face and choked. However, the above testimony would, in the absence of explanation, raise a reasonable doubt on this point. In light of section 724(2)(b) of the Criminal Code requiring the trial judge to make findings of fact on issues not essential to the jury's guilty verdict, failure to make the necessary findings prior to applying these as aggravating factors resulted in an error in principle. Because consideration of the alleged punching and choking as aggravating factors was significant in the decision, the sentence must be set aside.
- [15] In summary, the trial judge erred by concluding that the jury had to have accepted the complainant's testimony that she was punched and choked because such violence was not essential to the verdict that Mr. Murphy was guilty of sexual assault. He further erred by failing to make the findings of fact necessary to establish those aggravating factors beyond a reasonable doubt. Since those factors were clearly significant in the sentencing decision, the sentence of imprisonment must be set aside and a fit sentence imposed by this Court (section 687(1) of the Criminal Code).
- [68] In *Murphy*, the only aggravating factor the sentencing judge found as established beyond a reasonable doubt was the violence represented by the tearing of the complainant's clothes. The Court of Appeal accordingly set aside the sentence of fifty-four months' imprisonment, based on the full aggravating factors alleged, and reduced it to three-and-one-half years, consistent with other sexual assault cases with those less aggravating facts.
- [69] In *R. v. LM*, 2017 ONCA 33, LM appealed his conviction for the sexual assault of his sister-in-law. The complainant alleged that the accused had committed non-consensual penetrative intercourse with her approximately 10 to 50 times between August 1997 and August 1999, when she was 16 and 17 years old, and that the accused had kept her "enslaved." At para. 29 the Court of Appeal noted that the sentencing judge (Justice Lois B. Roberts, now of the Ontario Court of Appeal) " .had significant misgivings about the credibility and reliability of the complainant's evidence." [10] In her independent s.724 fact-finding exercise, the sentencing judge found that the Crown did not prove beyond a reasonable doubt that any of the sexual assaults occurred, save one in 1999: the minimum consistent with the jury verdict. She also found that the Crown had failed to establish the aggravating allegation of virtual enslavement.

- [70] On appeal, the Court of Appeal did not criticise the sentencing judge's minimalist s.724 approach. In fact, the Court set aside the jury's guilty verdict in its entirety, given the manifold difficulties with the complainant's evidence and credibility:
- [25] Appellate courts rarely intervene in credibility assessments by a judge or jury, as such determinations attract a high degree of deference: *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at para. 11; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 26; *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180. Triers of fact have the inestimable advantage of seeing the witnesses testify and hearing all of the evidence over the course of the trial, which in this case lasted 11 days.
- [26] This court, however, is obligated to review the reasonableness of criminal convictions: Criminal Code, s. 686(1)(a)(i). In exercising this authority, the court must review the trier of fact's credibility assessments and factual findings, bearing in mind the trier of fact's advantaged position and the appellate court's limited scope of review: *R. v. M.(N.)*, 2012 ONCA 296, [2012] O.J. No. 2043, at para. 32.
- [27] There are some cases where judicial experience teaches that the risk of wrongful conviction is simply too high to allow a jury verdict to stand. Where a witness has a motive to fabricate an accusation and falsely describes significant factual matters that are closely connected to or intertwined with the criminal conduct alleged, this sends danger signals to experienced jurists that a jury might not appreciate. The role of the appellate court is not to substitute its own judgment for that of the jury, but to determine whether a properly instructed jury could reasonably have rendered a guilty verdict: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at paras. 36-42.
- [28] As pointed out by Doherty J.A. in *R. v. M. (N.)*, at paras. 33-34:

The reasonableness review provides an important safeguard against miscarriages of justice. In *Biniaris*, at para. 42, the court described the nature of that review in these terms:

To the extent that it [appellate review] has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That in turn requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her personal experience and insight.

I understand *Biniaris* to instruct that the knowledge gained through the reviewing court's broad exposure to the criminal process provides insights into credibility assessments and fact-finding not available to jurors whose experience is generally limited to a single case. Those insights must inform the reasonableness assessment.

[emphasis added]

- [71] In R. v. JP, 2019 ONSC 6298, conviction appeal dismissed 2023 ONCA 570, the jury found JP guilty on one count each of sexual interference and sexual assault on his stepdaughter, NP. NP alleged hundreds of instances of childhood sexual abuse over six years. The allegations ranged from touching to intercourse. The indictment did not specify the accused's conduct relating to each count. The sentencing judge recited the considerable evidentiary difficulties and inconsistencies that cast doubt on the complainant's reliability and credibility. She concluded that she was not convinced beyond a reasonable doubt of any of the aggravating instances of sexual intercourse, and found the minimum facts consistent with the jury verdict:
- [47] I am therefore required to come to my own independent determination of the relevant facts. The allegations that JP engaged in multiple incidents of sexual intercourse with her are aggravating facts to consider. The law requires that I be convinced of aggravating facts beyond a reasonable doubt.
- [48] I find the evidence shows that JP's evidence on the particularized incidents of sexual abuse involving intercourse are replete with internal inconsistencies, inconsistencies with the mother's evidence and the forensic evidence and is in many areas simply implausible.
- [49] NP gave inconsistent accounts as between her statements to the police and her evidence at the preliminary inquiry about the sexual intercourse incidents. The fact that those incidents are alleged to have occurred at times when other persons including the mother, sister and grandparents were in close proximity in the home and the fact that the mother testified NP was not home alone with the younger children after school as NP alleged raises serious credibility, reliability and plausibility problems for NP.
- [50] The unspecified incidents are incredibly numerous, hundreds of incidents of sexual abuse at both the Ennerdale and Riverview apartments both in the bed and bunk bed shared with the sister and in the parents' bed while JP slept beside the mother. The implausibility and incredibility of that evidence is obvious.
- [51] This is clearly a case with substantial credibility and reliability problems for NP. It is therefore, for the purpose of sentencing, open to me to find the minimum consistent facts consistent with the jury verdict. NP testified that some incidents involved JP touching her buttocks. I accept the defence's submission that there is the factual basis to find that one incident of JP touching her buttocks has been proven beyond a reasonable doubt and that those facts can support the charge of sexual interference and sexual assault.
- [emphasis added]
- [72] Applying LM and other authorities, the JP sentencing judge noted that "[f]or the purpose of sentencing, in cases involving significant credibility and reliability issues, it is open to the sentencing judge to find the minimum consistent facts consistent with the jury verdict": para. 10.

- [73] In *R. v. DF*, 2023 ONSC 5525 the jury convicted on one count each of sexual assault, sexual interference, and invitation to sexual touching of the child complainant between 2002 and 2007. The sentencing judge cited with approval the legal principles summarized in JP, including his ability to find the minimum facts consistent with the verdict. He divided the allegations into six location-based categories, and ultimately found that it could not be established beyond a reasonable doubt that any sexual activity had occurred in five of the six locations. He found that there was some sexual touching in the bedroom, but ultimately rejected the allegation that there was any penile penetration: paras. 3-5, 13-36.
- [74] In *R. v. IC*, 2024 ONSC 156, the accused was convicted of one count each of sexual interference and sexual assault against his stepdaughter in 2008 and 2010. The sentencing judge applied JP, confirming that significant reliability and credibility concerns can justify a sentencing judge finding the minimum required facts consistent with a jury verdict. She noted the considerable discrepancy between the complainant's versions of events when first disclosed to the police, and her testimony at trial two years later; both versions were provided when the complainant was an adult. The sentencing judge found that only one of the two allegations had been proven beyond a reasonable doubt. She accepted that while the jury must have rejected some of the accused's evidence regarding one incident, its members may have accepted "some, none, or all" of his evidence regarding the other incident: para. 33. Applying W(D), she was unable to decide whom to believe with respect to one incident: paras. 19-24, 32-34, 52-56.
- [75] In *R. v. AAL*, 2024 NBKB 130, a jury convicted the accused of sexually assaulting his child over an eight-year period. The seven alleged incidents ranged from touching to sexual assault accompanied by forceful violence. The sentencing judge noted the difficulties and inconsistencies in the complainant's evidence:
- [34] In the absence of jury clarity on which incidents they accepted as sustaining conviction, I run the risk of over-sentencing Mr. L. if I assume that the jury accepted that he committed most, or all, of the incidents as described. I risk under-sentencing him if I take the lenient view and determine that the verdict was based only on the most minor incident. This was the dilemma noted in the quote above from Brown - should I assume the jury took the most lenient view?
- [35] I will say that my review of the testimony of A.L. left me with a degree of uncertainty on certain of the incidents. For instance, in A.L.'s recollection of incident two, A.L. testified that Mr. L. 'may' have had his hands underneath A.L.'s underwear. Also, with respect to the third incident, A.L. testified that, once back in the apartment, their memory of what happened was "blurry". Similarly, with respect to the fourth incident, A.L. testified that their memory was, in part, "really fuzzy". These are but examples of what to me are 'red flags' to be on alert for when assessing the reliability of certain testimony. The testimony needed to support what had been originally set out in count 3, as having had intercourse with his child, A.L. (being the fifth incident) did not provide a basis for the matter even being put to the jury. The description of the sixth incident, that A.L. and their father did not leave the indoor pool

area until 2:00 a.m. to 3:00 a.m. seems out of touch with what a father would be doing up with a 10-year-old to those hours. I say this recognizing that the testimony of childhood events must not be examined under a microscope, and I do not intend to do so. The description of what happened in respect to the seventh incident simply left me with too many questions.

[emphasis added]

[76] The only incident that the AAL sentencing judge could find occurred beyond a reasonable doubt was the least intrusive and least aggravating incident, involving touching:

[36] Incident one, having occurred when A.L. was 4 or 5 years old, does present to me as an incident that I can conclude, with the degree of confidence required, had been sufficiently established for the jury (being the finders of the 'facts') to have convicted on that incident. And so, I am only comfortable sentencing on the circumstances of that incident. When faced with an ambiguous verdict of this type, the risk of over-sentencing is, in my view, in the same principled category as the maxim that it is better to let one hundred guilty persons go free than that one innocent person be convicted.

[emphasis added]

c. Decision and discussion

[77] As set out above, the totality of the evidence raised more than a reasonable doubt about the Crown's case. The allegations were wholly uncorroborated.[11] The complainant's police statement contained material errors and omissions. As a significant overarching shadow over all of her testimony, the complainant herself acknowledged concerns about her ability to perceive, understand, and recall the events in question. She exhibited antipathy towards and resentment of the accused during and after the relationship. In contrast, there was no evidence, save that of the complainant herself, contradicting or undermining the credible testimony of the accused. Even applying W(D) generously towards the complainant, considerable doubt remains as to whom is to be believed.

[78] The roughly 20 instances of nocturnal sexual assault alleged by the complainant suffer from specific difficulties, as surveyed above. These include the logistical complications of nocturnal sex, along the lines noted in Cadman at para. 40, above. The complainant's testimony was particularly imprecise on these allegations--to some extent reasonably, as in her own recounting she was asleep for the entirety or part of each of these alleged events. In any case, applying W(D), the Court cannot be convinced beyond a reasonable doubt that these assaults occurred, as alleged or at all.

- [79] The alleged daytime kitchen sexual assault is on slightly more solid ground. It occurred while the complainant was wide awake. It is the most recent occurrence, happening a month before the end of the relationship, at a particularly tumultuous time in an overall tumultuous relationship. Although she could not remember the date, she was able to provide some but not all details of the assault.
- [80] It would be too strong to say that aspects of the accused's testimony corroborated the kitchen assault: he categorically denied that it occurred at all. But his testimony provided some contextual echoes. Both the complainant and the accused agreed that towards the beginning of their relationship she had told the accused that she was curious about rough sex. They also agreed that they engaged in sexual activity throughout their residence, in rooms other than the bedroom. But for the accused's denial that the kitchen sexual assault occurred as alleged or at all, such facts might have formed the basis of a defence of honest but mistaken belief.
- [81] That all said, given the specific and overarching issues with the Crown's evidence, recited above, I cannot conclude that the kitchen sexual assault has been proven to the high standard of beyond a reasonable doubt. Neither the occurrence of the kitchen sexual assault nor its aggravating facts are necessary findings inherent in the jury verdict. Some or all jurors may have rejected the kitchen incident, preferring to rest their verdict on the sleep incidents.[12] Some or all jurors may have believed only aspects of those alleged events: perhaps short of penetration. Some or all jurors may have concluded only that some form of non-consensual intentional touching--the essential elements of the offence, as outlined in the jury instructions--likely occurred at least at some point during the tumultuous 18-month relationship.
- [82] Guided by the s.724 authorities surveyed above, and my direct assessment of the testimony and evidence at trial, and W(D), I cannot find that any of the disputed facts or aggravating factors urged by the Crown have been proven on a balance of probabilities, or beyond a reasonable doubt, respectively. Nor can I find that any particular category or incident of alleged sexual assault has been proven. The strongest conclusion that I can find, and then only to align the sentencing facts with the ambiguous verdict, as required, are the essential elements of the charge: that the accused intentionally sexually touched the complainant without consent at some point during the period alleged. In this, I find the minimum facts necessary to align the sentencing facts with the verdict, in the manner of Cadman, Reynolds, JP, DF, and AAL.

VIII. The single count sentencing conundrum

- [83] Many of the difficulties in the present exercise flow from the Crown's decision to group multiple alleged sexual assaults of distinct character and dates into a single count.[13]

- [84] It is granted that such a practice is not unusual or unjust. This is especially so where it would be unfair or unrealistic to expect the complainant to provide particular dates and details of each instance, as in the historical childhood sexual abuse cases considered in *Adams and AHK*, above, as well as in *LM, JP, DF, IC, and AAL* (although that practice created problems in these latter five cases).
- [85] A single count has also been used in prosecutions where an adult complains of multiple criminal acts based on a similar activity or course of conduct: *R. v. Sandhu*, 2009 ONCA 102 at paras. 19-25. As stated by Ryan JA in *R. v. GLM*, 1999 BCCA 467 at para. 11:

A "single transaction" may validly encompass a number of occurrences, each in themselves capable of constituting an offence, where the acts relate to a similar activity or involve a similar course of conduct. Thus, an indictment will not necessarily offend the single transaction rule even where it spans a lengthy period of time and involves a number of separate incidents in a variety of locations.

- [86] In a criminal prosecution, the Crown and the defence may each have sound reasons, tactical and otherwise, to prefer a single omnibus count over a multi-count indictment.
- [87] The defence may wish to avoid the potentially prejudicial appearance of a five- or 21-count indictment, to use the present case as an example.
- [88] The Crown, on the other hand, need only convince the jury that a single sexual assault has occurred during the period: it need not prove all alleged incidents, and the jury need not be unanimous in concluding that any specific one or all sexual assaults occurred as alleged. There are many possible paths to a conviction. As stated in *GLM*:
- [24] In my view the Thatcher reasoning logically applies to continuing offences such as the offence in the case at bar. The principle that the jury need only be unanimous as to the verdict reached applies equally to cases where the indictment charges an offence that encompasses a number of discrete or separate incidents over a period of time. If jurors are not required to be unanimous in their findings of fact or the evidentiary routes they follow in reaching a collective verdict, it follows that where the evidence comprises a number of incidents and proof of any one incident would be a sufficient finding of guilt, there is no legal requirement that individual jurors rely on the same incident in reaching a verdict of guilty. The unanimity requirement applies only to the essential ingredients of the offence, not the facts which establish them. While the judgment in *Thatcher* dealt with the commission of one act, the unlawful killing of the accused's wife, the decision is grounded in principles that are not confined in their application to situations involving s. 21 or alternative theories of legal culpability. The decision in *Thatcher* is a particular application of the principle that while jury unanimity is required on the verdict, the jurors may follow divergent paths involving different views of the facts that make up the offence in arriving at that verdict.

- [89] Again, to use the present case as an example, some jurors may have believed the kitchen incident to have been proven beyond a reasonable doubt, while others may have rejected that incident and have been satisfied of the first or multiple sleep assaults beyond a reasonable doubt, while others may have surmised that some form of nonconsensual intentional sexual touching likely would have occurred over the 18-month relationship.
- [90] That all said, in retrospect, the Court, and possibly counsel, would have preferred, in retrospect, if the indictment had been broken down into two, three, four, five, or 21 counts, to simplify the s.724 exercise, and to avoid strain and contradiction with the collective jury deliberations and verdict. In this the Court echoes the Cadman recognition (at para. 36) that the s.724 difficulty flowed from the Crown's decision to lump multiple incidents in (in that case) only two counts.
- [91] In *R. v. MRH*, 2019 SCC 46 at para. 5, the Supreme Court of Canada commented on the Crown's use of a single count of sexual assault to cover multiple alleged incidents: again, like Adams and AHK, in the context of childhood sexual abuse. The complainant alleged two distinct incidents, which took place a year or more apart in two separate locations, each of which, if believed, could itself constitute a sexual assault. The jury convicted the accused. For sentencing purposes, Mr Justice J. Harvey of this Court could only find beyond a reasonable doubt that one of the two incidents had occurred. The Court of Appeal overturned the jury's conviction and ordered a new trial: 2019 BCCA 39. In brief reasons allowing the Crown appeal substantially for the dissenting reasons of Mr Justice Savage, the Supreme Court observed in obiter dicta that the Crown practice of drafting a single count to capture multiple distinct incidents risks convicting the accused without unanimous jury agreement on any one underlying incident:
- [5] Finally, with respect to the interpretation of the phrase "single transaction" in s. 581(1) of the Criminal Code, R.S.C. 1985, c. C-46, we agree that the Crown practice of drafting a single count of an indictment to capture multiple distinct incidents creates the risk that the accused may be convicted without the jurors' unanimous agreement on any one underlying incident. We leave for another day whether the law supports such a practice and whether jury unanimity is required in such circumstances. In essence, the jury in this case asked whether unanimity on the first incident was sufficient to convict. It is not necessary to deal with the issue in this case, because it is clear from the jury's question and the response it received, that the jurors unanimously agreed that the first incident had been proven. Here, there is no risk of an injustice and the issue need not be considered (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 22).

[emphasis added]

- [92] In *R. v. RGS*, 2023 BCCA 52, appl'n for leave to appeal dismissed (August 24, 2023), SCC 40607, our Court of Appeal declined to refer the issue to a five-justice division, to reconsider GLM, citing the utility of a single count indictment in the context of multiple historical sexual assaults:

- [92] The question here comes down to whether there is sufficient reason to warrant referring what was decided in G.L.M. to a five-justice division for reconsideration. Our role is not to decide whether G.L.M. should be overruled, but to perform what is commonly referred to as a "gatekeeper function".
- [93] Preferring an indictment or information that has a wide range of dates covering a multitude of allegations may well be problematic for an accused. However, experience also tells us that when there are long ongoing events, often seen in sexual assault cases where the child is the complainant, it is difficult, if not impossible, to precisely define the dates and the events.
- [94] No Canadian court has held that there needs to be specific-act unanimity when a charge involves multiple acts in an ongoing transaction. Indeed, the law seems to be well-settled at the level of the intermediary courts of appeal. Despite the obiter comment by the Supreme Court in M.R.H., in my view, R.S. has not shown it would be appropriate for this Court to consider overruling G.L.M.
- [93] Again, MRH, as well as most of the cases cited above, grouped multiple alleged sexual assaults into single counts, in the context of historical childhood sexual assault, where such a practice may, understandably, be more justified and necessary. This Court humbly suggests that it is time to consider whether such a practice is appropriate in the context of an adult complainant reporting a relatively recent sexual assault--not decades after the alleged incidents.
- [94] In this case, neither Crown nor defence requested or applied for separate counts. A Court should only intervene to sever (by analogy) or separate counts on its own motion in the rarest of circumstances: *R. v. Mostowy*, 2024 BCCA 197 at para. 34. Nonetheless, I regret not pressing counsel on this issue in pre-trial conferences. Had Crown proceeded with multiple counts, there may well have been an acquittal or a mistrial. Alternatively, the present s.724 conclusions may have aligned more precisely with the inherently unknowable thought process of the jury.

"Crerar J."

- [1] From May 31 at 2:15pm to June 1, 2024 at 2:53pm.
- [2] In reciting this evidence, I am conscious that "the mere fact of a complainant having psychiatric or therapeutic consultations is [not] relevant to their credibility or reliability": *R. v. Kruk*, 2024 SCC 7 at para. 41; *R. v O'Connor*, [1995] 4 SCR 411 at para. 143; s. 278.3(4) of the Code. As recognised below, a sexual assault may well of course cause or exacerbate psychological conditions, such that conditions manifesting themselves after the assault in fact corroborate rather than undermine the allegation of the assault.
- [3] To be fair, the complainant explained that such a preamble would be typical in an academic paper.

- [4] The complainant explained that her use of the English verb "tergiversate" reflects the Spanish cognate: a word that she used to mean "twist."
- [5] At the s.724 hearing, the defence did not recite all aspects of the following summary of frailties in the complainant's evidence. This summary is based on the s.724 submissions, as well as trial closing arguments, and the evidence at trial.
- [6] See Thor Paulson et al., "Toward a Trauma-Informed Approach to Evidence Law--Witness Credibility and Reliability" (2023) 101:3 Canadian Bar Rev 496.
- [7] R. v. Barton, 2019 SCC 33 at para. 98; R. v. Ewanchuk, [1999] 1 SCR 330 at para. 51. See Ewanchuk at para.29: "While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent." As stated in R. v. Esau, [1997] 2 SCR 777 at para. 22: "In this appeal, it is the totality of the evidence that gives the defence an air of reality. The absence of resistance or violence is only one factor that must be considered alongside the accused's evidence that the complainant did and said things that led him to believe she was consenting. I intended my reasons to conclude that the absence of resistance or violence alone could not raise the defence." See also Esau at para. 15; R. v. IEB, 2013 NSCA 98 at para. 40; R. v. Percy, 2020 NSCA 11 at paras 107-108; and R. v. Howe, 2015 NSCA 84 at para. 55; and, generally, Kruk at para. 65 and Lisa Dufraimont, "Current Complications in the Law on Myths and Stereotypes", 2021 99-3 Canadian Bar Review 536 at 550-554.
- [8] While a somnolent sex act would in theory raise an automatism defence or otherwise negate mens rea, the accused did not and could not plausibly advance that argument, given his denial.
- [9] The defence prefaced this submission by cautioning the jury against stereotypical views of what a sexual assault victim typically does. Such evidence , which must be treated with caution, and as non-determinative, nonetheless may be relevant: R. v. LS, 2017 ONCA 685 at para. 89, and, generally, Kruk at para. 65 and Dufraimont, supra, at 550-554..
- [10] The sentencing judge's decision in this case is unpublished.
- [11] R. v. RSW, [1992] MJ No. 324 at paras. 26-27.
- [12] The jury's request or question to the Court likely indicated that not all jurors were convinced of the kitchen assault, at least at the time the question was posed. Specifically, at 4:50pm on the first half-day of deliberations, the jury asked to re-hear the recording of the complainant's testimony about the first sleep assault incident in September 2016: a request that would have been superfluous if all jurors were convinced of the more overt and

conventional form of sexual assault represented by the kitchen incident. R. v. MRH, 2019 SCC 46 at para. 5 suggests that a jury question, in limited circumstances, may illuminate which of multiple sexual assaults alleged in a single count the jury believed. That said, the timing and content of the jury request in this case was not as clear as that in MRH. Following the edict of Ferguson and the authorities cited above -- that the sentencing court not speculate on the jury's deliberations and thought process -- this Court declines to do so.

[13] And this is no criticism of Crown counsel in this case personally: by "Crown", I am referring to whatever process the Public Prosecution Office employs in its decision to frame the charges.

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