

CANADA / JUDGMENT

R. v. B.H.H.

2024 BCSC 2509

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Supreme Court of British Columbia

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2024 BCSC 2509 R. v. B.H.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.H.H.,

2024 BCSC 2509

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Regina

v.

B.H.H.

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Before: The Honourable Justice Brundrett

Oral Reasons for Judgment

Counsel for Crown:

A.M. Murray

Counsel for Accused:

R. Larmer

Place and Date of Hearing:

Fort St. John, B.C.

February 26-29, 2024

October 21-23, 2024

December 16-17, 2024

Place and Date of Judgment:

Fort St. John, B.C.

December 17, 2024

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I. Introduction

- [1] The accused is charged on a two-count indictment with sexual touching of a person under 16 years of age and sexual assault under ss. 151 and 271 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The Crown alleges that the offences occurred on October 6, 2021 in Fort St. John at the home of the complainant, A.L., where she resided with her grandmother, M.H. The accused is a brother of M.H. and a great uncle to A.L. A.L. was 15 at the time but took her own life weeks after the incident and was unavailable to testify at trial. The Crown's case is based in part upon A.L.'s statements to B.P., a family friend, Dr. Hopkins, and Cst. Plankenhorn, all of which were admitted at trial under the principled exception to the hearsay rule. The Crown also relies upon DNA evidence and evidence of A.L.'s demeanour the morning after the assault to support the allegation that sexual activity occurred between the accused and A.L.
- [3] The accused testified at trial. He denied having committed the offences and offered an innocent explanation for the presence of his DNA on A.L.'s underwear. The accused invites me to have a reasonable doubt based on the following: (1) the inherent frailties in A.L.'s evidence, which he argues undermine its ultimate reliability and the weight that can be placed on A.L.'s evidence without the benefit of cross-examination; (2) the existence of plausible alternative explanations for the DNA evidence; and (3) the evidence of the accused.
- [4] As A.L. was 15 at the time of the offence, her consent is vitiated by operation of s. 150.1(1) of the Criminal Code. The elements of the offences are not in dispute. However, the credibility and reliability of the witnesses including A.L. and the accused is strongly contested. The issue for my determination is whether the Crown has made out its case on either charge beyond a reasonable doubt.

II. Circumstances

A. Background

- [5] A.L. lived with her grandmother, M.H., in Fort St. John. M.H., who was 75 at the time of trial, is the sister of the accused from a large family. She had seven sisters and six brothers. M.H. herself has six children. She grew up in Fort Nelson but has lived in Fort St. John for the last 20 years. Her home is a duplex with two floors. The bottom floor had a laundry room that doubled as a playroom, a bedroom that was A.L.'s room, and a bathroom. The playroom/laundry room area downstairs had an extra bed in it. The living room, two more bedrooms and the kitchen were on the second floor.
- [6] M.H. raised A.L., along with two of her sisters, from a young age due to substance use issues with their parents.
- [7] A.L. was born on January 16, 2006, and was 15 years old in October of 2021. A.L. took her own life on December 23, 2021.

- [8] M.H. stated that the accused would sometimes come to town for 1-2 days at a time and stay with her. He would stay on the couch in the living room when he slept over. This occurred perhaps once a month or every couple of months. M.H. was close with her entire family. As to her attitude toward the accused, M.H. stated that she did not hate him, but she could not forgive him for what she thought he had done. She stated that her parents taught her not to hate anyone.
- [9] M.H. stated that the accused never babysat children for her or looked after A.L. As far as she knew, he and A.L. were not particularly close. M.H. noticed that A.L. did not want to be around the accused alone and appeared quite a few times to be uncomfortable with him when he was around.
- [10] The accused was visiting M.H.'s home on October 6, 2021. According to M.H., he arrived on or around October 4 or 5 and was on his way back to work at the time. In cross-examination, M.H. stated that she thought he arrived on October 4.

B. Events on the Morning of October 6, 2021

- [11] On the morning of October 6, 2021, A.L. texted M.H. at 7:13 a.m., reporting that the accused had touched her.
- [12] M.H. went downstairs. When she got to the hallway, M.H. could see the accused leaving. M.H. saw A.L. in the laundry room on the bed. A.L. told her to "get Brittany." She was dishevelled and "didn't seem right." A.L. told her to get out and that she didn't want to see her. This, according to M.H., was common practice for A.L. who never wanted anyone to see her unless she looked made up.
- [13] M.H. called the police. Cst. Plankenhorn attended the residence. She came in and observed M.H. and A.L. on the landing. She briefly spoke with them at which point A.L. began to hyperventilate. Cst. Plankenhorn described A.L. as distraught, crying, and having to sit down on the stairs. She became so distraught she began to throw up at one point and then to pass out. At that point, the officer called for an ambulance.
- [14] M.H. called B.P., a friend of the family who lived several houses away and was a counsellor at A.L.'s school. B.P. is a teacher specializing in Indigenous education, though she was off work at the time of trial due to disability. She was 38 years old at trial.
- [15] Returning to the narrative, M.H. was trying to deal with her other granddaughter, L.L., who had wanted to go downstairs. B.P. came quickly and took over handling A.L.
- [16] The accused returned in his truck to M.H.'s house when the police were there. He was arrested soon thereafter.
- [17] The police suggested that A.L. be taken to the hospital.

- [18] B.P. testified that she would see A.L. around the neighbourhood but did not formally meet her until she was in grade 7 when A.L. came to the school B.P. worked at. This was about six years ago. B.P. supported A.L. on a one-on-one basis at school but had come to know A.L. and M.H. as neighbours, too. They had become like family to her, and she felt a sense of responsibility toward them.
- [19] B.P. described A.L. as generally distrusting any form of authority, including the police. B.P. described that A.L. knew that, as a teacher, B.P. had a duty to report situations if A.L. was harmed or in danger and, therefore, A.L. would often not disclose things that happened to her for fear of the police, social services, or M.H. becoming involved. Typically, A.L. was quite guarded about what she would say.
- [20] B.P. saw A.L. often but irregularly. She noted that A.L. and M.H. would sometimes "butt heads" because A.L. was a teenage girl, and "they didn't always see eye to eye." B.P. had the type of relationship with A.L. where she could keep an eye on her and say things to A.L. that she would listen to. It was a relationship of trust in which A.L. confided in B.P. B.P. saw her role as supporting A.L. and taking some of the load off M.H.
- [21] On the morning of October 6, 2021, B.P. testified that she received a call from M.H. M.H. was distraught and screaming, and it was hard to determine what she was saying. B.P. could make out "my brother" and that M.H. needed her. B.P. got her teenage son to look after her baby and headed over to M.H.'s house.
- [22] When B.P. arrived at M.H.'s home, she saw the police there. She went in the house. A.L. was sitting on the stairs. She was sobbing. M.H. was standing at the top of the stairs. She was sobbing too.
- [23] B.P. stated that A.L. looked "really rough", as if she had been crying for a long time. She had mascara all over her face. B.P. had never seen her like that. A.L. would cry to the point where she would almost pass out, she would go limp, her eyes would close, and she would come to. She was coming in and out of consciousness. A.L. looked as if she was having a nightmare. She was moaning and kicking her legs. She had a detached affect and looked very nauseous.
- [24] B.P. asked A.L., "Did he rape you? Did he put his penis in your vagina?" A.L. did not give her an answer.

C. The Ambulance Ride

- [25] It was decided that A.L. needed to go to the hospital. An ambulance was called. On the way to the ambulance, B.P. thought A.L. smelled like alcohol. She noticed that A.L. was unsteady on her feet and couldn't walk properly. B.P. couldn't tell if she was intoxicated or having a panic attack over what had apparently happened. B.P. got into the ambulance with A.L.

- [26] B.P. stated that it was not until they were in the back of the ambulance that A.L. started to become more coherent and could converse with her. At that point, A.L. was able to maintain eye contact with B.P. and answer questions. She thought this would have been between 8:00 a.m. and 9:00 a.m.
- [27] In the ambulance, A.L. told B.P. that she had been drinking the previous evening and that she had been drunk.
- [28] During the ambulance ride, A.L. started talking, became more lucid and was able to answer more of B.P.'s questions.

D. Statements to B.P. at the Hospital

- [29] B.P. went into a hospital room with A.L. at the hospital. A.L. would not talk about specifics when the investigating officer, Cst. Plankenhorn, was initially present at the hospital. A.L. was also reluctant to talk about specifics when a nurse or doctor was present.
- [30] B.P. thought that A.L. was not feeling well. She was throwing up and had a headache. The staff gave her GRAVOL to assist. After the officer and nurse left, they had time to talk more, and A.L. provided more detail over the course of their time at the hospital.
- [31] B.P. reported that A.L. told her that the accused had purchased alcohol and that she drank it. She got very drunk. He came downstairs. A.L. told her that the accused had licked all of her stomach, her chest and her neck. He forced her to perform oral sex on him. In cross-examination, B.P. stated that A.L. reported that the accused "went down on me" and forced her to "go down on him." She stated that he did try to penetrate her vaginally, but he was not able to have intercourse with her because he had already ejaculated. A.L. said that "he was too old to get it up again so fast."
- [32] A.L. said that she could feel wetness on him and "down there" after he tried to force penile-vaginal penetration on her. She said that there was so much wetness that she later had to go to the bathroom to wipe it off with toilet paper. B.P. asked what she did with the toilet paper. A.L. said she flushed it.
- [33] B.P. stated that there were two time periods when A.L. was conversant about what happened. The first was when they got to the hospital within the first hour after her IV was started. Then A.L. slept for three or four hours or so. She kept sleeping even though Dr. Hopkins had tried to wake her up. When she woke up, she threw up.
- [34] B.P. stated that besides having a migraine headache, A.L. was later completely back to normal when talking to Dr. Hopkins.
- [35] During the sexual assault examination that afternoon, B.P. stayed in the room. She observed that A.L. was opening up to the doctor as much as she felt comfortable. A.L. was terrified at having the examination completed and went along with it as much as she could handle. Then, after the examination finished, A.L. and B.P. talked again.

- [36] B.P. reported that A.L. was reluctant to talk at first, and B.P. asked more specific questions. A.L. stated that she did not want to talk about it at first but then stated that if she did not tell anyone, she was going to kill herself. After they talked further, A.L. took the initiative to share information and provided information unprompted.
- [37] In terms of what was said in which conversation, B.P. reported that the parts about the accused trying to force unwanted sexual penetration but not being able to, and his licking her and her having to wipe herself were reported prior to Dr. Hopkins conducting the sexual assault examination.
- [38] B.P. described A.L. as becoming more coherent at the hospital. She was like a different person than the person that she was on the stairs. She became like the A.L. that B.P. knew. B.P. said that at the hospital, A.L. seemed like she had been hung over. She did not seem intoxicated at that point.
- [39] B.P. stated that the details of what A.L. disclosed never changed. She may have disclosed more after the sexual assault examination, but what she disclosed previously never changed.
- [40] More generally, B.P. stated that she observed some avoidant behaviour on A.L.'s part prior to the alleged incident. She started to become aware that A.L. was not always comfortable when the accused stayed over. A.L. would want to come to B.P.'s house, especially if M.H. was not home during the visit. She would not tell B.P. why or go into specifics.
- [41] B.P. stated that A.L. had previously been given a prescription for Ativan. B.P. kept her pills locked away in her room. After A.L. passed, she checked and noted that the two pills A.L. had were still in the bottle. B.P. conceded that it was possible that A.L. was given Ativan, Tylenol, Advil, Zofran, GRAVOL and vitamin B at the hospital.

E. Statements to Dr. Hopkins at the Hospital

- [42] Dr. Terri Hopkins was the medical doctor who was called to the emergency room of the Fort St. John Hospital on October 6, 2021 in her role as a sexual assault examiner.
- [43] Dr. Hopkins got to the hospital between 10:00 a.m. and 11:00 a.m. She saw A.L. after arriving, but A.L. was sleeping. Dr. Hopkins understood that A.L. had been given GRAVOL at 9:30 a.m. and Ativan at 9:55 a.m.
- [44] Dr. Hopkins was qualified to opine on the effects of these drugs. She stated that Ativan is a benzodiazepine that works to reduce the excitability of the central nervous system. It can calm someone who is having a panic attack. Drowsiness is the primary side effect. People can have amnesia while taking it, but loss of memory about events before ingestion is not a typical side effect. Its effects last about 4-6 hours, and she understood that A.L. was given 1 mg, which is within the 0.5 to 2 mg range for a typical dose.

- [45] Dr. Hopkins stated that GRAVOL is an antiemetic drug that is used to suppress nausea and vomiting. The typical duration is 4-6 hours. One of the side effects is drowsiness. It does not affect memory other than the fact that if one is sleeping, one is not comprehending.
- [46] Dr. Hopkins also stated that A.L. was given thiamine, which is an over-the-counter B1 vitamin. It is typically given to people with nutritional deficiency and does not affect memory. It may improve cognition. In relation to the Ativan, GRAVOL, and thiamine that A.L. took on October 6, 2021, I find that none of these drugs affected A.L.'s memory of events.
- [47] Dr. Hopkins checked on A.L. throughout the day and found her still sleeping. Later, at approximately 4:00 p.m., Dr. Hopkins was able to rouse her. At that point, A.L. provided her consent to an examination.
- [48] Dr. Hopkins took a history from A.L. A.L. told her that the accused had sexually assaulted her in her grandmother's basement. She reported contact from the accused on her neck, chest and abdomen. A.L. reported that there was digital penetration of her vagina and penile penetration of the surface of her vagina. A.L. was not sure if there was actual penetration of the vaginal canal. A.L. also reported that there was penile penetration of her mouth. A.L. denied any rectal involvement and reported that no objects were involved.
- [49] Dr. Hopkins asked if ejaculation had occurred. A.L. told her she was not sure if that happened (I note parenthetically that A.L. told B.P. that ejaculation had occurred). Dr. Hopkins asked if a condom was used, and A.L. said no. B.P. was present for the exam and the interview but did not guide the interview or answer questions.
- [50] During the physical examination, Dr. Hopkins swabbed A.L.'s right lower neck area, breast area, and stomach area with different swabs. These swabs were turned over to police who later forwarded them for biological analysis.
- [51] At the hospital on October 6, 2021, Cst. Plankenhorn seized A.L.'s pants and underwear that she had reportedly been wearing overnight on October 5-6, 2021. The underwear was also forwarded for analysis.

F. Statement to Police the Next Day

- [52] On the afternoon of the next day, October 7, 2021, B.P. and A.L. went to the RCMP detachment. A.L. would only provide a statement with B.P. present, and accordingly, B.P. was present when A.L. gave her police statement that afternoon. The statement was video recorded.
- [53] Cst. Plankenhorn described A.L. as nervous and emotional, sometimes crying, complaining about not feeling good, and having stomach problems. In the video, one can observe A.L. crying, sniffing and occasionally having difficulty breathing. Her demeanour is clearly reluctant.

- [54] The point of view of the video is less than ideal in that it does not capture the facial expressions of A.L.. However, the viewer can assess A.L.'s verbal reactions, the timing of her answers and her intonation in responding to questions, her apparent emotional state at the time she gave the statement, and some of her body language such as her fidgeting, hand gestures and head nods. The officer used open-ended questions during the interview and language appropriate to A.L.'s age.
- [55] No oath was formally administered to A.L. in her police statement, and there was no formal warning about the consequences of lying. However, Cst. Plankenhorn emphasized the importance of telling the truth at the outset of the interview, to which A.L. responded by nodding. Also, B.P. stated that in her observation A.L. knew what a lie was and that she had told A.L. that it was important not to lie to the police and to tell the truth. In the context of this case, this evidence is important because A.L. trusted B.P. I find that A.L. was likely to follow her advice and understood the importance of telling the truth.
- [56] In the video-recorded statement, A.L. said that the accused had arrived at the house the previous evening around dinner time. He asked her to go to the store with him. Her grandma wanted something from Tim Hortons, and they went and picked up Advil from Shoppers Drug Mart. He then got her the alcoholic beverage, Twisted Tea.
- [57] A.L. stated that after they got back to the house, the accused was lying on the couch. He told her to come over. She went to the fridge - probably looking for a snack. He smacked her butt before she went downstairs. She then went to the basement and started drinking. She did not remember how much she had to drink. She remembered lying down on the bed in the laundry room in the basement. She was really tired.
- [58] A.L. then stated that she woke up and the accused was on the bed. She was not sober. She was tired, had been drinking, and felt like she could not move. She did not know the sexual assault was happening until after it commenced. The accused tried taking off her pants at first, and she stopped him. She said "no," but he kept getting on top of her. He was slobbering all over her neck. He repeatedly tried to remove her shirt. He went down with his mouth, and she could not push him off.
- [59] At the point where A.L. was asked where the accused licked her with his mouth, A.L. starts crying. She could not get words out. Cst. Plankenhorn left the room. A.L. then tells B.P. on video, "he used his hand too." She stated that she knew she did push him and that she believed the accused knew that she was too drunk to stop him.
- [60] Cst. Plankenhorn returned to the interview room with diagrams of a male and female body. Cst. Plankenhorn and A.L. then went through labelling body parts. A.L. pointed to her vagina as the place the accused put his mouth. She pointed to the accused's hand as another body part he used and pointed to her vagina as the place he put it. She then pointed to her chest, stomach and neck on the diagram as other places where the accused used his mouth. She said she could not remember if the accused used his hand anywhere else. Cst. Plankenhorn then asks A.L. if there was any other part of the accused that touched her

anywhere else. A.L. said she did not know. B.P. told A.L. that it is important to finish telling Cst. Plankenhorn what happened.

- [61] Cst. Plankenhorn left the interview room toward the end of the interview. At that point, B.P. then asked A.L. why she did not finish telling Cst. Plankenhorn what he did. A.L. then asked what she meant, and B.P. then responded that A.L. told Dr. Hopkins that he forced his penis into her mouth and about him trying to penetrate her vaginally with his penis. A.L. responded, "she didn't ask about that."
- [62] Cst. Plankenhorn returned to the room shortly after. B.P. stated that A.L. had a couple of more things she wanted to talk about. A.L. then pointed to the mouth of the female diagram and the penis of the male diagram, and then the penis of the male diagram and the vagina of the female diagram.

G. Subsequent Events

- [63] A.L. stayed with B.P. after being seen by Dr. Hopkins. She would not go home to the place where the alleged offence occurred. She stayed with B.P. for the next two weeks and, after that, for approximately half the time until A.L.'s death.

H. DNA Evidence

- [64] Zorahim Hassam, a reporting scientist with the National Forensic Services Lab in Surrey, BC, was called as an expert in the areas of interpretation of bodily fluid testing results, the interpretation of DNA typing results, and the application of statistical significance to DNA typing results. She adopted and spoke to three reports prepared by Michelle LeBlanc, another reporting scientist with the same lab. Ms. Hassam was the technical reviewer for the reports which were the subject of admissions on the voir dire.
- [65] Ms. Hassam explained that the underwear seized from A.L. was examined in three areas.
- [66] The first area was the interior crotch area of the underwear, which was examined using a taping method to recover any sort of saliva or skin cells that may have been left if there was an oral assault or a digital assault. For the interior crotch area, two profiles were detected: one matching the DNA profile of the accused and one matching A.L.
- [67] The upper back left and centre back areas of the underwear were also examined. These areas yielded two DNA profiles. The male component matched that of the accused. The second component was weak and not suitable for comparison.
- [68] For the profiles that matched the accused, the chances of it matching by chance (i.e., that it was not the accused's DNA but someone else that had a matching profile) were 1 in 370 quintillion based on matching frequency in a database of Canadian Caucasian people. A random match probability was also extremely rare using three other ethnic databases. I find as a fact that the accused's DNA was on A.L.'s underwear in the identified areas.

- [69] Ms. Hassam stated and the lab reports indicate that sperm cells were found on the upper back left and centre back areas of the underwear. In the upper back left sample, rare sperm cells were noted, indicating that less than 10 sperm heads were noted on the slide examined from this area.
- [70] In the centre back sample, Ms. Hassam noted that frequent sperm heads were noted, indicating the presence of more than 10 sperm heads on the slide examined from that area. She opined that it was highly unlikely that the underwear had been laundered prior to the sperm being deposited there.
- [71] Ms. Hassam stated that, based on the serology testing and the yields of DNA found, it was highly likely that the male DNA on two areas of A.L.'s underwear came from sperm cells - more likely than any other body fluid. She also stated that because sperm has a lot of DNA, it tends to "trump out" other profiles which may explain why the second profile was not suitable for comparison in these areas. I find as a fact that the sperm cells on these areas of A.L.'s underwear came from the accused.
- [72] A partial DNA profile was obtained from the swab of A.L.'s neck. This DNA profile matched that of the accused. The probability of this DNA profile randomly matching another DNA profile by chance were 1 in 6.5 quintillion based on a matching frequency in a database of Canadian Caucasian people. I find as a fact that this was the accused's DNA.
- [73] The swabs taken from A.L.'s chest and neck had two DNA profiles. The major component matched the DNA profile of the accused. No meaningful comparison could be made in relation to the minor component. For the major component, the probability of an unrelated individual's profile randomly matching a DNA sample from the accused was 1 in 370 quintillion. I find as a fact that the DNA profiles on A.L.'s chest and neck also came from the accused.
- [74] Ms. Hassam opined that the DNA that was found on A.L.'s neck, chest and stomach could be saliva or skin/epithelial cells, or any biological material other than sperm.

I. Evidence of the Accused

- [75] The accused, B.H.H., testified that he is 66 years old. He is from Fort Nelson but presently lives in Fort St. John. He confirmed that M.H. is his older sister in a large family of numerous siblings and that he had a good relationship with her off and on.
- [76] The accused knew A.L., A.L., and stated that M.H. adopted her when she was a baby. He saw A.L. briefly as a baby in her first year and did not see her again until she was about 13. At that point, he would see A.L. from time to time when he stopped in to visit or stay over with M.H. The accused stated that he would do this once every month or two. He stated that A.L. was born a week after his youngest son was born in Fort St. John.

- [77] The accused testified that in the summer of 2021, A.L. phoned him and asked him to transfer \$100 to her, which he said he couldn't do.
- [78] The accused stated that he had a criminal record, including historical convictions in the 1970s and 1980s for various property and driving offences. More recently, he had convictions for assault in 2000 and breach of bail in 2000. These convictions are all dated and are of marginal relevance.
- [79] Starting around 2021, the accused was working in Houston, but he would go to Grand Prairie to see his son. He also worked at a camp in Skukunka outside Chetwynd. He would also go up to Yukon sometimes. He would sometimes stay at M.H.'s place when he was travelling through town and would sleep on her couch.
- [80] The accused confirmed the layout of M.H.'s two-level residence.
- [81] The accused also confirmed that he was in town visiting M.H. on the night of October 5-6, 2021, in the course of travelling for work. He was initially unsure when he arrived in town but later agreed in cross-examination that it was likely the afternoon of October 5, 2021.
- [82] The accused denied going to the liquor store with A.L. He said that he didn't drink and has not for many years. He initially did not remember what he did on the night of October 5, 2021, but admitted in cross-examination that he went out that evening to Tim Hortons to get something for M.H. and possibly to a drug store.
- [83] The accused stated that he slept on the couch in the upstairs living room that night. He woke up at 5:00 or 6:00 a.m. with an erection. He went downstairs because he did not want M.H. to notice, and he wanted to be more comfortable. He went on the bed in the laundry room where he lay down and masturbated. The bed had sheets on it. He ejaculated and then reached over to the floor and grabbed some clothing to clean himself off. He was shown the underwear recovered from A.L. and confirmed that he used that pair of underwear to wipe himself off. He remembered the colour of the pink underwear.
- [84] The accused then went back upstairs to the living room, lay down on the couch for an hour or so, and then went into the kitchen after hearing M.H. making coffee. He saw M.H. briefly and left soon thereafter. He confirmed that he received a phone call from M.H. and then returned to the house, where he was eventually arrested by police.
- [85] The accused denied climbing into bed with A.L. He denied ever licking A.L. on her neck, chest or stomach. He denied trying to have intercourse or oral sex with her. He denied touching her at all. He said he was never naked in her presence.

III. Legal Principles

A. The Offences

[86] As noted above, the accused is charged with two offences: sexual interference and sexual assault. My discussion of the offences will be brief because the elements of the offences are not in issue.

[87] The offence of sexual interference is set out in s. 151 of the Code. That section provides as follows:

Sexual interference

151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

(a) is guilty of an indictable offence

[88] The offence of sexual assault is set out in s. 271 of the Code. That section provides as follows:

271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence

[89] Sexual interference is a specific intent offence requiring subjective proof that the accused touched the complainant for a specific purpose. Sexual assault is a general intent offence, requiring objective proof that the touching was of a sexual nature: *R. v. T.L.P.*, 2015 BCSC 618 at paras. 12-14, 17-18; *R. v. Dias*, 2023 BCSC 1373 at paras. 78-80.

[90] A sexual assault is an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test is an objective one: whether, when viewed in light of all the circumstances, the sexual or carnal context of the assault is visible to a reasonable observer. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant: *R. v. Chase*, [1987] 2 S.C.R. 293 at 302, 1987 CanLII 23.

[91] The age of consent in Canada is 16 years of age. Section 150.1(1) of the Code provides that any sexual activity with a person under the age of 16 is illegal and is not subject to a defence of consent: see *R. v. George*, 2017 SCC 38 at para. 7. There are close-in-age exceptions to the above provision, which are not applicable here given the age of the accused and the complainant.

[92] The accused did not advance a defence based on honest but mistaken belief in age: *George* at para. 7. In any event, I find that the accused knew the age of A.L. He visited M.H.'s home regularly, and he testified that A.L. was born a week after his youngest son, whose age would have been known to him. I find that the evidence does not give rise to an air of reality that he was mistaken as to A.L.'s age.

[93] The case instead turns on issues of credibility and the application of the framework in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93, to the facts of the case.

B. Reasonable Doubt

[94] The accused is presumed innocent unless the Crown proves his guilt beyond a reasonable doubt. The standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence. That burden to prove the elements of the offences rests on the Crown throughout the trial and never shifts to the accused: *R. v. Lifchus*, [1997] 3 S.C.R. 320, 1997 CanLII 319. Proof beyond a reasonable doubt is closer to absolute certainty than probable guilt; however, the Crown does not have to prove anything to absolute certainty: *R. v. Starr*, 2000 SCC 40 at para. 231; *R. v. Whitmore*, 2021 BCCA 302 at paras. 41-43. As well, the Crown is not required to prove beyond a reasonable doubt each individual piece of evidence that makes up its theory: *R. v. Morin*, [1988] 2 S.C.R. 345, 1992 CanLII 89.

[95] When assessing reasonable doubt in a criminal trial in the context of conflicting testimony, the three-part test in *W.(D.)* at 757-58 provides one method of guiding the Court's analysis. This test reads as follows:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 1979 CanLII 2969 (ON CA), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

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

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

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

[96] Justice Binnie, writing for the Court in *R. v. J.H.S.*, 2008 SCC 30, confirmed the long roots of the *W.(D.)* instruction and further discussed the test as follows:

- [10] The precise formulation of the W. (D.) questions has been criticized. As to the first question, the jury may believe inculpatory elements of the statements of an accused but reject the exculpatory explanation. In *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1, the accused did not testify, but his description of the killing of his daughter was put into evidence by way of statements to the police. His description of the event itself was obviously believed. The exculpatory explanation did not amount to a defence at law. He was convicted. The principle that a jury may believe some, none, or all of the testimony of any witness, including that of an accused, suggests to some critics that the first W. (D.) question is something of an oversimplification.
- [11] As to the second question, some jurors may wonder how, if they believe none of the evidence of the accused, such rejected evidence may nevertheless of itself raise a reasonable doubt. Of course, some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.
- [12] The third question, again, is taken by some critics as failing to contemplate a jury's acceptance of inculpatory bits of the evidence of an accused but not the exculpatory elements. In light of these possible sources of difficulty, Wood J.A. in *H. (C.W.)* suggested an additional instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit." [p. 155]

- [13] In short the W. (D.) questions should not have attributed to them a level of sanctity or immutable perfection that their author never claimed for them. W. (D.)'s message that it must be made crystal clear to the jury that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt is of fundamental importance but its application should not result in a triumph of form over substance. In *R. v. S. (W.D.)*, 1994 CanLII 76 (SCC), [1994] 3 S.C.R. 521, Cory J. reiterated that the W. (D.) instructions need not be given "word for word as some magic incantation" (p. 533). In *R. v. Avetyan*, [2000] 2 S.C.R. 745, 2000 SCC 56, Major J. for the majority pointed out that in any case where credibility is important "[t]he question is really whether, in substance, the trial judge's instructions left the jury with the impression that it had to choose between the two versions of events" (para. 19). The main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt.

[Emphasis in original.]

- [97] As noted in *J.H.S.* at para. 12, the Court of Appeal for British Columbia in *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146, 1991 CanLII 3956 (BCCA) enhanced the W.(D.) test by adding a fourth branch:

If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit.

[98] In J.H.S. at para. 13, in commenting on the W.(D.) test, the Court reminded trial judges that lack of credibility on the part of the accused does not equate to proof of guilt beyond a reasonable doubt, and the burden never shifts away from the Crown to prove every element of the offence beyond a reasonable doubt.

IV. Application of Legal Principles

A. Evidence of the Crown

[99] I found the first Crown witness, M.H., to be very credible. Her evidence was internally and externally consistent. She was emotional at appropriate times, admitted faults and conceded points that were unfavourable to A.L. Her evidence was detailed and made sense. There was an impression of experience and wisdom in her evidence. She described not harbouring animosity toward the accused, which I accept.

[100] The evidence of A.L. is based on the statements A.L. made to B.P., Dr. Hopkins, and Cst. Plankenhorn. These statements were admitted into evidence under the principled exception to the hearsay rule. However, what is now in issue is the ultimate, rather than threshold, reliability of these statements. In assessing the ultimate reliability of this evidence, I am aware of the shortcomings in this evidence and, in particular, of the defence submission regarding the significance of the lack of cross-examination of A.L. at trial.

[101] I find all three narrators of A.L.'s statements to be credible. B.P. had an excellent recall of events. She was a responsible person in A.L.'s life. She obviously found testifying to be difficult. Her credibility and reliability as a reporter of A.L.'s statements were not impugned in cross-examination. She had opportunities to embellish her evidence, which she did not take. She was serious and careful in her testimony. She had a close relationship of trust with A.L., one in which they appeared to be honest with each other. She was candid about A.L.'s faults. B.P. had no apparent animosity toward the accused.

[102] Dr. Hopkins was the medical doctor assigned to examine A.L. at the hospital. Her memory, aided by her detailed notes of questions and answers, was excellent. I accept her evidence.

[103] Cst. Plankenhorn's evidence of A.L.'s statement is captured by video, and there is no concern with respect to her account of A.L.'s statement. Further, I otherwise accept Cst. Plankenhorn's evidence as credible.

[104] All the Crown's witnesses were prepared to concede points or make corrections in cross-examination where appropriate. I find all the Crown's witnesses to be highly credible, and I accept their evidence at trial.

- [105] Dealing with the credibility of A.L.'s account, I am aware of the absence of cross-examination of A.L. at trial and the caution urged upon me by the accused in relation to accepting A.L.'s evidence. In *R. v. Rosen*, 2018 ONCA 246, the Court commented on this issue at para. 41 by noting that it is advisable to instruct jurors to alert them to the shortcomings of hearsay evidence and the advisability of seeking out confirmatory evidence.
- [106] Similarly, in *R. v. Chretien*, 2014 ONCA 403 at para. 74, the Court held that a judge should also remind the jury that the out-of-court statement admitted as proof of the truth of its contents is simply one item of evidence adduced at trial. The statement should be considered together with and in light of the rest of the evidence. Its appropriate weight is affected by other evidence that may support or undermine the reliability of the statement. I take guidance from these reminders as the trier of fact in this case.
- [107] The accused points out his inability to test under cross-examination A.L.'s honesty, motive to lie, and possible animus, as well as the possibility of coaching by B.P., of whether A.L. might have dreamed of the incident and of other ways in which the DNA might have been transferred onto A.L.
- [108] I note that A.L. reported having been drinking overnight and having been drunk on the night of October 5-6, 2021. This is a concern that I take into account with respect to A.L.'s memory and the accuracy of her account. The critical issue is whether an intoxicated witness has a reliable memory of those events that they do remember: *R. v. Chen*, 2023 BCSC 745 at para. 17. Here, A.L. appears to have a memory of many events the evening of the incident, including what happened during the alleged sexual assault. For instance, she described on video in her police statement (while the officer was out of the room) the accused using his hand to touch her, her pushing him, and being too drunk to stop it. She was candid about her drinking and about gaps in her memory. Also, by the time she gave her statements to B.P. and Dr. Hopkins at the hospital, she was sober, and her condition had stabilized. I find that the drugs A.L. received at the hospital would not have affected her memory of events.
- [109] There is no discernable motive on A.L.'s part to lie, though this is a factor that I would not overemphasize. Implicating the accused does not appear to be in A.L.'s interest on the evidence. In fact, on her evidence, the accused was her occasional supplier of alcohol, and I find it most unlikely that she would want to wrongly implicate him. The accused did say that A.L. had once asked to borrow money from him and that he had refused. However, I find that this predated the offence by a sufficient time period and is a sufficiently minor matter that it was unlikely to have given rise to a motive to lie or fabricate allegations against him.

- [110] M.H. described A.L. as a very private person. B.P. described A.L. as distrustful of authority. Also, A.L. was a reluctant reporter about the allegations. She initially provided almost no detail to M.H. or to B.P. When B.P. initially asked A.L. if she was raped, A.L. said she did not want to talk about it.
- [111] The accused submits that A.L. may have been coached by B.P. However, I would not make such a finding on the evidence. A.L.'s first allegation was made to M.H., not B.P., who was called into the situation to help when A.L. needed support. Nor do I find that B.P.'s prompting of A.L. to be more disclosive when A.L.'s account to Cst. Plankenhorn was incomplete amounted to suggesting answers to her.
- [112] The accused argued that A.L. was troubled, bullied in school and mentally unwell. This description does not accord with the evidence of M.H. who described A.L. as having minor problems, including some bullying at school but "nothing major." B.P. described A.L. as getting into trouble on and off, such as drinking and partying with her friends, but "nothing really serious" and "typical teenage stuff." None of these alleged character allegations substantiate a concern over A.L.'s memory, perception, bias, or motive to fabricate.
- [113] A.L. gave three substantially consistent accounts of what happened between her and the accused soon after the offence. There is some minor inconsistency, such as on the issue of whether the accused ejaculated. A.L. told B.P. that he ejaculated and could not become erect again due to his age, and his ejaculation caused so much wetness on her that she had to clean off. When asked by Dr. Hopkins, A.L. said she was unsure whether ejaculation occurred. With Cst. Plankenhorn, she resorted to pointing to a diagram and did not disclose this detail.
- [114] There is otherwise a general lack of inconsistency in A.L.'s accounts to others. In noting this, I am aware that repetition and consistency do not enhance credibility. Witnesses cannot corroborate themselves through repetition of their account. But there is consistency in the three statements in that each contains similar allegations that the accused attempted penile-vaginal intercourse, licked her stomach, neck and chest, and forced her to engage in oral sex. This is not a credibility-enhancing factor, however, but merely a lack of a factor that might undermine her credibility.
- [115] Significantly, A.L. was observed in an extremely distraught condition on the morning of October 6, 2021. M.H. testified that when she encountered A.L. after getting a text that morning, A.L. looked unusually dishevelled, told her to get B.P., and did not want to see M.H. or her sister L.L.
- [116] On the morning of October 6, when B.P. came over and observed A.L. on the staircase, she was crying, hyperventilating, throwing up, and so distraught to the point of almost passing out. She began to calm down during the ambulance ride and was calmed down further at the hospital. Her demeanour that day goes beyond what can be explained by alcohol consumption. Her demeanour the next day during her police statement at times resembled emotional difficulties when talking about critical events of the alleged incident. For weeks

after, A.L. stayed with B.P. at her residence in order to avoid going back to M.H.'s residence where the offences allegedly occurred. While I would be cautious not to over-emphasize this factor, I find that A.L.'s demeanour is corroborative of her recently experiencing something traumatic: R. v. J.A.A., 2011 SCC 17 at para. 40; R. v. Greif, 2021 BCCA 187 at paras. 66, 70.

- [117] The DNA evidence provides significant corroboration to A.L.'s account of events. The presence of the accused's DNA and sperm on A.L.'s underwear corroborates A.L.'s evidence that the accused had physical contact with her after the time he ejaculated. The presence of the accused's DNA on A.L.'s neck, chest and stomach corroborates her account of his licking her torso and neck areas.
- [118] Overall, A.L.'s account fits comfortably with the surrounding circumstances. It is consistent with all aspects of the DNA evidence, the evidence of her condition and demeanour, and makes logical sense on the evidence which I accept at trial.
- [119] In all the circumstances and based upon A.L.'s evidence and its shortcomings, including the lack of cross-examination and the presence of corroborating evidence, I accept the evidence of A.L.'s account of sexual activity occurring between her and the accused.

B. Evidence of the Accused

- [120] In terms of his demeanour, the accused testified in a straightforward manner and gave generally responsive answers without hesitation. His speech was slightly unclear at times, but I attribute this merely to his manner of communication. He admitted to unfavourable or embarrassing points and conceded he had gaps in his memory, such as where he was coming from when he stayed overnight at M.H.'s home. I detected no obvious deceit in his presentation.
- [121] The accused's account of peripheral matters was generally consistent with M.H.'s evidence, and I accept this evidence. On the critical issue of what happened overnight and the next morning on October 5-6, 2021, the accused's account of having masturbated in the laundry room and using A.L.'s underwear to wipe himself off could potentially explain the presence of his DNA and sperm cells on A.L.'s underwear.
- [122] However, on this account, A.L. would have had to leave her underwear on the floor beside the bed in the laundry room/playroom. This might be possible if she removed and deposited the underwear there that night or previously. Indeed, M.H. testified that the laundry would get done every other day or so, and there would be clean and dirty clothes in the room. But there is little cogency to the accused's theory when extrapolated. After waking up, A.L. would then have had to coincidentally find this same pair of underwear in the adjacent room. On this theory, she would then have worn it, presumably without noticing that her underwear was stained. This would have had to occur in a narrow timeframe between the accused wiping himself in the morning with the underwear and A.L. going into the laundry room and putting on that same pair of underwear before

reporting an assault to M.H. and leaving for the hospital where the underwear was later seized. Further, all this would have had to occur around the same time that some other unknown factor caused A.L. to become extremely upset that morning to account for her highly distraught presentation. These features contribute to the inherent unlikelihood of the accused's account in the specific situation.

[123] Significantly, the accused's account does not explain the presence of his DNA on swabs of A.L.'s neck, chest and stomach. Ms. Hassam stated that she could not say how the accused's DNA got onto A.L. She opined that various factors affected the transfer of DNA, including the fact that wet stains transfer more easily. Other factors include the friction and amount of force, type of touching, the smoothness or roughness of the target surface, and how prone to shedding skin cells a person is. Still, on the accused's account, there would have been no direct transfer of his DNA onto A.L.'s torso or neck area because he was never in contact with her body. I therefore find any hypothesized scenario of indirect transfer of the accused's DNA to A.L.'s upper body to be improbable on his narrative.

[124] In addition, no semen was found in the swabs from A.L.'s neck, chest and stomach. Ms. Hassam testified that based on the serology results, the DNA in these areas was likely skin or saliva and not semen. Ms. Hassam testified that all evidence searchers are trained to identify spermatozoa cells and that sperm is identifiable under a microscope. If there was an accidental or secondary transfer of semen to A.L.'s body, the evidence supports a reasonable expectation of finding sperm in one or more of the samples from her neck, chest and stomach. Yet none was found.

[125] I would resist any invitation to make credibility assessments on the basis of what people normally do in someone else's home, despite the invitations of counsel to do so. For instance, I would not draw an inference for or against the accused on the basis of how someone staying at their sister's house would behave sexually. My assessments instead are grounded in the facts of this case and what is reliably known about the situation and the behaviour of the parties.

[126] On the facts of this case, I cannot reconcile the accused's evidence with the presence of his DNA on A.L.'s neck, chest and stomach. The accused's evidence is also inconsistent with the absence of sperm in the swabs of A.L.'s neck, chest and stomach, which is consistent with the presence of his saliva or skin cells. I also cannot reconcile the accused's evidence with A.L.'s extremely distraught and emotional condition on the morning of October 6, 2021, a condition which I find to be entirely consistent with her having experienced something traumatic. I also find the accused's account of masturbating on a discarded pair of A.L.'s underwear and then her putting them on again before she went to the hospital, and all about the same time that she became extremely upset, to be questionable given what is reliably known about the timing of events, the layout in the home and reasonable expectations of A.L.'s behaviour.

[127] While I accept the evidence of the accused on peripheral matters, in all the circumstances, I reject the evidence of the accused on the critical aspects of what happened between him and A.L. overnight on October 5-6, 2021.

C. Overall Assessment

[128] The evidence of the accused does not leave me with a reasonable doubt. Nor, after careful consideration of all the evidence, am I unable to decide whom to believe.

[129] I find on all the evidence that the accused purchased alcohol for A.L. on the evening of October 5, 2021, and that she became intoxicated. I find that at some point overnight that evening, she fell asleep on the bed in the laundry room. The accused entered the room where she was sleeping and engaged in sexual relations with her. He thereafter touched her for a sexual purpose. He licked all over her stomach, her chest and her neck, thereby transferring his saliva and/or skin cells to A.L.'s body. He performed oral sex on her and forced her to perform oral sex on him. The accused attempted to penetrate A.L. vaginally with his penis but was unable to because he had already ejaculated. I find that some of the semen from the accused was transferred onto her vaginal area and underwear. All this occurred at a time when A.L. was 15 years old. The accused knew the age of A.L.

[130] I find that A.L. was traumatized as a result of the incident when she awoke the next morning and that this explains her reactions and behaviour throughout the day on October 6, 2021, and the next day, October 7, 2021, during her police statement.

[131] Having regard to the whole of the evidence, including the evidence of A.L., her grandmother, M.H., her family friend, B.P., Dr. Hopkins, the DNA evidence, and the evidence of the accused, I am not left with a reasonable doubt on count 1 or count 2.

V. Conclusion

[132] Mr. H., will you please stand?

[133] I find you guilty on counts 1 and 2.

"Brundrett J."

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