

CANADA / JUDGMENT

R. v. B.J.H.

2024 BCSC 969

COURT

Supreme Court of British Columbia

DECIDED

31 May 2024

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.J.H.,

2024 BCSC 969

Date: 20240531

Docket: 94691

Registry: Abbotsford

Rex

v.

B.J.H.

Restriction on publication: A publication ban has been imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission of any evidence that would identify the complainant. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: These reasons for judgment were redacted for publication on April 11, 2025.

Before: The Honourable Justice Elwood

Oral Reasons for Judgment

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M. Beckett

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Place and Date of Trial:

Abbotsford, B.C.

April 8-12, 2024

Place and Date of Judgment:

Abbotsford, B.C.

May 31, 2024

I. INTRODUCTION

- [1] These reasons for judgment were delivered orally and then issued to the parties in writing with citations and full quotations added, and initials substituted for names. They have since been redacted for publication to protect the identity of the complainant. An amendment has also been made to para. 99 to incorporate a change made in supplemental reasons for judgment following a joint request by the Crown and defence for clarification. A sealing order has been made, sealing the original unredacted copy of the oral reasons for judgment in the court registry.
- [2] BH is charged with sexual interference, invitation to sexual touching and sexual assault contrary to ss. 151, 152 and 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [3] The Crown alleges that BH committed these offences against his daughter, SH, over a period of time spanning December 2017 to September 1, 2021, when SH was between eight and 11 years of age.
- [4] The Crown alleges that BH masturbated and ejaculated on SH, touched her vagina with his penis and his fingers, penetrated her vagina with his penis, performed oral sex on her and invited and allowed her to perform oral sex on him.
- [5] Identity of the accused is not in issue, nor is his relationship with the complainant or his knowledge of her age. Consent is not available as a defence.
- [6] The Crown's case rests on the testimony by SH, who is now 14 years old. Her testimony consisted of an audio/video recorded statement obtained from her on November 10, 2021, and admitted into evidence pursuant to s. 715.1 of the Code, and viva voce evidence by closed-circuit television from a separate room during the trial, both in direct and cross-examination.
- [7] BH testified in his own defence. He denied all of the allegations and testified that he has never, on any occasion, engaged in any sexual acts with SH.

- [8] To obtain a conviction, the Crown must prove beyond a reasonable doubt that BH committed the sexual acts described by SH. BH is presumed to be innocent. He is not required to prove anything.
- [9] In these reasons for judgment, I will set out the undisputed facts and identify the material aspects of SH's evidence which BH denies. I will then review the governing legal principles and assess the testimony of BH and SH within that legal framework. Lastly, I will state my conclusions on the evidence as a whole.

II. FACTS AND EVIDENCE

A. Background and Timeline

- [10] SH was born in [month and year]. Her parents separated when she was about two and a half years old. Initially, her parents shared parenting responsibilities. In about [redacted for publication], BH assumed full custody of SH. From that date until recently, SH's biological mother was largely out her life.
- [11] SW, who gave evidence as part of the Crown's case, began babysitting SH in mid-[year]. After BH assumed full custody of SH, SW moved in with them and became a live-in nanny. BH was working long hours in the [redacted for publication] industry. SW, who did not work outside the home, formed a close and supportive relationship with SH.
- [12] In [year], BH, SH and SW moved together to a townhouse in [redacted for publication]. In [year], SW relocated to [redacted for publication], but she stayed in touch and would return to live with BH and SH in [year].
- [13] In about [month and year], BH and SH moved to a condo near [redacted for publication] in [redacted for publication]. Of relevance to SH's allegations, the condo had two bedrooms and a bathroom with a combined tub and shower.
- [14] In [month and year], BH and SH moved to a house on a street I will refer to as BC Street in [redacted for publication]. Of relevance to the allegations, the house had two bedrooms on the main floor and a space that could be used as a bedroom downstairs. It had three bathrooms: a main bathroom off the hallway on the main floor with a combined tub and shower; an ensuite bathroom off the principal bedroom on the main floor with a walk-in shower; and a downstairs bathroom with a shower.
- [15] BH's girlfriend, now wife, EB, moved into the house on BC Street. EB also worked in the [redacted for publication] industry, although not as long hours as BH. She and BH slept in the principal bedroom. SH slept in the second bedroom on the main floor.
- [16] In the summer of [year], SW, her new husband and their child came to visit, stayed for BH's wedding and eventually moved into the lower floor of the house on BC Street. After moving in, SW resumed her role as live-in nanny.

- [17] In the video statement and in her evidence at trial, SH testified that the sexual behaviours by her father began in the shower at the condo near [redacted for publication]. She testified that the sexual behaviours continued in both bathroom showers on the main floor and on the beds in her room and in BH's room at BC Street when EB was not home. She could not say how many times these things happened, only that they were each more than once. From what she could remember, the sexual behaviour on the beds would always involve a shower as well. I will return to SH's description of the sexual behaviours in a moment.
- [18] SH testified that the sexual behaviours came to an end after a conversation in which BH asked her to shower with him and she declined. She could not say how old she was when they had this conversation. She confirmed during the video statement in November 2021 that the behaviours had ended, in her words "for now". She said the last time she remembered something sexual happening was when she was 10 or in her words "last [month]", which would have been when she turned 11.
- [19] SH told a friend at school about the sexual behaviours. In the video statement, she said that the friend asked her--she was not sure what the word was--whether she had ever had sex before, and she recalled saying or thinking that she was not sure if what had happened with her father counted. She described the friend as a close friend. She testified that she did not expect the friend to tell anyone. In cross-examination, she agreed that she told the friend not to tell anyone, and that she did not want the friend to tell anyone.
- [20] On October 29, 2021, two social workers with the Ministry of Children and Family Development ("MCFD"), a male and a female, came to SH's school. SH testified that she was called out of class to meet with the social workers and did not know why they were there. She testified that she felt confused about what was going on. Later, she testified that she felt scared. Under cross-examination, she acknowledged that, in answer to questions from the male social worker, she denied that anything happened with her father that involved private parts, but then told the female social worker about what happened after her male colleague left the room. When asked in re-examination why this was, SH responded that she was not sure but the only reason she could think of was that she felt safer with the female social worker.
- [21] SH is now in the care of her biological mother.

B. SH's Evidence of the Alleged Sexual Behaviours

- [22] SH's direct evidence of the alleged sexual behaviours by BH was mostly in the video statement, initially within long answers to open-ended questions by the interviewing officer, sometimes preceded by lengthy pauses. Her answers included the following--I will quote from the transcript because I think it is important to convey the original voice of the child rather than an adult interpretation of her words:

- p. 32, l. 22: We used to have showers together and then he said 'can I do something?' I'm like 'sure' cause I didn't know what it was and I wasn't smart enough at the time - I was eight I think, seven maybe? And then he was rubbing his penis like this [mimics masturbation] and white stuff came out
- p. 32, l. 36: and then it once happened in his bed and then he had a towel underneath us just in case and he got it all over my vagina sadly. I'm like - ew - ran to the shower and had a shower by myself but - yeah - that's pretty much all I can remember 'cause it happened multiple times.
- p. 39, l. 12: then he'd do what he did - same thing with the bed, sometimes it would happen before the shower and then he did it again in the shower.
- p. 43, l. 27: Sometimes before the shower we'd go into his bed and then he was doing this weird thing - I don't know what it was called at the time - once we were in his bed and the - uh - white stuff came out of my dad's private
- p. 44, l. 1: Sometimes if I needed to pee - uhm - and like, because he was doing that weird stuff to me - huh - I - he gave me permission to pee on him yeah, I did - punishment payback for doing that weird thing.
- p. 45, l. 5-
- p. 45, l. 16: He'd rub his vagina and once - I mean his thingy - mushroom [her word for penis] and - uhm - grew out - you know - like, that weird white stuff and once he made me put my mouth over his mushroom - it was not fun, blech - later on I would quickly - ran to the fridge and [drank] my milk only did it once - the next time he asked me to do it I'm like no what also made me really feel really uncomfortable is when he - uhm - when he, like, licked my vagina - that was not fun at all.
- p. 48, l. 40: He was rubbing his penis against my vagina [on the bed] and [demonstrates masturbating] eventually the white stuff came out and went all over my vagina
- p. 51, l. 25: He puts a weird rub on his finger and then do that [touch her].
- p. 54, l. 10: He put this white, like, this liquid rub I have no idea what it was - it was something - it was almost like water but not. He said it was for that purpose that it was meant for what we were doing.
- [23] SH provided the following additional information in response to follow-up questions from the officer:
- p. 39, l. 12: [tell me about the shower habits of you and your dad]: When [EB] isn't around we go in the shower together and he'd do what he did - same thing with the bed - sometimes it happened before the shower and then he did again in the shower.

- p. 35, l. 32: [that happened you said in the shower?] Yeah - it happens in the shower sometimes and [just] in his bedroom when [EB]'s not there.
- p. 39, l. 22: [How often did that happen?] not all that often. [How many times?] I don't know I can't keep track of that stuff.
- p. 39, l. 31: [how old were you when you stopped taking a shower with your dad?] I don't know cause it - I was at the age when I didn't need to - I did it cause I wasn't smart enough obviously.
- p. 45, l. 21: [tell me more {about licking your vagina}] All I remember is that he licked my vagina and it was all slimy.
- p. 45, l. 25: [Where was that]? At home - in my room.
- p. 46, l. 33: [Do you remember when it was?] Nope it happened two, three times I think I was eight when it happened. A lot of this is probably when I was eight.
- p. 55, l. 25: [How many times did he lick your vagina?] I don't know - I think once or twice maybe three times but that might be a big maybe.
- p. 48, l. 12: [In the master bedroom he had a towel under him?] Under us well it was mainly under me so we didn't leave marks on the bed so then [EB] didn't find out we washed the towels as she was gone.
- p. 50, l. 1: [Did he ever put his penis in your vagina?] Well, he did once - it was in kind of but that was only once it was kind of inside but I'm not absolutely sure.
- p. 50, l. 42: it wasn't always inside my vagina - it'd be, like, on it, rubbing like that [motions with her hand].
- [24] Unprompted by the interviewing officer, SH described her father shaking on one or more occasions and acknowledging that what he was doing was illegal:
- p. 28, l. 11: My dad was shaking 'cause he knows its illegal and I was eight at the time so I asked him why are you shaking? And he said 'cause what we're - cause I'm not supposed to be doing what we are doing
- p. 32, l. 26: and other times - uhm - 'cause I wasn't smart enough - I realized he was shaking - I'm like why are you shaking? He's like 'cause I'm not supposed to be doing this - this is illegal He's like, but it's hard to - we formed a habit and I'm like, then I'm going to change it but it kept happening.
- p. 42, l. 26: the one I can remember the most is the one where he told me it was illegal then after that each time it would happen I, I always stiffen 'cause it's awkward knowing its illegal and whenever I feel awkward and the same situation happens over and over I normally will just stiffen knowing that it's not meant to happen

- [25] In direct viva voce evidence at trial, SH described one occasion when she had a shower with BH in the principal bedroom ensuite shower at BC Street after she had dyed her hair pink. She remembered this occasion because EB later got mad at her after EB found pink hair dye on the tiles of the shower.
- [26] SH provided more evidence in her direct at trial about the alleged oral sex. Initially, she could not recall if BH said anything to make her put her mouth on his penis. After refreshing her memory from the transcript of her evidence at the preliminary inquiry, SH testified that BH told her to "suck his penis like a lollipop". She testified that this happened in the bathtub in the main upstairs bathroom. Under cross-examination, she could not remember what happened after she put her mouth on his penis, although in her video statement she had said she ran to the kitchen to drink some milk.
- [27] SH also provided more evidence in direct about the liquid rub she said her father put on his finger. She testified that she remembered--but only vaguely--that he played with her vagina after he put the rub on his hands. She testified that she could only remember one occasion on which he did this. She recalled that he told her the liquid was "for that purpose" and he asked her if it "felt good". Under cross-examination, she testified that the liquid came from a bottle that BH retrieved from the top of his dresser. She recalled that the bottle was tiny and that the liquid was clear, but could not remember any further details.
- [28] Under cross-examination, SH was generally unable to provide additional details of the alleged sexual touching. In answer to questions from defence counsel, SH acknowledged that she either did not know or could not remember: when the first incident occurred--the year, the month, the season, the time of day; when the further incidents occurred at BC Street; where anyone was within the house when the incidents occurred, except that EB was not home; where EB had gone when she had left the house; anything else that had happened on any day of any of the incidents; whether anything memorable happened at home or at school on any day of the incidents; what she had to eat; what she was wearing; what BH was wearing; what was said during the incidents; how long any incident lasted; what they did before and after each of the incidents; where the "white stuff" landed on her body in the showers; anything distinctive about the white stuff including its temperature or how it smelled; how they cleaned up the white stuff; any description of BH's penis; any change in the size or shape of his penis during the incidents; whether BH made any sounds before the white stuff came out of his penis; what part of BH's body she urinated on; how the towels were placed under her; where the towels came from; how their clothes were removed; or how any of the incidents ended.

III. ANALYSIS

A. General Legal Principles

- [29] The decision of the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93, provides a set of instructions with which to give effect to the Crown's burden of proof beyond a reasonable doubt when, as in this case, the accused gives evidence that is inconsistent with their guilt:
- a) First, if I believe BH's evidence, I must acquit him.
 - b) Second, if I do not fully believe BH's testimony but I am left in reasonable doubt by it, I must acquit him.
 - c) Third, even if I am not left in doubt by BH's evidence, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt that he is guilty.
- [30] If, after considering all of the evidence, I am not sure whom to believe, I must acquit BH: *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146, 1991 CanLII 3956 (B.C.C.A.).
- [31] Although it is framed as a series of three or four questions, no "specific form or sequence of analysis" is required by the *W.(D.)* framework, so long as the focus throughout remains on the requirement of proof beyond a reasonable doubt: *R. v. Tyers*, 2015 BCCA 507 at para. 15. The "paramount question" is "whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused": *R. v. Vuradin*, 2013 SCC 38 at para. 21.
- [32] Justice Donegan summarized the principles underlying the *W.(D.)* framework in *R. v. Manuel*, 2021 BCSC 1763 at para. 9, citing an article by David Paciocco, a justice of the Ontario Court of Appeal:
1. Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred;
 2. A criminal fact-finder that believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;
 3. Even if a criminal fact-finder does not entirely believe evidence inconsistent with guilt, if the fact-finder cannot decide whether that evidence is true, there is a reasonable doubt and an acquittal must follow;
 4. Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
 5. Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

- [33] The criminal standard of proof beyond a reasonable doubt is an exacting standard rarely encountered in everyday life. Proof beyond a reasonable doubt is something less than absolute certainty, but more than probable guilt. Along the spectrum of probabilities, it is much closer to absolute certainty than it is to the standard in civil cases of proof on a balance of probabilities: *R. v. Starr*, 2000 SCC 40 at paras. 241-243.
- [34] A reasonable doubt is not an imaginary or frivolous doubt, but rather a doubt that is rational and arises from the evidence or the absence of evidence: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36, 1997 CanLII 319.
- [35] In this case, determining whether the Crown has met the burden of proof beyond a reasonable doubt requires an assessment of the credibility and reliability of the testimony by BH and SH. Credibility is concerned with the truthfulness of the witness testimony. Reliability is concerned with the accuracy of the witness testimony. Credibility requires an assessment of whether the witness is telling the truth. Reliability requires an assessment of the ability of the witness to accurately observe, remember and communicate what they observed. A witness may be honest, but mistaken and therefore credible but unreliable: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 205, 1995 CanLII 3498 (Ont. C.A.).
- [36] In *R. v. Denniston*, 2023 BCSC 1223 at para. 60, Justice Giaschi provided a helpful summary of the factors that may be considered when assessing credibility and reliability:

the ability of the witness to perceive events; the ability of the witness to accurately recall the events; the ability of the witness to recount those events accurately; the ability of a witness to resist the influence of interest to modify their recollection; internal inconsistencies in the evidence of a witness; prior inconsistent statements made by the witness; inconsistencies between the witness's testimony and the testimony of other witnesses; the existence of independent evidence that confirms or contradicts the witness's testimony, for example, does the witness's evidence harmonize with the independent evidence that has been accepted; whether the witness has given exaggerated or embellished evidence, (although absence of exaggeration or embellishment does not necessarily enhance credibility); whether the witness has a motive to lie, (although absence of a motive to lie does not generally enhance credibility); evidence pertaining to the honesty and forthrightness of the witness, such as having given false statements to the police; the "sense" of the evidence, when weighed with common sense does it seem impossible or unlikely, does it make sense; and the demeanour of the witness, but demeanour is a factor that is to be used with caution.

- [37] Ultimately, the question is whether the evidence of the witness is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
- [38] Trial judges are entitled, and expected, to rely on their life experience in making credibility findings. This necessarily includes drawing common-sense inferences from established facts. In doing so, trial judges must take care to not assess the credibility of a complainant based on myths or stereotypes about victims of sexual assault. Trial judges also must not assess the credibility of the accused based on improper assumptions that run contrary to the

right to silence or the presumption of innocence. However, as the Supreme Court of Canada recently held, there is no rule against common-sense assumptions. Testimonial assessments must be based on the evidence, but triers of fact are entitled to use generalized expectations based on common sense or human experience as a benchmark when assessing the evidence: *R. v. Kruk*, 2024 SCC 7 at paras. 72, 92-97 and 129.

B. Assessment of BH's Evidence

- [39] BH was a careful and responsive witness. His evidence was straightforward and plausible: he acknowledged a close relationship with SH and the opportunity to commit the alleged offences, but denied each of the allegations of sexual misconduct. He acknowledged taking showers with his daughter, but only before she turned seven years of age and never involving anything inappropriate.
- [40] BH's demeanor under cross-examination was calm and respectful, but firm and unshaken in his denials of the allegations. None of his answers appeared contrived or exaggerated; there were no inconsistencies in his evidence; his memory of events was appropriate in relation to the passage of time; he did not claim to remember details or alibis that would seem unlikely or unreasonable; he did not show any animus toward SH or SW.
- [41] BH's firm and clear denials must be assessed in light of all of the evidence, including the complainant's testimony. Accordingly, I turn to an assessment of SH's evidence.

C. Assessment of SH's Evidence

- [42] SH was an impressive witness for her age. She was calm and attentive, and gave considered answers. She readily acknowledged what she could not remember and what she did not know. She was responsive throughout a tiring and exacting (but always appropriate) cross-examination. Although far from determinative, her demeanour was that of a 14-year-old who was trying her best to tell the truth.
- [43] The conduct of the interview that generated the statement which is part of her evidence was also impressive. The interview took place in a private room with a comfortable couch for SH to sit on. Constable Page and SH were the only people in the room. Constable Page was friendly, polite and worked hard to ensure that SH felt safe. Constable Page asked simple questions that were, for the most part, non-leading. There was nothing concerning about her demeanour, language or interview technique.
- [44] SH responded well during the interview. While she said it was really uncomfortable talking to a stranger, she appeared to relax and let her guard down. She acknowledged that her memory was hazy; however, she said she did her best to remember what she could. She instructed herself out loud on the importance of telling the truth. She provided much of the substance of the statement without prompting, in a natural flow of conversation. She mimicked her own voice as a younger girl, and gestured occasionally toward her own body to demonstrate what BH did or where he touched her. At one point, she corrected Constable

Page when the officer said BH had put a towel under himself.

- [45] In her statement, SH described sexual acts of which she could not be expected to have knowledge at her age at the time. She was uncertain what it meant to be a virgin and whether what her father did counts as sex. Unprompted, she asked Constable Page what it means to be raped. She used child-like terms for penis, vagina, breasts and semen. This lack of familiarity with adult sexual concepts and language "imbues her statement with its own peculiar stamp of reliability": *R. v. D.W.L.*, 2018 BCSC 2480 at para. 122, quoting *R. v. Khan*, [1990] 2 S.C.R. 531, 1990 CanLII 77.
- [46] I am not concerned that SH acquired the knowledge of the sex acts she described from elsewhere. She testified that she is generally not on social media and does not search the Internet for sexual content. She acknowledged an occasion when sexual ads popped up on her computer when she tried to download an extension, but said she closed them as soon as they popped up. While she exhibited a fairly advanced understanding of sexual orientation and gender fluidity, these topics do not equate to knowledge of the sexual acts she described. Most importantly, her statement reflected age-appropriate confusion over sexual behaviours beyond her years rather than mimicry of pornography or any sexual discussion with friends.
- [47] The video statement must be assessed in light of the cross-examination at trial. The cross-examination highlighted SH's inability to articulate the number or frequency of the incidents or when the sexual behaviors began. She told Constable Page that she was seven or eight when the behaviours in the shower first started. At the preliminary inquiry she said she knew for a fact that she was not seven. At trial, she said she was "pretty sure" she was eight. Her explanation at trial revolved around her hair style which was different from her memory trigger at the preliminary inquiry.
- [48] SH was also imprecise on the timing of when she said her father was shaking and said what they were doing was illegal. In the video statement, she said he was shaking during the fifth time that it happened, but she also described incidents when she stiffened after he had said it was illegal. Under cross-examination, after being taken to her preliminary inquiry transcript, she conceded that she could not link his shaking to any particular event.
- [49] The cross-examination also demonstrated that SH could not provide additional details surrounding the instances of sexual behaviour (for example, what she was doing before, what she was doing after, what she was wearing, what her father was wearing, and so on), or additional details of the sexual acts themselves (for example, what her father's penis looks like, how he stroked it, where the ejaculate hit her, how it felt on her body, etc.).
- [50] The evidence of every witness who testifies before the court must be assessed carefully with reference to criteria appropriate for their mental development and ability to communicate. The Supreme Court of Canada has established that the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children. Children experience the world differently than adults. They may not be able to recount precise details

and communicate the when and where of an event exactly, but this does not mean that they have misconceived what happened to them: *R. v. B.(G.)*, [1990] 2 S.C.R. 30 at 54-55, 1990 CanLII 7308; *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at 134, 1992 CanLII 56.

- [51] Justice Dickson of our Court of Appeal summarized the necessary considerations when the court is assessing the evidence of a child in *R. v. M.D.*, 2021 BCCA 339:
- [56] Assessing credibility may be particularly challenging and nuanced when it involves a child witness. Judges evaluate the evidence of young children differently from the evidence of adults... For example, courts have long recognized that children may experience the world differently than adults and, therefore, details like the time, place and frequency of events may be missing from their recollections because such details may be less important to them. In addition, child witnesses may be more prone to suggestibility and less able to express themselves precisely than adult witnesses... This does not mean that the evidence of children is subject to a different standard of proof than the evidence of adults, but it does mean that when assessing the credibility of child witnesses trial judges should approach their evidence on a "common sense" basis, bearing in mind its strengths and weaknesses in each case. In particular, when the credibility of a child witness is determined "the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which [the witness] is testifying"

[References omitted; emphasis added.]

- [52] The frequency and timing of incidents is generally considered a peripheral matter in cases of child sexual abuse, and not a weakness that should significantly detract from the key question of whether the abuse occurred as described: *M.D.* at para. 63; *D.W.L.* at para. 84.
- [53] In this case, although she had no specific memory of when her father first did something inappropriate, SH testified that it was when they were living in the condo in [redacted for publication]. The evidence as a whole confirms that they lived in that condo for about a year from [month and year], meaning that SH was between seven and eight years of age. This accords with her evidence that she was seven or eight years old when the behaviours began.
- [54] SH's general recollection of when the behaviours occurred--when she was eight, nine and ten and, "a couple of years ago" when she gave the statement--also accords with the evidence as a whole.
- [55] However, the lack of clear memory of how many times the incidents occurred was a notable feature of SH's evidence. She could not say even in general terms how many times these things happened, only that they happened more than once, multiple times or a handful of times.

- [56] Her lack of recall in response to detailed questioning from defence counsel was a further notable feature of SH's evidence. I would not go so far as to say--as the defence submits--that her evidence was devoid of detail. Nor would I agree that her evidence was simply a description of alleged sex acts without any context. However, it is fair to say that she could not answer most of the contextual questions that were put to her in cross-examination.
- [57] Considering the evidence as a whole, however, I find that SH provided meaningful details of the incidents and sufficient context with which to assess the credibility and reliability of her evidence. She just could not provide the specific details that were put to her in cross-examination.
- [58] The details she provided included the following. She remembered her father asking if he could do something, and saying yes. She remembered a conversation around what they were doing being illegal, and that it had become a habit. She remembered stiffening up after that conversation because she knew it was illegal. She remembered her father putting a towel under her on the bed and why. She remembered thinking when he got semen on her vagina that she was glad she was too young to get pregnant. She remembered urinating on her father as punishment for the weird stuff he was doing. After refreshing her memory, she remembered what her father said to get her to put her mouth on his penis. She remembered that she did not like the taste of his penis and that she ran to the kitchen to drink her favourite milk. She remembered that it felt slimy when he licked her vagina. She remembered the characteristics of an adult personal lubricant. She remembered what her father said when he used the lubricant, and what she said in response.
- [59] I would not reject her evidence as unreliable or lacking in credibility because she could not remember additional details under cross-examination. Most of the details that were put to her in cross-examination were the kinds of details that one would expect a reasonable adult to remember from a sexual encounter, such as how did it start, how did it end, what were people wearing, how did the sex feel, etc. SH was a young child when she says these things happened to her. She was clear and unshaken in the details that made an impression on her young mind. It makes sense that a child would remember details like running to the kitchen to drink her favorite milk or that her father was shaking, rather than more adult details like what his penis looked like.
- [60] The defence notes two significant details in SH's evidence at trial that were not part of her video statement: the incident involving pink hair dye in the ensuite bathroom shower, and the instruction from BH to "suck his penis like a lollipop".
- [61] The former in my view is a factual detail I would not expect SH to have included in her statement to the police. The potential significance of the pink hair dye incident emerged from the evidence at trial. The latter, on the other hand, is properly regarded as an inconsistency because Constable Page asked SH what else she could remember about the oral sex.

- [62] It is important when assessing the evidence of a child to consider both consistencies and inconsistencies in their testimony. As Dickson J.A. explained in *M.D.*:
- [69] In *Untinen*, this Court rejected the Crown's submission that mere consistency between a videotaped statement admitted under s. 715.1 and a complainant's testimony at trial can add weight to, bolster or corroborate the complainant's account when testifying: at paras. 53, 56. However, speaking for the Court, Justice Fitch also affirmed that both consistencies and inconsistencies between a complainant's videotaped statement and trial testimony may be relevant for the purposes of credibility assessment, depending on the context and the use to which they are put:
- [76] ... Where inconsistencies are raised to challenge the credibility of the complainant when a video statement is tendered, the truth-seeking function of the trial demands that the entirety of the complainant's account be scrutinized, including internal inconsistencies as between her video statement and trial testimony, in deciding whether the inconsistencies relied on by the defence so impact on the credibility of reliability of the complainant as to give rise to a reasonable doubt.
- [Emphasis added.]
- [63] In this case, SH gave evidence her father told her to "suck his penis like a lollipop" at the preliminary inquiry as well as at trial. The Crown does not rely on her evidence at the preliminary inquiry as a prior consistent statement; instead, it argues, and I agree, that the previous evidence rebuts the suggestion by the defence that SH included this detail to bolster her evidence at trial.
- [64] Moreover, it is important to recognize, with children in particular, that disclosure of sexual abuse may be incremental: *R. v. Garford*, 2021 ABCA 338 at para. 22. In other words, details like what her father said may emerge over time.
- [65] For these reasons, I do not find SH's failure to tell Constable Page that her father told her to "suck his penis like a lollipop" problematic in terms of her credibility.
- [66] The defence also relies on evidence of unrelated dishonesty. SH stole money from her stepmother's purse. BH testified that this occurred on multiple occasions. While the act of stealing money is clearly dishonest, SH was forthright about it in her evidence. It does not in my view detract from her credibility as an honest witness under oath.
- [67] SH also lied, one way or another, to the MCFD social workers. When she was first asked about the alleged abuse, SH denied anything involving private parts, but then disclosed sexual touching.
- [68] The defence argues that SH's initial statement to the social workers was both the truth and a prior inconsistent statement. In my view, the explanation given by SH--that she was initially confused and frightened when asked by the male social worker, but then felt safer when speaking to the female social worker alone--makes sense in the circumstances. This is not a

case in which a complainant provided a considered statement that she later changed after an opportunity to consider her answers. Rather, in this case, SH she gave conflicting answers to a question within the same interview, when asked by different people.

- [69] The necessary implication of accepting her evidence at trial is that she lied when she was first asked about the abuse by an adult. This does not in my view detract from her credibility. Expecting SH to provide full and honest disclosure when first asked by an adult would essentially apply the myth that real victims of sexual assault disclose the abuse at the first opportunity.
- [70] It is also notable in my view that SH did not initiate the disclosure. It appears that MCFD was investigating because, after SH told her friend, the friend told her own mother, who then told someone in authority. SH did not intend or expect the information she disclosed to her friend to go any further than the friend. She testified that she regretted telling her friend because she did not want social workers, police, or the courts involved in her life.
- [71] In my view, this evidence reflects the very real conflict SH experienced as a complainant against her own father. It is clear that she loves her father and does not want harm to come to him. When asked by the police interviewer about her parents, SH exclaimed: "my dad's amazing and my stepmom is pregnant" (p. 20, l. 23). She said that she gets along with her dad "really well" (p. 23, l. 1), and that she hoped she could see him on her upcoming birthday (p. 27, l. 36).
- [72] Asked if her dad had ever threatened her, SH said "no - he just told me that if someone finds out then he's going to jail and I don't want my dad in jail 'cause we have a strong connection" (p. 60, l. 38).
- [73] Asked how she felt about her dad, SH testified: "Well I still love him I don't want him going to jail - I don't wanta leave him cause if they take him away and puts him in jail it's - not only are they punishing him but they are punishing me" (p. 69, l. 26). She also said: "My father means way too much to me. He's the main part of my life. If he's gone most of my life is gone (p. 70, l. 18).
- [74] During the statement, SH became visibly upset at the mention of foster care. It was apparent that she understood that the result of having told her friend about the abuse was that she had been removed from her home and placed with her mother, with whom she had had little contact since she was two years old. It was also evident she was concerned that if her father is found guilty, she may not see him for some period of time, which is not something she wants.

- [75] A trier of fact is entitled to consider an absence of evidence of a motive to fabricate when assessing a complainant's credibility, although such absence cannot be determinative. The complainant's evidence must still be tested in light of all of the evidence and the burden of proof must remain on the Crown. Moreover, the accused must not be required to explain why the complainant would make up the allegations: *R. v. Swain*, 2021 BCCA 207 at paras. 29-33.
- [76] Here, I am not suggesting the Crown has proven the absence of a motive to lie. Rather, the Crown has shown that, as a matter of common sense, it is unlikely SH would lie in circumstances where she appreciates that her allegations of sexual misconduct may impact her own life negatively.
- [77] The Crown also relies on SW's evidence as confirmatory evidence.
- [78] The role of confirmatory evidence was discussed by Justice Fitzpatrick in *R. v. Razak*, 2019 BCSC 815 at para. 154, citing *R. v. Demedeiros*, 2018 ABCA 241, aff'd 2019 SCC 11, where the Alberta Court of Appeal stated:
10. In this appeal, what is described as "confirmatory" evidence is no more than a consideration of all of the evidence on the record to decide if the Crown had proven the case beyond a reasonable doubt. Whether evidence is relevant to the Crown's case, and whether it is of sufficient weight to influence the verdict, is factually driven. The weight to be given to the confirmatory evidence will be influenced by factors such as the independence of the confirmatory evidence from that of the complainant, how directly it relates to the essential elements of the case, and many other factors. It is simply another part of the trial judge's credibility and fact finding, and is only reviewable for palpable and overriding error. Whether evidence can be confirmatory is a common sense analysis of whether the evidence can provide comfort to the trier of fact that the witness is telling the truth: *R. v. Khela*, 2009 SCC 4 at para. 39, [2009] 1 SCR 104. To be given confirmatory weight, evidence need only be more consistent with the complainant's version of events than with another version: *R. v. T.W.S.*, 2018 BCCA 119 at para. 40.
- [Emphasis in *Razak*.]
- [79] In this case, SW testified that she saw pink hair dye on the tiles in the shower of the principal bedroom ensuite bathroom at BC Street. SW recalled going into the ensuite with EB and being shown the pink stain on the new tiles. SW disagreed with the suggestion put to her in cross-examination that she saw this stain in the main bathroom.
- [80] SW testified that she dyed SH's hair in the main bathroom the day before she saw the pink hair dye in the ensuite. She explained that hair dye is normally left in for a while and that it will run before it is washed out. She testified that she had told SH she would help her wash her hair out. She testified that SH was upset when she was confronted by EB about the stain in the ensuite and that SH said it was not her fault.

- [81] SH did not recall saying anything in response to EB's scolding. SW's evidence that SH said it was not her fault is inadmissible hearsay if those words are tendered by the Crown as evidence that BH forced SH to use the ensuite shower with him. However, SW's evidence about the pink hair dye and the exchange between SH and EB is admissible to place SH in the ensuite shower, a shower that BH acknowledges she would not normally use. I agree with the Crown that it may be relied upon as some support for the credibility of SH's evidence that she showered with her father in the ensuite bathroom.
- [82] The second point of potential support comes from SW's evidence of a conversation at the dinner table at BC Street. SW testified, and BH agreed, that the adults frequently encountered resistance from SH when they tried to get her to take a shower before bed, which was the normal time for her shower. SW recalled an evening, when she was asking SH to hurry up with her dinner and go have her shower, when BH said SH had already taken a shower that day. SW testified that BH then said that sometimes it was easier to get SH's "ass in gear" in the morning if they showered together.
- [83] SW did not mention this comment in her police interview in December 2021. When she first raised it in an interview with Crown counsel in 2024, she tied the comment to the pink hair dye incident before later correcting herself that those were actually two different conversations.
- [84] SW explained that she did not think to tell the police that BH had said something about showering with SH because its potential significance did not register on her at the time the comment was made or when she was interviewed. She testified that, when she was interviewed by the police, they seemed focused on whether she had witnessed anything inappropriate, not whether she heard something unusual. Although she was actually asked about what she knew about the allegations, I accept SW's explanation for why the conversation did not seem important at the time she gave a statement to the police.
- [85] In my view, SW was an independent witness whose evidence was generally reliable and credible. While she obviously cares about SH, SW also showed no animus toward BH. She did not seem to take a position on the allegations against him. I accept her evidence on the two points I have just discussed.
- [86] While this evidence does not directly corroborate any of SH's evidence of sexual abuse by BH, it provides some support for her evidence that he showered with her after the age of seven and therefore some support for her credibility.
- [87] SW also testified about an occasion when she smelled something "that smelled a lot like semen" on the bed in SH's room. In my view this evidence is not cogent enough to provide additional support for SH's credibility. As SW acknowledged under cross-examination, the smell could have been bleach or some other chemical. In my view, SW was speculating at the time about the origin of the smell, and has since found confirmation for her speculation in the allegations against BH.

- [88] Lastly, SW testified that she thought it odd how many towels she saw in the family laundry. Again, this evidence is not cogent enough to provide additional support for SH's credibility. SH did not recall using towels frequently with BH. She also testified that they washed the towels so that EB would not find out, which does not accord with leaving an overabundance of towels in the laundry where EB could easily find them.

D. Analysis of the Evidence as a Whole

- [89] It does not automatically follow from the W.(D.) framework that an accused who denies the allegations is entitled to an acquittal unless the trial judge can identify and articulate reasons why the denial is rejected. This is because the court does not assess the evidence of the accused in isolation. A trial judge may reject the evidence of the accused, and find that it does not give rise to a reasonable doubt, based on a considered and reasoned acceptance beyond a reasonable doubt of the conflicting evidence of the complainant: *R. v. J.J.R.D.* (2006), 215 C.C.C. (3d) 252 at para. 53, 2006 CanLII 40088 (Ont. C.A.), leave to appeal to SCC ref'd, 31767 (10 May 2007); *R. v. Redden*, 2021 BCCA 230 at para. 81.
- [90] On the other hand, it does not automatically follow from a finding that the complainant is a credible and reliable witness that the denial by the accused must be rejected. The trier of fact must still decide on the evidence as a whole, including that of the accused, whether the Crown has proven its case beyond a reasonable doubt: *R. v. Van Deventer*, 2021 SKCA 163 at paras. 26-29.
- [91] Put another way, the court must not compartmentalize the testimony of the complainant and the accused and then choose between the competing narratives, simply preferring one over the other. However, the court may, after comparing and contrasting the evidence as a whole, reject the evidence of the accused and find that it does not raise a reasonable doubt because the denial of sexual activity cannot stand in light of the cogency of the complainant's testimony: *R. v. R.M.*, 2023 BCCA 455 at paras. 69-70; *R. v. P.A.*, 2024 BCCA 93 at paras. 33-37.
- [92] In this case, BH and SH agreed on the basic timeline of where they lived and the layout of the [redacted for publication] condo and the BC Street house.
- [93] BH acknowledged showering with SH, but said it stopped by the time she turned seven. BH acknowledged seeing pink hair dye in a bathroom at BC Street, but said it was in the main bathroom. BH did not remember making the comment about sometimes showering with SH in the morning, but did not deny saying words to that effect. When pressed by Crown counsel, BH speculated that if he did say something about showering with SH, he must have been referring to the showers they took together before she turned seven.
- [94] I appreciate that BH was trying to be responsive to questions from Crown counsel, but his explanations of the evidence about showers do not make sense. First, regarding the pink hair dye incident, pink hair dye in the master bathroom does not explain why EB was upset with SH. EB was upset with SH because there was pink hair dye on the new tiles in the

ensuite shower. Second, the comment about showering together to get SH's "ass in gear" arose in a conversation at BC Street sometime in the second half of 2019 or in 2020, in the context of getting SH to take her evening shower. It is implausible in my view that BH would, in that context, refer to showers he took with his daughter years earlier at a different residence.

- [95] On the evidence as a whole, I reject BH's testimony he did not shower with his daughter after she turned seven. I am persuaded that he showered with her at BC Street.
- [96] More importantly, I accept beyond a reasonable doubt the core aspects of SH's description of the sexual behaviours by BH. I found SH to be a credible and reliable witness who endeavoured to tell the truth and accurately describe what happened to her. Although her memory of details and surrounding context was not good, her evidence of the sexual abuse itself was compelling. I have considered the asserted frailties in her evidence raised by the defence, but find that they do not undermine the credibility or reliability of her basic assertion that her father masturbated on her and touched her sexually with his penis and his fingers. Of lesser importance, but still factors, there is some confirmatory evidence supporting her credibility and no evidence that she has any motive to lie about these matters.
- [97] I find that this is a case in which the denial by the accused cannot stand in light of the cogency of the complainant's testimony. For these reasons, I reject BH's evidence and find that it does not give rise to a reasonable doubt.
- [98] On the evidence I do accept, I find that the Crown has proved beyond a reasonable doubt that BH masturbated and ejaculated on SH, touched her vagina with his penis and his fingers, performed oral sex on her and invited and allowed her to perform oral sex on him.
- [99] I find that the Crown has proved beyond a reasonable doubt that each of these sex acts happened at least once over the time period spanning December 2017 to December 2020, when SH was between eight and 11 years of age. However, the Crown has not proved beyond a reasonable doubt that BH committed each of these sex acts on multiple occasions or as a continuous pattern of behaviour over that time period. The evidence does not permit me to make findings as to the number, frequency or timing of specific sex acts, except to say that I am satisfied beyond a reasonable doubt that they each occurred as SH described, at least once. Some of the sex acts may have occurred in combination with others - for example, sexual touching on a bed, followed by sexual touching in a shower - however, to be clear, I am not suggesting that they may have all occurred as a single encounter. Rather, my conclusion is that the Crown has proved beyond a reasonable doubt that the sex acts set out in para. 98 each occurred at least once, either as separate acts or in combination with others, between December 2017 and December 2020.

[100] With respect to penile contact, I find that the Crown has proved beyond a reasonable doubt that BH touched SH with his penis and ejaculated on her vagina, but has not proved beyond a reasonable doubt that he penetrated her vagina with his penis.

IV. CONCLUSION

[101] As the essential elements of each offence have been proved beyond a reasonable doubt, I find BH guilty on the charges of sexual interference, invitation to sexual touching and sexual assault.

"Elwood J."

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