

CANADA / JUDGMENT

R. v. C.R.J.

2024 BCCA 308

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 308 R. v. C.R.J.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. C.R.J.,

2024 BCCA 308

Date: 20240829

Docket: CA49165

Between:

Rex

Respondent

And

C.R.J.

Appellant

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Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated
October 7, 2022 (conviction) (R. v. C.R.J., New Westminster Docket 83561-2).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

M.K. Brown

Place and Date of Hearing:

Vancouver, British Columbia

June 19, 2024

Place and Date of Judgment:

Vancouver, British Columbia

August 29, 2024

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Justice Fleming

Summary:

A jury found the appellant guilty of one count of sexual interference. On appeal, he says the trial judge erred in her instructions to the jury. She did not adequately explain the use to be made of evidence of delayed disclosure in the context of a case where the defence asserted motive to fabricate. HELD: Appeal dismissed. In the particular circumstances of this case, the jury was properly equipped to apply the law to the evidence. On a fair reading of the charge, as a whole and in the context of the record, the jurors would have understood that in assessing the credibility and reliability of the complainants' evidence, they were to consider the timing of the complainants' disclosures of sexual abuse, including delay, the context in which their disclosures were made (a contested family law proceeding), and variations in substance over time. These were the key factors and pieces of evidence underlying the defence theory of motive to fabricate.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] In October 2022, a jury found the appellant, C.R.J., guilty of one count of sexual interference of a child (I.S.), contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46. The offence encompassed multiple incidents of alleged sexual abuse, said to have occurred between January 2012 and September 2013.
- [2] The appellant was also charged with a second count of sexual interference involving I.S.'s younger sister (G.J.), with an offence date of January 2019 to March 2020. The second count was tried at the same time. However, the jury was unable to reach a verdict on that count and the judge declared a mistrial.
- [3] The appellant appeals the conviction involving I.S. on grounds that the judge erred in her instructions to the jury. Specifically, he says the judge did not adequately instruct the jury on the use it could make of evidence of delay in the disclosure of sexual abuse by I.S. He also says the judge unfairly undermined his reliance on this evidence in support of motive to fabricate by repeatedly warning the jury against drawing an adverse inference from delayed disclosure.
- [4] I am satisfied that in the circumstances of this case, the judge did not commit reversible error. Accordingly, I would dismiss the appeal.

Factual Background

- [5] It is not necessary to set out the entirety of the evidence adduced at trial. Instead, a brief synopsis of I.S.'s disclosures, the timing of those disclosures, and the surrounding context will suffice.
- [6] I.S.'s mother was dating the appellant in 2012-2013. He would stay with them several nights per week. I.S. was then six years old. In 2013, she told her mother the appellant had been "rubbing" her vagina.
- [7] I.S. was interviewed by the police in 2013. She did not disclose sexual abuse to them. Nor did she disclose sexual abuse to any counsellors or therapists she saw in 2013-2014. When asked at trial why she did not tell the police about the appellant's conduct, I.S. said she was afraid she was the "one in trouble".
- [8] Following the disclosure to I.S.'s mother, the appellant left the home and I.S. had nothing further to do with him. At that time, the mother was five months pregnant with G.J. (the appellant's daughter).
- [9] In 2019-2020, a parenting-time dispute arose between I.S.'s mother and the appellant, specific to G.J. They had an informal parenting arrangement in place, one that had been crafted without the assistance of a lawyer. Under this agreement, the mother had primary care of G.J. However, the appellant spent unsupervised time with her each week. The mother told C.R.J. that she was contemplating a move to another city. He opposed the move

and hired a lawyer to seek increased parenting-time with G.J. By this time, I.S. was 14 years old.

- [10] In response to the appellant's position, I.S.'s mother raised the 2013 disclosure. She first did this in person with the appellant and then later in correspondence with his lawyer. The correspondence was admitted at trial, albeit for a limited purpose. Among other things, the mother stated to the lawyer:

[The appellant] was not present before or after [G.J.'s] birth due to allegations of your client inappropriately touching one of my other daughters. I'm finding it very disturbing he is fighting so hard for more time with [G.J.] now she is approaching the age that my other daughter was when the incident occurred and saying its merely because I mentioned that a move may be beneficial in the future. My daughter was very young and too afraid to speak to councillors at the time so no charges were laid. Doesn't mean it didn't happen, doesn't mean the damage to the family didn't happen and it certainly doesn't mean I'm comfortable with allowing more time with [G.J.].

- [11] The mother testified she told I.S. that the things she said about the appellant in 2013 might arise in the family law proceeding. She wanted her daughter to be "made aware that the situation may come up". Subsequently, in March 2020, I.S. provided a statement to the police in which she disclosed sexual abuse in 2012-2013. She testified that she did so "because nothing was done about it the first time. Because [she] wouldn't talk. But then [she] realized [she] needed to do this For the safety of [her] little sister". G.J. also provided a statement to the police in 2020. She too disclosed sexual abuse, which she said occurred while staying at the appellant's home.
- [12] I.S.'s statement in 2020 contained details of sexual abuse that were not included in her 2013 disclosure to her mother. In response to a police summary of what she had said to them, I.S. agreed that on some occasions, the appellant would look at her vagina. On other occasions, he would engage in cunnilingus. I.S. made no mention of "rubbing" in the 2020 statement.
- [13] Following the complainants' 2020 statements, criminal charges were laid against the appellant in relation to both I.S. and G.J. By the time of trial in 2022, I.S. was 16 years old. Her testimony about the sexual abuse differed from the 2013 disclosure to her mother and from the 2020 disclosure to the police. At trial, she said that every incident of sexual abuse (as opposed to only some of them) involved cunnilingus. I.S. was challenged on the differences. She did not view her description of what took place as having changed from 2020. She said that when she answered questions in 2020, she understood herself to be telling the police that each incident with the appellant included him looking at her vagina and cunnilingus: "In my statement I meant he did both, that's why I agreed to both".
- [14] I.S.'s mother was called as a Crown witness. Among other things, she testified about the 2013 disclosure, her plan to relocate, the parenting-time dispute, and the fact that I.S. spoke to the police in 2020. In cross-examination, defence counsel (not counsel on appeal), suggested to the mother that she had threatened the appellant with the 2013 disclosure in response to

the parenting-time dispute and that she wanted to use her daughters' 2020 disclosures " against [C.R.J.] and the positions he was taking in the family law proceedings ". She denied this. She acknowledged, however, that as a result of the disclosures, C.R.J. was prohibited from having contact with G.J. and that the " family law proceedings went nowhere ", with the mother obtaining 100% of the parenting time.

[15] The appellant testified. He denied any form of sexual touching.

Grounds of Appeal

[16] The appellant raised three grounds of appeal in his factum. At the hearing of the appeal, he advanced only two.

[17] First, he says the judge did not adequately instruct the jury on the permissible use it could make of evidence of delay in disclosing sexual abuse when assessing whether I.S.'s testimony was tainted by motive to fabricate for purposes of the family law proceeding.

[18] Second, the appellant contends that the impairing effect of this first error was compounded by the judge correcting defence counsel's submissions about delay and leaving the jury with the erroneous impression that it could not draw an adverse inference against I.S. based on delayed disclosure between 2013 and 2020.

Standard of Review

[19] Both grounds of appeal allege errors in the final instructions to the jury. It is well-established that in deciding whether these errors occurred, the jury charge must be reviewed as a whole and in the context of the record, including the live issues at trial and the submissions of counsel: *R. v. Abdullahi*, 2023 SCC 19 at paras. 36-37.

[20] An "ambiguous or problematic statement" contained in one part of final instructions will not necessarily amount to reversible error: *Abdullahi* at paras. 41-42. Instead, instructions are reviewed with restraint and the overriding question is whether the jury was "properly equipped" with the law to apply to the evidence: *Abdullahi* at paras. 32, 34-35. "It is the substance of the charge that matters, not adherence to a prescribed formula or particular sequence ": *Abdullahi* at para. 35, internal reference omitted.

Discussion

A. The trial context

[21] In resolving the appeal, it is necessary to consider the appellant's theory of the case as presented at trial, what he asked the jury to conclude from the evidence, and how the judge addressed those issues in her instructions.

The appellant advanced motive to fabricate

- [22] The appellant's theory (or at least an integral part of it), was that the jurors should have a reasonable doubt about the credibility and reliability of the complainants' evidence because of the timing and the context in which they disclosed the sexual abuse described at trial. Early in the family law dispute, when C.R.J. expressed opposition to a possible relocation, the mother warned the appellant that what was said by I.S. in 2013 might come forward. She again made mention of the 2013 disclosure in correspondence with C.R.J.'s lawyer. From the appellant's perspective, the circumstances surrounding the complainants' 2020 disclosures raised a realistic possibility of motive to fabricate (orchestrated by the mother).
- [23] The defence theory of motive to fabricate was first laid bare for the jury in the appellant's opening statement, after the Crown closed its case.
- [24] Defence counsel told the jury that when the appellant learned of the mother's possible relocation with G.J., he reached out to discuss the issue. When he expressed his opposition to the move, the mother said: "Remember [I.S.] can say something any time". The appellant eventually hired a lawyer to oppose the relocation. According to defence counsel: "it was only when [C.R.J.] attempted to enforce his parental rights to prevent the move and sort out their respective finances and custody arrangement that the girls came forward with these allegations".
- [25] With this statement to the jury, the possibility of motive to fabricate sexual abuse in support of the mother's position in the family law proceeding was solidified as a live issue.

Pre-charge conferencing

- [26] As the trial progressed, the judge held pre-charge conferences with counsel. They discussed various issues in anticipation of the final instructions to the jury, including the use the jurors could make of the timing, the context, and the content of the complainants' pre-trial disclosures.
- [27] Early on, the judge told counsel she was contemplating an instruction to address the: interrelationship between the instructions we now give on sexual assaults with respect to stereotypical thinking and whether -- particularly around delay of disclosure and whether that needs -- those cautions need to be given here.

[Emphasis added.]

- [28] The pertinent instruction is found in *R. v. D.D.*, 2000 SCC 43 [D.D.]. In that case, the Supreme Court of Canada held that in sexual assault trials with evidence of delayed disclosure:

65 A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of

understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

[Emphasis added.]

See also, *R. v. Kruk*, 2024 SCC 7 at para. 41; *R. v. Crouch*, 2023 CMAAC 11 at paras. 22-30; and *R. v. Lacombe*, 2019 ONCA 938 at paras. 41-42.

[29] Defence counsel expressed concern about including a D.D. instruction. He told the judge he was not challenging the credibility and reliability of I.S. on the basis of delay alone. Consequently, a D.D. instruction might confuse the jury. It is helpful to review some of what was said by defence counsel in this regard:

defence is saying it's not delay alone, it's a -- various numbers of factors where opportunity was given for statements where statements were not made, where people didn't come forward even though they were taken to the police, for example, or taken to a counsellor and said nothing juxtaposed against the timing of when the statement does come forward.

Delay alone, we all know is a stereotype, but that's not what happened here. It's the timing of the disclosure in -- also in light of a number of other factors.

I am not saying that [a D.D. warning is] necessarily, in and of itself, problematic, but I just want to make it clear that the defence position is actually that there wasn't delay in this case.

And so in that sense it's different from that standard instruction, so I am concerned, I guess, just to clarify my concern is, is that that standard instruction that we normally use with respect to delay, doesn't apply quite in the same way in this case.

[Emphasis added.]

[30] As I understand these submissions, defence counsel was not opposed to a D.D. instruction, per se. However, if that instruction was included in the final charge, he wanted the judge to also emphasize that there was a permissible use to be made of the circumstances surrounding I.S.'s disclosure to her mother in 2013, the fact of non-disclosure to the police, counsellors, and therapists in 2013-2014, and the more detailed and materially different description of sexual abuse she provided to the police seven years later, in 2020. Defence counsel was concerned that without an instruction on permissible use, a D.D. warning would leave the jury with the erroneous impression that it could not use this evidence as a basis from which to draw an adverse inference about the credibility or reliability of I.S.'s testimony.

Closing submissions

[31] In the appellant's closing submissions to the jury, which occurred after the above-noted discussions, defence counsel addressed the complainants' disclosures. To assist the jurors, he provided them with an aide-mémoire in the form of a two-page written Timeline of Events that captured the main events in the case, including any and all disclosures between 2013 and 2020. The Crown did not object to the use of an aide-mémoire. Defence counsel justified its use by explaining that the appellant needed the jury to "clearly understand [the] sequence of events".

[32] In working through the Timeline, defence counsel highlighted I.S.'s 2013 interview with the police, in which she did not disclose sexual abuse:

Back in 2013, [I.S.] was brought to the police station for an interview [I.S.] did not disclose any touching, nothing whatsoever.

That's a reasonable doubt with respect to the allegations involving [I.S.]. If something in fact happened, why didn't [I.S.] disclose it to the police back in 2013? Well, she has an explanation for that.

The Crown asked her about that and her explanation was she thought she was the one who was going to get into trouble if she disclosed it, and I say to you that explanation makes no sense. Why? Because

[I.S.] was expressly told in 2013, during her initial interview with the [police] officer, that she would not get into trouble for anything she said.

if something in fact happened she would have disclosed it to the police back in 2013, and the fact that she didn't disclose it raises a doubt about whether it occurred and further supports [C.R.J.'s] denial.

[Emphasis added.]

[33] Defence counsel then turned to the fact that I.S. did not disclose sexual abuse to counsellors and therapists in 2013-2014:

Reasonable doubt after going to see the police [I.S.] is tak[en] to various different counsellors and therapists She never said anything to any of them, nothing.

The reason she didn't disclose it is because there was nothing to disclose. The reason she didn't disclose it is because, in fact, nothing happened. That's just yet another factor that supports and corroborates [C.R.J.'s] denial. That's reasonable doubt

[Emphasis added.]

[34] Specific to the 2020 police disclosure, defence counsel made this submission:

I have already talked to you about how [I.S.] didn't say anything to [the police], back in 2013 and I have already talked to you about how [I.S.] didn't say anything to her multiple counsellors or therapists in the time that followed that police interview.

[In 2019/2020, there was a parenting-time dispute.] [I.S.'s mother] was saying [C.R.J.], you push me, you cross me, [I.S.] will come forward with allegations of misconduct. And that's exactly what ended up happening.

And that also explains why [I.S.'s] version has changed over time. That's why you've got the various inconsistencies.

The timing of the allegations and the seriousness of the allegations should be extremely concerning to you, or anybody else looking at this case.

Are we supposed to just accept that it's a coincidence -- a coincidence that the girls came forward on their own initiative the minute after this correspondence [in which I.S.'s mother raised the 2013 disclosure with the appellant's lawyer]? Are we supposed to accept that that's just a coincidence after [the mother] threatened it in October or November of 2019? No way. No way are you going to accept that. You are not that naïve.

In light of [the mother's] previous threats, it is not hard to believe that [the mother] asked [I.S.] to make the allegation against [C.R.J.] in order to protect her mother within the family law proceedings. After all, isn't that what [the mother] had been threatening all along?

the timing of the disclosure looks unbelievable. It looks unbelievable because it is unbelievable.

[The mother] is at the heart of this case. She is the mother of both girls. All roads lead to [the mother]. She is a liar and she is the kind of person who would weaponize her children to get what she wants, and indeed I submit to you in the circumstances of this case, the circumstances of this case demonstrate that that's in fact what she did and it worked

[Emphasis added.]

[35] Two points emerge from these closing submissions, specific to I.S. and the issues raised on appeal.

[36] First, although defence counsel told the judge he would not invite the jury to draw inferences from the mere fact of delayed disclosure, his submissions did precisely that. It may not have been his intention, but defence counsel drew the jury's attention to the fact that I.S. did not disclose sexual abuse to the police, counsellors, and therapists in 2013-2014, and then invited the jury to conclude from the mere fact of non-disclosure that sexual abuse had not occurred. Statements such as "[t]he reason she didn't disclose it is because, in fact, nothing happened", plainly risked impermissible reasoning. Indeed, at the end of his closing submissions, defence counsel summarized in list-form the reasons why he said I.S.'s evidence should raise a reasonable doubt, and this included: (1) her "failure to tell the police anything happened way back in [2013]"; and (2) her "failure to tell many of her counsellors or therapists about it".

[37] The second point is that consistent with the appellant's opening statement to the jury, motive to fabricate was affirmed as a live issue for the jury's determination. Defence counsel did not use those precise words, but that was the effect of his submission. He told the jurors that the timing of I.S.'s disclosure to the police in 2020 and the inconsistencies between that disclosure, what I.S. said to her mother in 2013, and what she said at trial, should be "extremely concerning" and there was reason to believe that the 2020 disclosure as repeated at trial had come forward at the request of the mother in support of her fight against increased parenting-time with G.J. In fact, defence counsel went a step further and suggested actual fabrication: the mother is "the kind of person who would weaponize her children to get what she wants" and "that's in fact what she did" (emphasis added).

[38] This view of the appellant's closing submissions finds support in the Crown's response. Crown counsel clearly thought motive to fabricate had been raised by the defence and was an issue of such significance that it required a direct response in the Crown's closing address:

So now I'm going to move on to [the mother's] motive, and remember, and this feels a little bit complicated, but this is not her motive to lie but this is her motive to make both of her children lie. And of course, my friend's theory includes that she's lying, as well, about everything, but when we're talking about motive we're talking about her motive to make her children lie.

My friend submits that [the mother] didn't want to change the custody arrangements in 2020 and so she orchestrated all of these allegations.

[Emphasis added.]

[39] The judge was understandably troubled by defence counsel's closing submission about the use the jury could make of the fact of non-disclosure to the police, counsellors, and therapists in 2013-2014. Before she delivered her final instructions, she asked defence counsel whether this submission was contrary to the "Barton warnings", which caution against reliance on myths and stereotypes in cases involving sexual violence (R. v. Barton, 2019 SCC 33). This includes the myth or stereotype associated with delayed disclosure addressed in D.D.

[40] Defence counsel denied that he was asking the jury to invoke a myth or stereotype about how a victim of sexual abuse would typically behave, specific to disclosure. Rather, he said his intention was to challenge the credibility of the explanation I.S. provided for not disclosing to the police in 2013, namely, that she thought she was the one in trouble. Defence counsel said this explanation made no sense in light of the fact that I.S. was specifically told at the time that she would not get into trouble.

[41] The judge was not satisfied with this response. From her perspective, the defence submission about the 2013-2014 non-disclosure "came very close [to saying] 'You shouldn't accept her credibility because she didn't come forward to the police in 2013,' and, 'You shouldn't accept her credibility because she didn't speak to her therapists about this in 2013

and 2014". Accordingly, the judge said she would consider how best to address the issue in her final instructions. Her inclination was to include the defence submission, but then "restate the Barton warning afterwards". Defence counsel responded with: "That's fine".

Charge to the jury

[42] Prior to delivery of the final instructions, there was further discussion about how best to address the defence challenge to I.S.'s evidence and what could be done with the evidence surrounding disclosure. The judge was not prepared to tell the jury that the fact I.S. did not disclose to the police in 2013 was evidence that could be considered in assessing credibility. However, she was prepared to tell the jury--in support of the defence theory--that inconsistencies in I.S.'s disclosures over time and her explanation for why she did not say anything to the police in 2013 were relevant.

[43] At the start of her final instructions, the judge cautioned the jurors about "unconscious bias" and "unwarranted assumptions". (She had also provided this warning in her opening instructions.) The judge said: "There is no typical victim, typical assailant, typical situation, or typical reaction".

[44] Specific to the issue of disclosure, the judge provided the D.D. instruction as contemplated:

There was a time when it was assumed that victims, including child victims, would report a sexual assault or sexual abuse immediately, and not associate with the perpetrator afterwards. In recent years, the law has set aside these stereotypes. The law recognizes young people who are the victims of trauma like sexual interference do not respond and behave in any particular way. Some will avoid the perpetrator and some will not. Some will make an immediate complaint, some will delay, and some will never disclose the abuse. The reasons for delay are many and at least include embarrassment, fear, shame, guilt, or a lack of understanding and knowledge.

Because we know that victims of sexual interference behave differently, the absence of avoidant behaviour or a change in behaviour is logically irrelevant and, as such, cannot form the basis of a credibility assessment. This is all the more so when dealing with child victims who often fail to make early disclosure and may attempt to normalize behaviour for any number of reasons.

You must ensure that any verdict you reach is not based upon these myths or stereotypes.

[45] Following this instruction, and after explaining the presumption of innocence, the jury's obligation to consider the whole of the evidence, and the Crown's burden of proof, the judge turned to the issues of credibility and reliability. Among other things, she told the jurors that in assessing I.S.'s testimony, they should ask whether there was a reason why she would not tell the truth and whether she had motive to lie. The judge then said:

In assessing the evidence of [I.S.] and [G.J.], the timing of their initial disclosures and subsequent disclosures is simply one circumstance to consider as part of the overall circumstances. You should also consider the explanations [I.S.] provided for the delay or additional later disclosure, the nature of those disclosures, and any additional factors that you consider may have affected

those disclosures. Notwithstanding [defence counsel's] submissions yesterday, you should not conclude that [I.S.] is less credible based solely on a delay in disclosing her allegations against [C.R.J.] in 2013 or in 2014, standing alone.

[Emphasis added.]

[46] The judge next provided the jury with an instruction specific to the appellant's testimony (R. v. W.(D.), [1991] 1 S.C.R. 742, 1991 CanLII 93 [W.(D.)]). No issue is taken with the correctness of that instruction.

[47] The judge returned to the task of assessing credibility and reliability and explained the use the jury could make of inconsistencies between a witness's testimony and previous statements made by them:

In assessing the credibility of the witnesses, you will have to consider the significance of any inconsistencies between their testimony at trial and any previous statements or evidence they have given. You should consider whether the inconsistency is on a minor point or a crucial one. You should also consider whether it is the result of confusion or forgetfulness or whether it affects a deliberate attempt to mislead. Finally, you should consider any explanation for the inconsistency.

An important example of prior statements in this trial are the disclosures made by [I.S.] and [G.J.] prior to their testimony in court.

With respect to [I.S.], you must not use any consistency you find between the previous disclosures of [I.S.] to her mother, the police, or Crown counsel as confirmation of her evidence at trial regarding the same incidents.

[Emphasis added.]

[48] The judge next turned to the evidence of the correspondence between I.S.'s mother and C.R.J.'s lawyer in which the mother raised the 2013 disclosure. Text messages between the mother and the appellant had also been adduced. The judge explained that this material was not admitted for the truth of its content. Rather, it was evidence that could only be considered:

in relation to the general nature of the family dispute in 2020, and the history and general timing of the family dispute in relation to the disclosures by [I.S.] and [G.J.]. It is relevant for that purpose only.

[Emphasis added.]

[49] Still on the subject of hearsay, the judge addressed I.S.'s 2013 and 2020 disclosures and warned the jury against using the content of those disclosures as confirmatory of the allegations made at trial:

Another important example of hearsay evidence in this case is the evidence of the disclosures made by [I.S.] to her mother, [C.D.], in 2013 and later in 2020. You also heard evidence of a statement [I.S.] made to police on March 5, 2020. If you find that [I.S.] made these disclosures, you may consider them to show the history and timing of the disclosures, how they came about, and to assess the credibility of the witnesses. But you must not use the content of those disclosures as proof that what [I.S.] said was true, because the content of her statements to her mother and to the police officer is hearsay evidence and therefore inadmissible to the proof -- to prove the truth of what was disclosed.

[Emphasis added.]

[50] From here, the judge moved to various other issues, including reiterating the need to consider the whole of the evidence and explaining the constituent elements of the offence. When addressing the element of intentional touching, which the Crown must prove to obtain a conviction for sexual interference, the judge said:

[C.R.J.'s] defence is that the incidents alleged by [I.S.] never occurred.

In this regard, [C.R.J.] relies in part on changes in [I.S.'s] disclosures. My recollection of the evidence is that, in 2013, [I.S.] disclosed to her mother that [C.R.J.] touched and licked her vagina. In March 2020, [I.S.] told the police officer that, "He would either look at me or the stuff I told you" and that "stuff" meant licking her vagina. And then at trial, [I.S.'s] evidence was that every incident involved licking of her vagina.

[C.R.J.] also says that the timing of the disclosure in March 2020 is particularly significant because it coincides with an escalation in [C.R.J.'s] family dispute with her mother, [C.D.]. My recollection of the evidence on this point is that [I.S.] stated that she made this disclosure because she was concerned about her sister, because she was turning six, although she had no reason to believe anything had happened to her sister at that time. She denied that her mother talked about her family dispute with [C.R.J.] at that time. In cross-examination, [the mother] acknowledged that she did talk to [I.S.] about the possibility that her allegations against [C.R.J.] might come out in the family dispute, and this was the context in which [I.S.] chose to make her 2020 statement to police.

[Emphasis added.]

[51] I note that the latter instruction (delivered verbally), was factually incorrect. The evidence is that in 2013, I.S. did not say the appellant "licked her vagina". In the written charge, however, the judge used the word "rubbed" in this same paragraph. It was the written charge that remained with the jury for its deliberations. The difference between the verbal and written charge has not been raised as an issue on appeal.

[52] After this instruction, the judge reminded the jurors of the W.(D.) principles, addressed some additional items, and then turned to the parties' positions. The appellant's primary position was that he denied touching the complainants in a sexual manner; he provided candid and forthright testimony in this regard; and his testimony was sufficient to raise a

reasonable doubt. However, the appellant also said there were a number of specific reasons why the jury should doubt the credibility and reliability of the complainants' testimony. The judge set out those reasons. Specific to I.S., she said they consisted of: (1) I.S.'s explanation for not disclosing sexual abuse to the police in 2013 was not credible; (2) she provided "dramatically different" versions of the abuse over time; (3) she failed to disclose the "most memorable moments" to her mother in 2013; (4) she disclosed to the police in 2020 at the same time C.R.J. was trying to increase his parenting-time with G.J.; and (5) the mother is the "kind of person who would weaponize her children to get what she wants".

[53] The judge did not include in this list two of the reasons for doubting I.S.'s testimony that had been advanced by defence counsel in his closing submissions: (1) the fact that I.S. did not disclose sexual abuse to the police in 2013; and (2) the fact that she did not disclose sexual abuse to counsellors and therapists in 2013-2014. The judge did not include these items because she thought they would encourage impermissible reasoning.

[54] In summarizing the defence position, the judge made no mention of "motive to fabricate". Defence counsel had not used this language in his closing submissions. Indeed, in pre-charge discussions, he specifically asked the judge to not describe I.S. as a fabricator. He said: "I am not going to argue exactly what was going on in [I.S.'s] mind I don't know who fabricated the allegations It may have been [I.S.], it may have been somebody else".

[55] After summarizing the defence position, the judge said this:

With respect to defence counsel's submissions to you, I remind you of my warning at the outset of these instructions that the law recognizes that young people who are the victims of trauma like sexual interference do not respond and behave in any particular way. Some will make an immediate complaint, some will delay, and some will never disclose the abuse. The reasons for delay are many. A failure to disclose, or a delay in disclosing, without more, is not a basis to not believe a complainant.

Because we know that victims of sexual interference behave differently, the absence of avoidant behaviour or a change in behaviour is logically irrelevant and, as such, cannot form the basis of a credibility assessment. This is all the more so when dealing with child victims who often fail to make early disclosure and may attempt to normalize behaviour for any number of reasons.

[Emphasis added.]

[56] This was the last instruction provided on the use the jury could make of non-disclosure of sexual abuse, or a delay in disclosure.

[57] After the charge was delivered, the judge asked whether counsel objected to any parts of the instructions. Defence counsel did not express concern specific to the above-noted excerpts.

B. Alleged errors in the charge

[58] On appeal, the appellant says the instructions surrounding the evidence of I.S.'s disclosures did not properly equip the jury to understand how it could and could not consider that evidence in assessing the credibility and reliability of her testimony.

[59] The judge told the jury more than once that delayed disclosure "standing alone" or "without more" is not a basis from which to disbelieve a complainant's evidence. However, this was a case in which the defence asserted that the complainants' 2020 disclosures came about during the course of and in response to a parenting-time dispute and, importantly, they occurred after I.S.'s mother had forewarned the appellant that allegations may be forthcoming. This included a disclosure from I.S. that was materially different in substance from what she had said to her mother in 2013. From the defence perspective, the evidence surrounding the disclosures raised a realistic possibility of motive to fabricate the specifics that I.S. provided to the police in 2020 and subsequently described at trial. In this context, says the appellant, the judge had to go beyond the standard D.D. warning and make sure the jury understood there was a permissible use of the fact that I.S. said nothing about sexual abuse to the police, counsellors, and therapists after first disclosing to her mother in 2013, and then later came forward with a more detailed and varied disclosure while the mother was in the midst of a contested family proceeding. The appellant put it this way in his factum:

as a matter of law, the jury was entitled to disbelieve I.S. if they concluded that the timing or the delay in her disclosure was, on its own, due to the motive to fabricate. But this was not at all made clear to the jury. If anything, the judge's instructions suggested just the opposite: that they could not disbelieve her evidence based only on the alleged motive to fabricate.

.. the judge [should have clearly explained] to the jury the permissible and impermissible purposes of which a delay in disclosure could be considered. This did not occur here to the prejudice of the appellant's defence.

the cumulative effect of the judge's repeated instructions against considering I.S.'s delay in disclosure - expressed as both general legal propositions and pertaining to I.S. specifically - created a real risk in the jury thinking that they could not do anything with I.S.'s past disclosures and to adopt a hands-off approach entirely as it related to any of her previous statements and disclosures.

[Italics in original; underlining added.]

[60] In responding to the appeal, the Crown emphasizes the functional and contextual nature of appellate review of jury instructions. It says that when the final charge is considered as a whole and in the context of the record, the judge "made clear that the jury should consider the defence position concerning [the] timing of I.S.'s disclosures in relation to the alleged motive to fabricate".

- [61] In support of this position, the Crown's factum sets out various excerpts from the judge's mid-trial and final instructions, as well as defence counsel's closing submissions, which it says cumulatively highlighted: (1) the evidence surrounding the parenting-time dispute; (2) the timing of the 2020 disclosures of both complainants in the context of that dispute; (3) the defence submission that the fact the complainants' disclosures occurred in 2020 was "particularly significant" because they ran in tandem with an escalation in the family law dispute; and (4) the reasons why the defence said I.S.'s testimony was not credible, including the timing of the 2020 disclosure and the mother's alleged proclivity to "weaponize her children to get what she wants".
- [62] The Crown submits that a D.D. instruction was necessary given defence counsel's closing submissions. Moreover, including this instruction did not undermine the defence theory or preclude the jury from considering the fact of non-disclosure or delay in disclosure between 2013 and 2020. In fact, the jury was specifically told that the timing and the context of I.S.'s 2020 disclosure was relevant to its deliberations. The only thing the D.D. instruction did was properly warn the jury against myths and stereotypical thinking.

C. Analysis

- [63] The fact that a particular piece of evidence carries the potential for impermissible reasoning based on a myth or stereotype applied to complainants in cases involving sexual violence does not mean it cannot be used for any purpose: *R. v. Roth*, 2020 BCCA 240 at para. 130; *Kruk* at para. 65. This includes evidence of delay in disclosing the fact of sexual abuse.
- [64] It is now well-accepted that by itself, the fact of non-disclosure or delayed disclosure cannot support an inference that the alleged sexual violation must not have occurred, or, specific to adult complainants, that the sexual contact must have been consensual: *Kruk* at para. 41; *Lacombe* at paras. 41-42; *D.D.* at para. 65. To allow this form of reasoning would give credence to "now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse": *D.D.* at para. 63, internal references omitted.
- [65] However, the law also recognizes that there may be cases in which the fact of non-reporting or delayed disclosure is relevant to assessing the credibility and reliability of a complainant's testimonial narrative because there is evidence that supports a non-stereotypical nexus between that narrative and a live issue in the case. In other words, there may be cases in which the evidentiary record allows for inferences to be drawn from the fact of non-reporting or delay that are not grounded in myths or stereotypes of how a victim of sexual violence is or is not expected to behave.
- [66] As noted by Professor Lisa Dufraimont in "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44:2 *Queen's L.J.* 316 at 346:

Suggestions that delayed disclosure [is] always irrelevant or inadmissible, in general or in relation to particular issues like credibility or consent, have been rejected. Instead, the law prohibits stereotypical or discriminatory lines of reasoning flowing from these forms of evidence, but acknowledges that they may be relevant for other, legitimate inferential purposes.

[Emphasis added.]

[67] Whether there is a "legitimate inferential purpose" to evidence of delayed disclosure is necessarily assessed on an individualized basis and contextually informed by the factual mosaic of the case. In this case, the defence asserted motive to fabricate (recognized to render delayed disclosure relevant), and it is on this basis that the appellant says the jury required proper instruction about permissible use of the evidence surrounding I.S.'s disclosures between 2013 and 2020.

[68] In *R. v. Greif*, 2021 BCCA 187, leave to appeal to SCC ref'd 39689 (4 November 2021), this Court explained how evidence surrounding the timing of disclosure may be relevant where the defence alleges motive to fabricate:

[63] It would be impermissible for a trier of fact to draw an adverse inference against a complainant's credibility by relying on the stereotype that a true victim of sexual abuse would not delay in reporting, so a complainant who delayed reporting is less likely to be telling the truth. However, in the appropriate circumstance, it would not be improper for the trier of fact to consider whether the timing of disclosure supports a defence argument that the complainant had a motive to fabricate the events, which would be relevant to their credibility.

[Emphasis added.]

[69] The Supreme Court of Canada approved of this same use in *Kruk*:

[65] just because the evidence happens to align with a myth or stereotype does not necessarily mean that any inferences that can be drawn from that evidence will be prejudicial. While it is a myth that women regularly fabricate allegations of sexual assault, it is not an error to consider whether the circumstances of a particular case support the existence of a motive to fabricate (see, e.g., *R. v. Esquivel-Benitez*, 2020 ONCA 160, 61 C.R. (7th) 326, at paras. 9-15) -- indeed, where the defence adduces evidence on this point, a trial judge is obliged to consider it to give full effect to the presumption of innocence, and a failure to do so constitutes reversible error.

[Italics in original; underlining added.]

[70] The Crown accepts that motive to fabricate was a live issue here. It accepts that the evidence surrounding the chronology, the context, and variations in the substance of I.S.'s disclosures provided a foundation from which the defence could advance motive to fabricate. The jury did not have to accept the defence theory. I.S. disclosed "rubbing" in 2013 and she provided explanations for why she did not disclose to the police at that time. She also explained

inconsistencies between her disclosures. She was only six years old when she first disclosed to her mother and 14 when she disclosed to the police in 2020. However, it cannot be said on this record, considered as a whole, that motive to fabricate the sexual abuse described at trial was speculative and not open for the jury's consideration.

- [71] In that context, we must decide: (1) whether the judge adequately (sufficiently) instructed the jury on the permissible use of the disclosure evidence; and (2) whether, by repeatedly warning the jury about impermissible use of delayed disclosure, the judge unfairly undermined or diminished defence reliance on that evidence.
- [72] The appellant says the judge's approach in this case is similar to the error found to exist in *R. v. Crampton*, [2004] O.J. No. 3161, 2004 CarswellOnt 3138 (Ont. C.A.).
- [73] In *Crampton*, the teenage complainant told her mother of being sexually assaulted eight or nine days after the events. She reported the incidents to the police approximately one month later, but did not want criminal charges. Eventually, criminal charges were sworn (approximately one year later). At trial, the defence asserted motive to fabricate.
- [74] The judge in *Crampton* included a D.D.-type instruction in the jury charge:
- 4 As a matter of law, it cannot be said that a complainant who is wronged will always complain at the first opportunity. Delays in disclosure must not be used to support an adverse inference against the complainant's credibility or an inference that she is more likely to have consented[.]
- [75] The Ontario Court of Appeal held it was appropriate to include this instruction, although it would have been preferable for the judge to make clear that the impermissible inference addressed in D.D. is one drawn from the mere fact of delayed disclosure. Or, articulated differently, from delayed disclosure "standing alone": at para. 5.
- [76] However, the Court went on to hold that in light of the defence assertion of motive to fabricate (not mentioned anywhere in the final instructions), it was incumbent on the judge to address that position, and more importantly, to make sure the jurors understood that although they could not draw an adverse inference from the mere fact of delayed disclosure, they were "required" to consider whether the delay reflected motive to fabricate:
- [6] We do not accept the Crown's submission that it was unnecessary for the trial judge to refer to the defence position concerning fabrication in his jury charge, since defence counsel had fully canvassed the defence theory in his closing address. Although it is unnecessary that a trial judge comprehensively review the evidence in his charge, it is important that the trial judge alert the jury to the main components of each party's position. In this case, the allegation of fabrication went hand-in-hand with the defence theory of consent and the trial judge should have pointed it out to the jury specifically. More significantly however, having instructed the jury that delayed disclosure does not create an adverse inference, it was necessary that the trial judge confirm that, in the circumstances of this case, the jury was nevertheless required to consider whether the delay in disclosure was the result of fabrication after the complainant had spoken to her boyfriend.

[Emphasis added.]

- [77] The Court found that the deficiency in the final instructions amounted to a "serious error" and was "in no way neutralized by defence counsel's failure to object": at para. 13. The Court ordered a new trial.
- [78] Another case in which a similar issue arose is *R. v. B. (W.)*, [2005] O.J. No. 3578, 2005 CarswellOnt 3929 (Ont. C.A.) [B. (W.)]. Neither the Crown nor appellant's counsel referred us to this decision.
- [79] In *B. (W.)*, the appellant was charged with eight offences of violence against one adult complainant, including three counts of sexual assault. The complainant lived with the appellant. In April 2002, she reported to the police that the appellant had choked and threatened her earlier in the day. She made no further allegations. She later spoke with the interviewing police officer by telephone on more than one occasion, but made no further complaints: at para. 2.
- [80] Approximately one month later, the complainant prepared a written statement with the assistance of a friend in which she said the appellant had sexually assaulted her the month before she made her initial report to the police. In light of this statement, the police re-interviewed the complainant. In the interview, the complainant alleged a total of three sexual assaults, which she said occurred in February, March, and April 2002: at para. 3.
- [81] At trial, B.W. told the jury it should have a reasonable doubt about the credibility of the complainant because, in part, she failed to disclose the three sexual assaults when first interacting with the police, or in the written statement that resulted in a second police interview: at para. 9. In response, the Crown "reviewed at some length" the danger of stereotypical thinking with the jury and emphasized there may be a number of reasons why someone does not immediately report sexual or intimate partner violence: at para. 10.
- [82] The final instructions in *B. (W.)* twice provided a D.D.-type instruction. The judge told the jury that the timing of a complaint is "simply one factor" to consider in assessing credibility, and that "[d]elay in disclosure must not be used to support an adverse inference against the victim's credibility" (*italics omitted*). He highlighted the defence position that the complainant was neither trustworthy nor reliable because "she had ample opportunity to complain about the sexual assaults, but didn't". The judge then said: "You might think one would say right away to the police, but that's stereotyping, as I told you. You cannot draw an adverse inference because she made a complaint 40 days later or 30 days later, if you so believe her to be credible": at para. 11, *italics omitted*.
- [83] On appeal, B.W. argued that the judge misdirected the jury on the relevance of the delayed and incremental disclosure. The Ontario Court of Appeal found there was room for improvement in the judge's use of the D.D. instruction:

13 it would have been preferable had the trial judge instructed the jury, "Delay in disclosure standing alone must not be used to support an adverse inference against the victim's credibility," and, "You cannot draw an adverse inference only because she made a complaint 40 days later or 30 days later, if you so believe her to be credible."

[Italics in original.]

[84] However, the Court was satisfied that when the instructions were read as a whole, in light of the complainant's evidence and the closing submissions, the less-than-perfect articulation of the D.D. warning did not amount to "an error of such gravity" that it resulted in an unfair trial: at para. 13. The Court distinguished B. (W.) from Crampton on the basis that in the latter case, the judge made no reference to the defence theory of fabrication:

14 I reject the appellant's submission that the rationale for excluding delay as a consideration when assessing a complainant's credibility -- namely, the invalid stereotype that a credible victim would never delay reporting sexual abuse -- was not at play in this case.

15 The fact that the complainant went to the police on April 12, 2002, yet made no complaint of sexual assault that day was certainly a factor for the jury to consider. However, it remains the case that the explanation the complainant offered was that the delay was the product of what Major J. in R. v. D. (D.) described as "embarrassment, fear, guilt, or a lack of understanding and knowledge."

16 In my view, this case does not fall into the same category as R. v. Crampton, [2004] O.J. No. 3161 (Ont. C.A.). In that case, the trial judge told the jury that they could not take into account delay in disclosure and then failed to make any reference to the defence theory of fabrication, which was based on the fact that the complainant had only disclosed her allegations after her boyfriend had learned that she had been with the accused on two consecutive evenings. In the case at bar, the trial judge presented the defence theory to the jury.

17 At the end of the day, I am satisfied that the jury would have understood that they were entitled to consider the factor of delay in assessing the complainant's credibility, but that they were to do so with caution and avoid falling into the trap of stereotypical thinking. Accordingly, despite the shortcomings I have noted in the trial judge's instructions on this point, I would not give effect to this ground of appeal.

[Emphasis added.]

[85] For cases involving related discussions, see also: R. v. Marshall, 2017 ONCA 1013 at paras. 12-21, leave to appeal to SCC ref'd 38715 (31 October 2019); R. v. A.W.B., 2015 ONCA 185 at paras. 45-46 [A.W.B.]; and R. v. W.W.M., 205 C.C.C. (3d) 410, 2006 CanLII 3262 (Ont. C.A.) [W.W.M.] at paras. 5-12. Before us, the Crown cited Marshall as authority in support of its position. In that case, the defence did not allege "a specific motive to fabricate": at para. 21. The same is true of both A.W.B. and W.W.M., in which trial judges were found to have not erred by including a D.D. instruction without flagging permissible inferences to be drawn from evidence of delayed disclosure.

- [86] As stated, whether an instruction on the use that can or cannot be made of delayed disclosure properly equips a jury for purposes of its deliberations will be assessed case-by-case and contextually informed. The line between an acceptable and an erroneous instruction will not always be clear. On the one hand, juries must be steered away from impermissible reasoning that is grounded in myths and stereotypes. On the other hand, judges must ensure that the presumption of innocence is given full effect. When the defence advances a non-speculative theory or an issue arises on the evidence that renders the fact of non-reporting or delayed disclosure relevant, the judge must make clear the jury's obligation to consider that evidence in its proper context and for a permitted purpose. Depending on the circumstances, a failure to do so may amount to reversible error.
- [87] In this case, the defence asserted motive to fabricate the sexual abuse that was disclosed by I.S. in 2020 and testified to at trial. The judge did not mention "motive to fabricate" when summarizing the defence position in her final instructions. Nor did she pointedly relate the evidence surrounding I.S.'s disclosures to that theory. In my view, it would have been more effective and safer to do so. Jury instructions should: (1) explain the theories of each side; and (2) review the salient facts that support the theories and the case for each side, relating the facts to those theories: *R. v. Daley*, 2007 SCC 53 at paras. 122, 143; *R. v. Charles*, 2011 ONCA 228 at paras. 16-19, leave to appeal to SCC ref'd 36074 (4 December 2014).
- [88] However, applying a functional and contextual standard of review to this case, which we are obliged to do, I am satisfied the key factors underlying the defence theory were sufficiently left with the jurors and the relevant evidence was highlighted for them. Based on everything said by the judge, these jurors would have understood that in assessing the credibility and reliability of I.S.'s evidence, they were to consider the entire chronology of her disclosures, including the seven years between the first disclosure in 2013 and the 2020 statement to the police, the full context of the 2020 disclosure, and variations in substance over time.
- [89] I agree with the Crown that in light of the defence closing submissions, a D.D. instruction was necessary. The judge was correct about this, notwithstanding defence counsel's protestations to the contrary. The appellant's closing submissions invited the jury to have a reasonable doubt about I.S.'s testimony based on the mere fact that she did not disclose sexual abuse in 2013-2014 after having initially disclosed to her mother. This the jury could not do.
- [90] I also accept that on a fair reading of the final charge, the jury's attention was directed to permissible use of the evidence surrounding I.S.'s disclosures between 2013 and 2020, including delay in disclosing the details of sexual abuse that were eventually described at trial.

- [91] The judge told the jury that the "timing" of I.S.'s "initial disclosures" and "subsequent disclosures" was a "circumstance to consider as part of the overall circumstances" in assessing her evidence (emphasis added). This instruction logically brought into play the fact of a first disclosure in 2013, non-disclosure to the police, counsellors, and therapists in 2013-2014, and then a further and more detailed disclosure seven years later, in 2020.
- [92] She also said that in assessing I.S.'s evidence, the jury should consider "the explanations [she] provided for the delay or additional later disclosure, the nature of those disclosures, and any additional factors that [the jury considered] may have affected those disclosures" (emphasis added). This instruction highlighted the fact of delay in disclosure, focused the jury's attention on the substance of the disclosures (and by necessary implication the differences between them), and directed the jurors to consider the disclosures in the context of "additional factors" that may have affected them. This would include, of course, the broader context of the family law proceeding and the mother's position in that dispute.
- [93] In both a mid-trial instruction and the final charge, the judge told the jury that the communication between the appellant and the mother relating to the family law proceeding was not admissible for its truth, but could be "considered in relation to the general nature of the family dispute in 2020, and the history and general timing of the family dispute in relation to the disclosures by [I.S.] and [G.J.]" (emphasis added). These instructions connected the fact of disclosure in 2020 to the dispute between the appellant and the mother and the related dynamics.
- [94] The jurors were told that from the appellant's perspective, "the timing of the disclosure in March 2020 [was] particularly significant because it coincide[d] with an escalation in [C.R.J.'s] family dispute with her mother" (emphasis added). The judge also highlighted the fact that the mother acknowledged having spoken to I.S. about the possibility of her 2013 disclosure arising in the dispute, and that "this was the context in which [I.S.] chose to make her 2020 statement to the police". These instructions highlighted important parts of the evidentiary foundation underlying the defence theory that the 2020 disclosure and I.S.'s testimony were highly suspicious because the disclosure came about at the same time as the dispute, and importantly, after the mother told I.S. that what she had said in 2013 could be raised in that dispute.
- [95] The judge instructed the jury that it could make use of prior inconsistent statements when assessing credibility (which included the 2013 and 2020 disclosures), and stated that when assessing a witness's testimony, the jury should ask whether the witness had motive to lie. She made specific note of the fact that in her testimony, I.S. "agreed that [there were details in her evidence that] were not included in her initial disclosure to her mother in 2013, or in her statement to the police in March 2020". These too were factors of particular importance to the defence theory. They were highlighted for the jury's attention.

- [96] Finally, when summarizing the defence "point of view", the judge repeated a number of the reasons provided by defence counsel in his closing submissions for disbelieving or doubting I.S.'s testimony. This included the nature of the explanation I.S. gave for not telling the police about sexual abuse in 2013 (again highlighting the fact of non-disclosure); material inconsistencies between her disclosures over time; the fact that the 2020 disclosure occurred as C.R.J. sought to obtain increased parenting time; and the assertion that the mother "is the kind of person who would weaponize her children to get what she wants". The judge did not use the language of "motive to fabricate", but she captured the evidentiary foundation relied upon by the defence in support of that theory.
- [97] The Crown says that cumulatively, the various things said by the judge properly equipped the jury to assess the credibility and reliability of I.S.'s evidence. This is especially so in light of the parties' closing submissions, which put the timing of the disclosures and motive to fabricate squarely on the table, and the fact that the jury received proper instructions on reasonable doubt, the obligation to consider the evidence as a whole, and accurate directions on how to assess a witness's evidence, generally.
- [98] The Crown says that overall, this jury would have understood that in assessing the credibility and reliability of I.S.'s evidence, it could consider the fact that after disclosing to her mother in 2013, she said nothing further about sexual abuse until 2020 and that the latter disclosure, with greater detail and differences in substance, came in the midst of a contested family law proceeding, after her mother had warned the appellant that allegations may be forthcoming.
- [99] I accept that such is the case and would not accede to the first ground of appeal.
- [100] That brings me to the second claimed error. The appellant says the manner in which the judge positioned the D.D. instruction in the final charge compounded the impairing effect of her inadequate explanation of permissible use, and raised a realistic possibility of unfairly undermining or diminishing defence reliance on the evidence surrounding I.S.'s disclosures. At the very least, the positioning of the D.D. instruction would have left the jury confused about what it could and could not do with this evidence.
- [101] After telling the jury in the final charge that the "timing of [the complainants'] initial disclosures and subsequent disclosures" was a circumstance to consider in assessing their evidence, the judge went on to state that "[n]otwithstanding [defence counsel's] submissions yesterday" (his closing submissions), the jury should not conclude that I.S. was "less credible based solely on a delay in disclosing her allegations against [C.R.J.] in 2013 or in 2014, standing alone".

- [102] Later, after setting out the reasons why the appellant said the jury should have a reasonable doubt about I.S., the judge again provided a D.D. instruction and cautioned the jury about defence counsel's closing submissions: "With respect to defence counsel's submissions to you, I remind you [that a] failure to disclose, or a delay in disclosing, without more, is not a basis to not believe a complainant".
- [103] There was only one aspect of "defence counsel's submissions" that invited impermissible reasoning. There was also a permissible use arising out of the disclosure evidence and when providing the D.D. instructions, the judge did not distinguish between the two or acknowledge that fact.
- [104] In my view, given the nature of the defence theory and the importance of the evidence surrounding I.S.'s disclosures to that theory, it would have been helpful for the judge to clarify that the D.D. instruction did not mean the jury should distance itself from the whole of defence counsel's closing submissions or from the evidence at issue.
- [105] When the defence advances a non-speculative theory or an issue arises on the evidence that properly renders the fact of non-reporting of sexual abuse or delayed disclosure relevant, judges must be careful to ensure that the D.D. instruction is not framed, stated, or emphasized in a way that deprives the defence of the benefit of available permissible inferences. In this case, for example, the defence accepted that "delay in disclosing, without more, is not a basis to not believe a complainant". However, defence counsel also said there was "more" on the face of the record. There was evidence from which the jury could ask whether the manner and the context in which I.S.'s disclosures unfolded over time reflected motive to fabricate and undermined the credibility and reliability of her evidence overall. The final charge would have benefitted from a clearly stated explanation of the "more".
- [106] However, I have concluded that the instructions, overall, did leave the defence theory with the jury and did sufficiently identify the factors and the evidence the jury was obliged to consider in assessing the credibility and reliability of I.S.'s testimony. The first ground of appeal said to be compounded by the second, has not been made out.
- [107] Defence counsel's closing submissions asked the jury to draw impermissible inferences from the fact of non-disclosure and it was both proper and necessary for the judge to provide a D.D. instruction. That instruction was correct at law and appropriately restricted to inferences drawn from the mere fact of non-disclosure or delay. In this context, I am not persuaded that the positioning of the D.D. instructions as corrective of defence counsel's submissions would have left the jury with the mistaken impression that the whole of the chronology of I.S.'s disclosure, including delay, was precluded from its consideration. To reach the appellant's suggested conclusion, the jury would have had to ignore everything else said by the judge about the evidence surrounding disclosure and its relevance to the assessment of credibility and reliability. (See, for example, the discussion in W.W.M. at paras. 6-8.) As made clear in Abdullahi at para. 35, the accused is entitled to a jury that is "

properly, not perfectly, instructed " (internal references omitted).

Disposition

[108] I have found that in the circumstances of this case, the final instructions to the jury do not reflect reversible error.

[109] Accordingly, I would dismiss the appeal from the conviction on Count 1 of the Indictment.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Justice Fleming"

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