

CANADA / JUDGMENT

R. v. Campbell

2020 BCSC 1423

COURT

Supreme Court of British Columbia

DECIDED

26 August 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1423 R. v. Campbell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Campbell,

2020 BCSC 1423

Date: 20200826

Docket: 27802-A

Registry: Vancouver

Regina

v.

David Bruce Campbell

Restriction on Publication: A publication ban has been imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Mr. Justice Brundrett

Oral Reasons for Judgment

Counsel for Crown:

A.C. Ip

Counsel for Accused:

R.T. Gill

N. Wright (articling student)

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 13-15, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2020

Introduction[1]

[1] The accused is charged as follows with sexual interference with a minor and sexual assault occurring inclusively between 1995 and 1999:

Count 1

David Bruce CAMPBELL, from the 1st day of January, 1995 to the 31st day of December, 1999, inclusive, at or near Delta, in the Province of British Columbia, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of J.J., a person under the age of fourteen years, contrary to Section 151 of the Criminal Code.

Count 2

David Bruce CAMPBELL, from the 1st day of January, 1995 to the 31st day of December, 1999, inclusive, at or near Delta, in the Province of British Columbia, did sexually assault J.J., contrary to Section 271 of the Criminal Code.[2]

[2] The Crown alleges that the accused was a friend of the complainant's family who inappropriately massaged her under her clothing when she was between 8 and 11 years old. On the Crown's theory, the incident took place at her parents' Delta home sometime between the beginning of 1995 and the end of 1999.

[3] The accused denies the charges. However, he admits he did massage the complainant on one occasion similar in manner to her allegation. He says it occurred when she was approximately 14 or perhaps 15. The date of the alleged incident is important because if it happened when the accused says it did, the date of the offences would fall after the complainant's 14th birthday, which is outside the reach of count 1 and at a time when her consent would not be automatically be vitiated by operation of the Criminal Code.[3] In addition to the date, the complainant and the accused differ on the location, details and context of the massage.

- [4] The accused challenges the reliability of the complaint's evidence but not her credibility. He submits that while the complainant's version of events is plausible, the accused's version is also plausible. He argues therefore that the Crown is unable to prove its case beyond a reasonable doubt.
- [5] The Crown called two witnesses: the complainant, J.J., and her mother, K.A. The accused testified on his behalf.
- [6] The main issues at trial are (1) the credibility and reliability of the narratives provided by the complainant and the accused, and (2) whether the Crown has on the whole of the evidence proven its case on either or both counts beyond a reasonable doubt.

Background

- [7] The parties are in agreement as to some of the largely uncontentious background facts.
- [8] The complainant was born on July 13, 1987. She is the middle child of three sisters. Her parents divorced when she was 10 or 11. She knew the accused as her father's best friend and a friend of the family.
- [9] The residences the complainant's family lived in assist in fixing the time period when the relevant events allegedly occurred. All three witnesses testified as to the order of residences that the family inhabited.
- [10] The complainant's family lived in Australia until 1992. After moving to British Columbia in 1992, they lived with her father's parents for three months. They then lived briefly at and renovated a house over the course of another six months.
- [11] After that, the family moved to a house on Saratoga Drive in the Tsawwassen area of Delta, B.C. They lived there from February 1993 until September 1996. The complainant would have had her sixth, seventh, eighth and ninth birthdays in the Saratoga Drive home.
- [12] In September 1996, the family moved to a residence on Upland Drive in Tsawwassen. By this time, K.A.'s relationship with P.J., her husband and the complainant's father, was breaking down. K.A. described the Upland Drive home as an inducement so that she would continue to stay with him. Initially, she and her husband slept in the same room; however, by January 1, 1999, they were sleeping in different bedrooms. K.A. separated from P.J. in May of 1999 when the complainant was 11 years old and moved out of the Upland Drive home.
- [13] Cross-referencing the complainant's age against the family's changes in residence, the complainant would have moved to the Upland Drive home when she was 9 years of age. She had her 10th and 11th birthdays at that location.

- [14] After K.A. moved out of the Upland Drive home in May of 1999, she lived in a home nearby in Tsawwassen on Beach Grove Road. K.A. and P.J. co-parented their three daughters after that, though K.A. was the primary caregiver and the girls were with her more at first. P.J. remained in the Upland Drive home until the divorce was finalized. Then K.A. moved back into the Upland Drive home.
- [15] P.J. moved to a house on Tsawwassen Beach Road in Tsawwassen after the divorce. The complainant said she was about 14 or 15, and no younger than 14, when this occurred.
- [16] The accused was born on December 3, 1954. This places him in his early forties (on the complainant's version) or his mid-forties (on his version) when the massage incident occurred. He was the best friend of P.J. and a close friend of the family. He also frequently visited the Saratoga Home, the Upland Drive home, and the Tsawwassen Beach home. When the family lived in the Upland Drive home, the accused stayed in his motorhome that he parked on the home's driveway. His van was not connected to power, sewer, or water services while there, and I accept that he would have used those services in the home from time to time.

The Complainant's Version of Events

- [17] The complainant described the massage incident occurring at their Upland Drive home in Tsawwassen. She said the incident occurred sometime after her seventh birthday, as she recalled having that birthday at their previous house on Saratoga Drive. She also recalled that it happened before her parents split up and her mother moved out in May of 1999. She further testified that it occurred in her parents' shared bed, which would place the incident in time before January 1, 1999.
- [18] Based upon the complainant's recollection, and intersecting what is known about the timing of various events and the age of the complainant, the massage incident on her version would have occurred when she was between 9 and 11 years of age.
- [19] The complainant knew the accused as her father's really close friend. She described him as someone she idolized quite a lot. She knew his musical background and had a lot of admiration for him. She had spent a lot of time with him, played with him, and hung out with him throughout her childhood.
- [20] The complainant described an incident involving her and the accused occurring at the Upland Drive home. She was in her parents' bedroom in the evening, having gone to bed in her parents' bed. This was a common practice for her because she was more attached to her parents than her sisters, and she often asked if she could sleep in their bed if they went out.
- [21] The complainant recalled wearing one of her father's t-shirts as a nightshirt at the time of the incident. She was not wearing any underwear or anything else.

- [22] She thought her mother and father were out for the night, but her recollection as to her parents' whereabouts that evening was vague other than that they were not present at the time. The complainant believed the accused was babysitting while her parents were out and she was alone with her sisters. She stated that it was not uncommon for him to stay with her family from time to time.
- [23] The complainant recalled that as the accused was putting her to bed, he asked her if she wanted a back massage. She replied, "yes." He gave her a back massage over her nightshirt. He massaged her on the back and shoulders in a pinching motion for about five minutes.
- [24] I pause here to note that the Crown does not seek a conviction based on the first part of the massage. In other words, it is not submitting that this form of touching constituted a sexual assault.
- [25] The second part of the massage occurred when, in what the accused called a "fun" or "want to know something cool" way, he asked her if she knew the best way to give a back massage. He told her that you have to give the massage on the top and bottom at the same time.
- [26] The accused then instructed the complainant to go on her hands and knees. She recalled being on the left side of the bed, which was her mother's side. The lights were off in the room, but a bedside lamp was on.
- [27] The accused proceeded to massage the complainant with both hands, one under her body on her full chest and stomach area, and the other on her back at the same time. The palms of the accused's hands were on her body as they moved in a synchronous circular motion.
- [28] During this second massage, the accused was massaging the complainant under her clothing. He was kneeling behind her, and his arm went between her legs to massage her chest and stomach area.
- [29] The complainant started to feel uncomfortable. Her genital area was exposed to the accused, and he was reaching through her legs from behind her. The massage went on for a couple of minutes. The complainant then said that she wanted to go to sleep. The accused stopped. He left without further incident, and she went to sleep.
- [30] The complainant confirmed a fact that is relevant to the accused's version of events; that is, she testified that she went on a trip to Australia with her father when she was between 14 and 16.
- [31] The complainant first reported the massage incident to her sister in 2008.

The Accused's Version of Events

- [32] As noted, the accused largely agrees with the complainant as to the massage incident itself. However, his description of the massage, the context, the date, and events leading up to it is markedly different.

- [33] The accused testified that he was on the deck of the Tsawwassen Beach home when the complainant asked if he could help her choose a swimsuit for her upcoming trip to Australia. The accused estimates that she was approximately 14 or 15 years old at the time, which is consistent with the dates the complainant lived at her father's Tsawwassen Beach home. The accused acknowledged that he was familiar with the complainant's age.
- [34] While trying on clothes for the accused during this incident, the complainant would change elsewhere, then come back to the outside deck and show the accused each bathing suit. At one point when she came back, the complainant said that her back had been bothering her. He could not remember if he offered or if she asked for a back rub. He said the weather was sunny and hot.
- [35] The accused said it was probably his idea to go inside. They moved inside the house, just inside from the French doors to the deck. The complainant lay down on either the floor or possibly a couch. After initially massaging her back, neck and shoulders for a few minutes, he told her he had another idea about another style of massage. He asked her if she wanted to try it.
- [36] The accused stated that he was not a massage therapist, but he did have many "alternative friends" and was familiar with an energy transfer form of massage.
- [37] The accused asked the complainant if she could get into a position where he could perform his alternative energy massage. He instructed the complainant to go on all fours so that he could rub her stomach and back. He began moving his hands in a circular motion, one palm against the complainant's stomach, and the other against her back.
- [38] At some point, the accused reached around the complainant's closest leg and continued massaging her stomach with one of his arms between her legs. The accused reported that it was a bit of an awkward moment, and he realized that things were becoming inappropriate.
- [39] At that point, he stopped. They had a little chuckle, and each carried on with their day. The accused stated that the complainant did not say stop and that she appeared to enjoy it.
- [40] The accused stated that during the massage, the complainant was wearing a swimsuit. The accused was positioned behind her. He testified that he touched her back, stomach and shoulders, but not her buttocks, genital area or breasts.
- [41] Defence counsel put the accused's version of events to the complainant in cross-examination. She adamantly denied the contradictory details in the accused's version of events including showing him the bathing suits prior to her Australia trip and the massage in the living room area of the home.

The Evidence of K.A, the Complainant's Mother

- [42] The complainant's mother testified. Her credibility was not challenged, and I accept her evidence.

- [43] K.A. provided background to the family's history and a timeline of the family's moves from residence to residence in Tsawwassen.
- [44] K.A. knew the accused as her husband's best friend and as a family friend. She said that because the accused was around a lot, she became very familiar with him.
- [45] K.A. was asked about the possibility of the complainant being left alone with the accused. In her statement to police, and at the preliminary inquiry, K.A. was positive that she would not have allowed the accused to babysit the children. K.A. was the children's primary caregiver at the time. She had concerns about the accused's character and did not trust him.[4] She did not trust her spouse around the children either.
- [46] While this evidence might tend to support a lack of opportunity for the accused to commit the offences as the complainant described, I find that it does not do so.
- [47] K.A. testified that there was a lot of turmoil in her relationship with her spouse at the time the offences allegedly occurred, and it was possible that the children were left alone with the accused. While living at the Upland Drive home, she was seeking her own healing by going to Victoria with her youngest child to see a psychologist. Looking back on that time, she testified that she was in a fragile place and said she was perhaps not as diligent as she should have been as a mother.
- [48] While the evolution in K.A.'s testimony was recorded by the Crown in his pre-trial interview, I find that she had been thinking about this issue for some time and her change of thinking was unprompted by the Crown.
- [49] The parties disagree as to the import of K.A.'s evidence, but I find that her evidence does not foreclose the possibility of the accused having the opportunity to commit the offence.
- [50] Even apart from K.A.'s evidence, it is apparent that the accused was trusted by the complainant's family, had ample access to the complainant's home, and was regularly in and around the family home. In these circumstances, it is not unreasonable to infer that the accused may have been left alone with the complainant at night for a short period of time when others were away or perhaps preoccupied and oblivious to what was occurring in the bedroom.

Applicable Legal Principles

The Legal Requirements of the Offences

- [51] As noted, the accused is charged with two offences, being sexual interference and sexual assault.

- [52] The accused is presumed innocent unless the Crown proves his guilt beyond a reasonable doubt. The burden to prove the elements of the offences rests upon the Crown to prove beyond a reasonable doubt and never shifts to the accused. However, the Crown is not required to prove each individual piece of evidence that makes up its theory beyond a reasonable doubt: see *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Arp*, [1998] 3 S.C.R. 339.
- [53] In relation to the charge of sexual interference on count 1, s. 151 of the Criminal Code, in effect at the relevant time, provided as follows:
151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
- [54] Sexual interference is a specific intent offence, requiring subjective proof that the accused touched the complainant for a specific purpose. Sexual assault is a general intent offence, requiring objective proof that the touching was of a sexual nature: *R. v. T.L.P.*, 2015 BCSC 618 at paras. 12-18.
- [55] With respect to the charge of sexual assault on count 2, s. 271 of the Criminal Code, in effect during the relevant time, provides that, "Everyone who commits a sexual assault is guilty of (a) an indictable offence ; or (b) an offence punishable on summary conviction ". Section 265(1)(a) defines an assault as including the non-consensual application of force intentionally to another person, directly or indirectly. By virtue of s. 265(2), the definition applies to all forms of assault including sexual assault.
- [56] A sexual assault is an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test is an objective one: whether, when viewed in light of all the circumstances, the sexual or carnal context of the assault is visible to a reasonable observer. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant: *R. v. Chase*, [1987] 2 S.C.R. 293 at 302 [Chase].
- [57] Section 150.1 of the Criminal Code provided at the relevant time that when an accused is charged with one of the offences at issue here, the defence of consent is removed as a potential defence where the complainant is younger than 14:
- 150.1 (1) Where an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

[58] As the accused is 32 years older than the complainant, the close-in-age exceptions do not apply here. Nor does the defence of honest-but-mistaken belief as to the age of the complainant arise on the facts of this case.

The Assessment of Credibility

[59] The assessment of credibility is important in this case. However, a court must not base its verdict on a choice between the Crown's evidence and the accused's evidence: *R. v. Pangan*, [1996] B.C.J. No. 2616 (C.A.) at para. 40.

[60] In other words, what I cannot do in my role as trier of fact is assume that I must choose between the witnesses as to whom I believe: *R. v. Jeng*, 2004 BCCA 464 at para. 37. Nor can I allow a determination of guilt or innocence to devolve into a mere credibility contest: *R. v. J.H.S.*, 2008 SCC 30 at paras. 9, 13 [J.H.S.]. Instead, the verdict must be based on an assessment of the evidence as a whole and whether on such an assessment a judge or jury is left with a reasonable doubt as to the accused's guilt.

[61] The rule requiring corroboration in sexual offences was abolished on January 1, 1988, by virtue of s. 274 of the Criminal Code. This makes possible the conviction of the accused on the evidence of the complainant alone and indeed that has occurred in some cases. However, in such cases, the assessment of credibility takes on greater importance. Justice O'Connor in *R. v. L.F.*, [2006] O.J. No. 4173 at para. 9 (S.C.J.) made the following comments which are apt here:

Very often in sexual assault and related sexual and physical abuse allegations, proof to the criminal standard relies primarily on the credibility of the complainant and the accused. Sexual assaults are almost always perpetrated in private, with only the complainant and the assaulter present. Corroboration, as the term was formerly defined in the Criminal Code, is no longer necessary for a conviction for sexual related offences. A court may convict on the evidence of a complainant alone. However, unless there is some confirmatory or supportive evidence of the allegations by the complainant, a court may have difficulty concluding beyond a reasonable doubt that the Crown has proven the offence(s). Confirmatory evidence can include a broad spectrum of direct and circumstantial evidence from strong, e.g. eye witnesses to the assault, semen of the accused found on the complainant, her clothes or bedclothes, to moderately supportive, e.g. similar act evidence, to marginally confirmatory, e.g. evidence of opportunity or motive. However, where there is no evidence other than the testimony of the complainant and the accused, their credibility will be critical to resolving the 'he says/she says' conundrum the court faces.

[62] Credibility and reliability are different concepts. In *R. v. H.C.*, 2009 ONCA 56 at para. 41 (cited with approval in *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal ref'd [2015] S.C.C.A. No. 374 and *R. v. Plehanov*, 2019 BCCA 462 at para. 51), the Ontario Court of Appeal explained that credibility has to do with a witness's veracity, and reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to

accurately observe, recall, and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.

[63] In assessing reasonable doubt in a criminal trial in the context of conflicting testimony, the three-part test in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, provides one method of guiding the court's analysis. It reads as follows:

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

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

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

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

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

[64] Justice Binnie, writing for the Court in *J.H.S.* confirmed the "long roots" of the *W.(D.)* instruction and further discussed the test as follows:

[10] The precise formulation of the *W. (D.)* questions has been criticized. As to the first question, the jury may believe inculpatory elements of the statements of an accused but reject the exculpatory explanation. In *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1, the accused did not testify, but his description of the killing of his daughter was put into evidence by way of statements to the police. His description of the event itself was obviously believed. The exculpatory explanation did not amount to a defence at law. He was convicted. The principle that a jury may believe some, none, or all of the testimony of any witness, including that of an accused, suggests to some critics that the first *W. (D.)* question is something of an oversimplification.

- [11] As to the second question, some jurors may wonder how, if they believe none of the evidence of the accused, such rejected evidence may nevertheless of itself raise a reasonable doubt. Of course, some elements of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.
- [12] The third question, again, is taken by some critics as failing to contemplate a jury's acceptance of inculpatory bits of the evidence of an accused but not the exculpatory elements. In light of these possible sources of difficulty, Wood J.A. in H. (C.W.) suggested an additional instruction:

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

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

[Emphasis added.]

- [65] As noted in J.H.S. at para. 12, the B.C. Court of Appeal in R. v. C.W.H. (1991), 68 C.C.C. (3d) 146 (B.C.C.A.), enhanced the W.(D.) test by adding a fourth branch to the W.(D.) test: "If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit." In J.H.S. at para. 13, in commenting on the W.(D.) test, the Court reminded trial judges that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt, and the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.

Evidence of Adults Testifying About Childhood Events

[66] Certain considerations apply to the assessment of the evidence of children. For instance, "we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a 'common sense' basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case": *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at 134. As to adults testifying about events in childhood, the Court held as follows at 134:

It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards--to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, 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 she is testifying.

Application of the Legal Principles

Assessment of the Complainant's Evidence

- [67] The complainant testified in a forthright manner. She appeared to be a careful witness with a sombre demeanour who was attempting to recall events as best she could. Though I would place relatively little reliance on her in-court presentation, there was nothing in her demeanour that undermined her credibility.
- [68] In terms of the credibility and reliability of the complainant's substantive testimony, the complainant's evidence was internally consistent. Her narrative of the event was plausible. She admitted weaknesses in her evidence where appropriate, and she was not contradicted on any material fact.
- [69] The complainant had opportunities to embellish her evidence or cast the accused in a poor light which she did not take advantage of. For instance, she stated she could not remember if the accused touched her vaginal area, and she agreed that she did not feel forced by the accused. She could have easily have added these details if she wanted to somehow implicate him.

- [70] The complainant also did not have any dispute with the accused so as to give her a motivation to lie. In fact, she testified that the accused was someone whom she admired as a child for his musical talents, and more broadly as a close family friend. It was not in her interest to falsely implicate the accused. While I would not use her lack of motivation to lie as an overriding or even a key factor, I note that she risked a deterioration of her relationship with her father by accusing his best friend of impropriety.
- [71] Counsel for the accused indicated that he was not making any comment with respect to the complainant's credibility whatsoever. I take this to mean that the accused accepted the complainant as a witness appearing to be truthful, but that he takes issue with the reliability of her version of events. In essence, his argument was that the complainant may have had a mistaken memory. Ultimately, the accused submitted the complainant's version was plausible, but that the accused's version of events was also plausible.
- [72] The accused pointed out that the complainant's evidence was lacking in surrounding details such as events precipitating or following the alleged sexual assault. For instance, she could not remember other details about the day in question, including who else might have been in the home or her parents leaving for the night. She could not remember anything about the next day, or what she was doing the day before the assault. She could not remember the season or time of the year.
- [73] On the other hand, the complainant was able to provide some context. She testified that the incident took place in her parent's room and that she was on her mother's side of the bed, being the left side. She described the room. She also described her position and that of the accused. She described what she was wearing. She testified that one or both nightstand lamps were on in the room but not the ceiling lights.
- [74] I do not find the lack of greater detail in the surrounding circumstances to be remarkable given the complainant's age at the time and the fact that her memory would likely have been dominated by the incident itself. The complainant's memory as to the place of the alleged assault was clear and connected to her parents' bedroom in the Upland Drive home. That detail assists in placing the assault along the timeline of her life, which in turn establishes the time period when the assault occurred on her version of events.
- [75] The complainant did not disclose the incident until approximately 2008 when she briefly disclosed the incident to her sister. I do not find anything to undermine the complainant's credibility in the manner of her disclosure to her sister which occurred without detail and briefly in a washroom when the two were sharing past experiences. There is nothing to indicate that the complainant's memory of the incident has been influenced, or has changed or worsened over time.

- [76] The accused submits that while lack of contemporaneous disclosure is not necessarily determinative of the veracity of her version of events, the court must look at the whole of the evidence, including any explanation for the delay, in coming to its ultimate conclusion, citing *R. v. Semchuck*, 2011 BCSC 1543 at para. 39.
- [77] However, it is now well-settled that there is no inviolable rule on how people who are victims of sexual assault trauma will behave. 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: *R. v. D.D.*, 2000 SCC 43 at para. 65. I would not, in all the circumstances, take anything from the delay in the complainant's disclosure.
- [78] There is considerable agreement between the complainant and the accused on the nature of the incident itself. However, there is a lack of corroboration in the complainant's version of events with respect to the circumstances under which it occurred and the date it occurred. The lack of confirmatory evidence as to the inculpatory aspects of the event makes the assessment of credibility more critical.

Assessment of the Accused's Evidence

- [79] As with the complainant, I found the accused's demeanour on the stand to be unremarkable. He had a calm, serious and thoughtful presentation. Nothing in his demeanour on the witness stand told against his credibility.
- [80] The narrative of the accused was superficially believable. His evidence as to the surrounding details largely fits with the other witnesses. His evidence was internally consistent and substantially accorded with his police statement that was put to him in cross-examination. However, under scrutiny, there are troubling aspects to his version of events.
- [81] For instance, the accused did not offer an explanation for why a 14 or 15-year-old would complain of a sore back in the middle of showing him her swimsuits. While this gives me pause, and I find it to be improbable, it is certainly not fatal to his credibility. People behave in odd ways at times. Strange things happen. The complainant and the accused enjoyed a friendly relationship with each other. She might have had a sore back for some unexplained reason despite her young age. I would caution myself against making stereotypical assumptions about human behaviour: *R. v. Kodwat*, 2017 YKCA 11 at paras. 36-41.
- [82] More troublesome is the accused's explanation that he simultaneously rubbed the complainant's stomach and back area performing a "healing" or "energy transfer" type massage in order to alleviate her sore back. If he was truly giving her a massage, as he stated, it was unclear why it was necessary to have the complainant go up on all fours to perform the technique rather than merely inserting one hand beneath her stomach as she lay prone on the floor or couch, or perhaps having her elevate her stomach slightly.

- [83] Moreover, from a commonsense perspective, a stomach massage would seem to target the abdominal muscles, not the back. The therapeutic benefits of his supposed energy transfer technique seem questionable. While I recognize the accused said he thought the technique might be fun, it seems doubtful that the accused perceived that any rubbing of the complainant's stomach would help alleviate her back issues.
- [84] The basis for the energy transfer procedure was not well-explained in his testimony other than that he had learned the technique from adult "alternative" friends. In cross-examination, he referred to it as an "energy transfer thing." His use of this language indicated that he was not well-versed in the method. The accused would have known he was in a trusted relationship with the family. It seems puzzling for him to place his close friend's pubescent daughter on all fours in such a vulnerable position, while they were alone together and while she was wearing a bathing suit, simply in order to be able to rub her stomach in addition to her back.
- [85] By the same token, on his narrative it was completely unnecessary for the accused to reach between the complainant's legs, yet he admitted that he did so by reaching into her legs close to her left thigh. He was right beside her, and reaching between her legs was wholly unnecessary even if he did want to perform his energy transfer manoeuvre. If he wanted to massage the complainant, as he stated, he could have just reached beside her with one arm over her and one arm under. His explanation that the act of reaching through the complainant's legs was in furtherance of some form of massage did not make sense and struck me as illogical.
- [86] Next, the accused testified that he realized after he reached through the complainant's legs and rubbed her stomach area that his behaviour could be construed as inappropriate, and he disengaged. This professed belated realization of the inappropriateness of the situation does not strike me as credible. It seems to me that the accused would have undoubtedly known that he was a trusted family friend, alone with his friend's daughter, and that there was a significant age difference of 32 years between them.
- [87] By his account, the complainant was only in a swimsuit that she had tried on for him. He had instructed her to go on all fours to try a "fun" massage technique, and then he reached unnecessarily through her legs. He told police that it was at that point he realized "almost immediately" that the complaint's vaginal area was "right there," and it would not look good if P.J. came around the corner. At trial, he testified that it took a while for the the inappropriateness of the situation to dawn on him. I found the accused's descriptions both at trial and in his statement to police to amount to a denial of the obvious point that he should have been on alert to the objective impropriety of the situation far earlier than the point wherein he executed his energy transfer technique. The accused's repeated implausible explanations of his thinking and behaviour left the impression that he was attempting to minimize the more incriminatory aspects of the event.

- [88] The complainant had no memory of her showing the accused her bathing suits at the age of 14 or 15 in preparation for her upcoming trip to Australia as the accused described. Questioned further, she denied this occurred at all. I accept her evidence on this point. She appeared to be astonished by the suggestion and indicated (from her adult perspective) that she would be horrified if that happened. From the content and tenor of her evidence, it appears such an event would have been extraordinary for her. I infer that it would not be something that she would easily forget. I find that the complainant is not forgetful or mistaken on this point.
- [89] None of these difficulties are fatal to the accused's credibility in themselves. However, measuring the plausibility of the accused's narrative in the context of the surrounding circumstances, I find that there are several improbable aspects to his explanation of the massage incident that undermine his version of events. I would be careful to avoid stereotypical reasoning and speculation regarding human behaviour on the part of either the accused or the complainant. However, having done so, the accused's narrative does not accord with common sense, what is reliably known about the relationship between the accused and the complainant, and the probabilities inherent in the events the accused described.
- [90] As a result, I do not believe the evidence of the accused about the events preceding the massage, or the timing, the specific location, or the incriminating aspects of the massage.

Whether the Required Intent has been Made Out

- [91] I find as a fact on the whole of the evidence that the massage incident unfolded as the complainant described. This leads me to consider whether the Crown has proven the required intent for each offence beyond a reasonable doubt.
- [92] Dealing first with the sexual assault charge on count 2, the accused massaged the stomach, back, and chest area of the complainant beneath her oversized nightshirt while she was otherwise undressed and lying in her parents' bed. He reached between her legs with one arm to do so. I find that the accused touched the complainant in circumstances of a sexual nature. Viewed in light of all the circumstances, I am satisfied on an objective level beyond a reasonable doubt that the sexual context of the assault was readily visible to a reasonable observer: Chase at 302.
- [93] With respect to count 1, the count of sexual interference, I have more difficulty in finding that the touching was subjectively for a sexual purpose. Although highly suspicious, especially in light of his attempt at trial to describe the incident in a more favourable light, the touching was of relatively short duration, there was no overt indication of sexual gratification, and no sexualized words accompanied the act. Despite the areas of the body touched, and the act of reaching through the complainant's legs, I have difficulty in ascribing a sexual motive to the accused on the criminal standard of proof so as to ground a subjective intent to touch for a sexual purpose.

[94] Despite what I said above in rejecting the accused's narrative, on the whole of the evidence I am left with a reasonable doubt as to whether the incident, which was sexualized from any objective point of view, occurred during a lapse of judgment in relation to the accused's very misguided massage technique. I am compelled to find, therefore, that the circumstances raise a reasonable doubt as to whether the touching the accused engaged in was done for a subjectively sexual purpose, and I would acquit him of sexual interference on count 1.

Overall Assessment of the Whole of the Evidence on Count 2

- [95] I believe the evidence of the complainant. Her credibility was not seriously challenged. I cannot find a basis for finding that she had a mistaken memory. I found her narrative of events to be plausible, coherent, and reliable. I accept the complainant's evidence that the accused engaged in a single incident of massaging her under her clothing as she described. I find as a fact that the incident occurred while she was living at the house on Upland Drive in Delta between September 1996 and January 1, 1999, when the complainant was between the ages of 9 and 11 years of age.
- [96] I do not believe the evidence of the accused on the critical aspects of the massage incident. His description of the context of the key massage event appeared to me to be strained and contrived in order to explain away the more incriminating aspects of the complainant's narrative, such as why he was touching the complainant, why she was partially clothed, and why he reached through her legs. I also find that the accused deliberately lied about the date of the massage incident in order to cast himself in a better light and perhaps to attempt to pinpoint the date of the offence at a date where the complainant was sufficiently advanced in age to nominally consent to the behaviour in question.
- [97] The evidence of the accused does not leave me with a reasonable doubt. Nor, after careful consideration of all the evidence, am I unable to decide whom to believe.
- [98] Having regard to the whole of the evidence, including the evidence of the complainant, her mother K.A., and the evidence of the accused that I do accept, I am not left with a reasonable doubt on count 2. In coming to this conclusion, I repeat my finding that the evidence of K.A. did not foreclose the opportunity of the accused being left alone with the complainant one evening with the opportunity to commit a sexual assault.

Conclusion

- [99] Mr. Campbell, will you please stand?
- [100] I find you not guilty of count 1, sexual interference.
- [101] I find you guilty of count 2, sexual assault.

"Brundrett J."

- [1] These reasons for judgment were delivered orally. They have since been edited for publication.
- [2] The alleged date of the offences was amended at trial to end on December 31, 1999.
- [3] The Crown did not ask the Court to consider any included offences and did not seek a conviction if there was a reasonable doubt as to whether the offences occurred after the complainant turned 14. The age of consent was raised in 2008 from 14 to 16 by virtue of the Tackling Violent Crime Act, S.C. 2008, c. 6.
- [4] The accused did not put his character in issue at trial. While this evidence about K.A.'s perception of the accused's character is admissible to explain her actions and motivations, I cannot use it to assess credibility or whether the required elements of the offences are made out.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/14/2020BCSC1423.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-campbell-2020>

Prepared on 26 October 2026 · Esheria