

CANADA / JUDGMENT

R. v. Dias

2023 BCSC 1373

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Supreme Court of British Columbia

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2023 BCSC 1373 R. v. Dias

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dias,

2023 BCSC 1373

Date: 20230804

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Registry: Vancouver

Rex

v.

Garcia Ribeiro Dias

Before: The Honourable Justice MacNaughton

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Oral Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

August 8-11 & November 28, 2022

January 5 & May 1-2, 2023

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Vancouver, B.C.

August 4, 2023

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Introduction

- [1] Garcia Ribeiro Dias is charged with three sexual offences against I.L., who, at the time, was eight years old. She is now 12. He is charged with one count of sexual assault under s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code], and two counts of sexual interference under s. 151 of the Code.
- [2] The sexual assault charge and one of the sexual interference charges are Counts 1 and 2 on the indictment and relate to events alleged to have occurred in Vancouver between the dates of January 1, 2018, and December 17, 2018, inclusive.
- [3] The second sexual interference charge is Count 3 on the indictment and relates to events alleged to have occurred between December 18, 2018, and January 6, 2019, while I.L.; her grandmother, Y.L.; and Mr. Dias were vacationing in Peru.
- [4] Mr. Dias was not charged with sexual assault arising from the events in Peru because s. 7(4.1) of the Code, which extends the extraterritorial reach of the Code to certain listed offences committed outside of Canada by a Canadian citizen or permanent resident, does not include sexual assault.
- [5] Mr. Dias pled not guilty to all charges.
- [6] In closing submissions, the Crown says that Mr. Dias should be convicted on all charges but asks that I enter a stay of the sexual assault charge.
- [7] Key to the Crown's case is I.L.'s statement to the police on January 24, 2019 ("Statement"), and a recorded conversation between Y.L. and Mr. Dias ("Recorded Conversation") on May 2, 2019.

Procedural History

Voir Dire #1 - Voluntariness of Mr. Dias' Police Statement

- [8] At the beginning of trial, the Crown requested a ruling on the voluntariness of Mr. Dias' police statement because, in the event Mr. Dias testified, the Crown wished to rely on it for cross-examination. Mr. Dias challenged the voluntariness of his statement.
- [9] After hearing evidence from Detective Krista Parry (formerly Lum), who was involved in Mr. Dias' arrest, and from Detective Constable Conrad Nemeth, who was involved in taking Mr. Dias' statement, Mr. Dias conceded the voluntariness of his statement, invited a finding that the statement was made voluntarily, and asked that it be admitted in its entirety.
- [10] Mr. Dias' videotaped statement and a transcript of it were admitted as exhibits on the voir dire. As Mr. Dias did not testify, his statement was not used for the purpose of cross-examination, and the Crown did not tender it as a part of its case.

Counselling Records

- [11] At the end of the first day of trial, counsel for Mr. Dias advised that he had just learned of the existence of counselling records that I.L. attended before the events giving rise to these charges. He submitted that those records were possibly relevant to credibility issues that he intended to raise. He did not file an application under s. 278 of the Code, and there was no evidentiary foundation for an application for access to the records. I was of the view that I.L. was entitled to counsel to respond to an application for her counselling records.
- [12] Mr. Dias later advised that he would not be proceeding with an application for access to the records.

Section 715.1 of the Code

- [13] After reconsidering his earlier opposition, Mr. Dias indicated that he would not challenge the admissibility of I.L.'s Statement under s. 715.1 of the Code. At the time, it was expected that I.L. would testify and adopt her Statement as her evidence in chief under s. 715.1.

Voir Dire #2 - Admissibility of I.L.'s Videotaped Police Statement

- [14] I.L. did not testify at trial. Instead, the Crown sought to admit the videotaped Statement, made on January 24, 2019, to Detective Scott Rotherham, for the truth of its contents under the principled exception to the hearsay rule.
- [15] After a voir dire, during which I heard evidence from Y.L. and from Det. Rotherham--both of whom were cross-examined--I delivered oral reasons on January 5, 2023. My reasons were later released to the parties in written form but were not published. They are cited at 2023 BCSC 527 ("VD#2 Reasons"), and are being released with these reasons.
- [16] As set out in the VD#2 Reasons, I concluded that I.L.'s evidence was unavailable despite the Crown and Y.L.'s reasonable efforts, and that it was therefore reasonably necessary to admit the Statement.
- [17] I was also satisfied that the Crown had established, on a balance of probabilities, that I.L.'s Statement met the test of threshold reliability, that there was no prejudicial effect of admitting it, and that it had probative value. I declined to exercise my residual discretion to exclude it.
- [18] Det. Rotherham conducted the January 24, 2019, interview of I.L. At paras. 14-17 of the VD#2 Reasons, I set out the circumstances of the interview, the conditions in which it was conducted, and Det. Rotherham's explanation of the process, and the importance of I.L. telling the truth.
- [19] I.L. told Det. Rotherham that Mr. Dias began touching her in the summer of 2018 in the apartment she lived in with her grandmother, mother, and brother. She described how Mr. Dias would "play" with her and touch her legs and "private part" while she and her brother

were in a hiding spot they made with a blanket in the living room. She said that she tried pulling Mr. Dias' hand out "so then [she] could keep [her] body to [herself]" but that he was too strong for her. She said that the touching happened every time Mr. Dias came to her house and was close to her; she estimated that it happened ten times. She described how it bothered her very much and she tried to stop him. She said that she was scared that her grandmother would be angry with her if she said anything, as her grandmother was always angry with her.

- [20] I.L. also said that Mr. Dias touched her when she and her grandmother were in Peru with him. When her grandmother was out shopping or sleeping, and I.L. was alone with Mr. Dias, he touched her. I.L. said the touching was worse in Peru.
- [21] At first, I.L. told Det. Rotherham that Mr. Dias only touched her over her clothing. Later in her Statement, she said it also happened under her clothing, but not every time. She estimated that he had touched her about five times in Peru, three of which were under her clothing.
- [22] I.L. described how Mr. Dias would start touching her legs and then move up to her private part. She said she tried to pull his hand off. In Peru, he pressed down on her private part using three fingers, with what she described as a lot of pressure. She said it hurt but did not bleed. She got some tissues, put cold water on them, and put them on her private part.
- [23] I.L. described how she finally told her grandmother, who was very angry at Mr. Dias. After they returned from Peru, she never saw Mr. Dias again.
- [24] I determined that I.L.'s account of the abuse had the ring of truth. It sounded like an eight-year-old recounting what happened to her, not repeating a prepared or fabricated allegation. She used age-appropriate emotion when describing how she felt when Mr. Dias was touching her, and in describing her frustration about trying to pull his hand away when she was eating or watching TV.
- [25] I also determined that the timing and circumstances of I.L.'s disclosure supported the credibility of her Statement to Det. Rotherham and that her incremental disclosure did not negatively impact the credibility of her Statement.
- [26] Counsel agreed that evidence admitted in the second voir dire would be treated as having been admitted during the trial proper, so that it would be unnecessary to hear the evidence again.

Election to Call No Evidence

- [27] As he was entitled to do, Mr. Dias did not call any evidence during the second voir dire or at the trial.

- [28] In his closing submissions, counsel for Mr. Dias invited a conviction. He said that the defence did not take any issue with the actus reus elements of the offences as put before me by the Crown. Counsel for Mr. Dias invited me to make a ruling on the mens rea of the offences under the "axiom that a person intends the consequences of their actions".
- [29] Counsel for Mr. Dias also said that he and the Crown agreed that the evidence upon which I could convict Mr. Dias consisted of I.L.'s Statement and a recorded statement Mr. Dias made to Y.L. He said that it was clear that Mr. Dias unequivocally admitted the actus reus of the offences during the Recorded Conversation with Y.L. Although not entirely clear, I took counsel's submission to refer only to the offence arising from the events in Peru as it was the sole subject matter of the Recorded Conversation between Mr. Dias and Y.L.
- [30] At a later point in his submissions, counsel for Mr. Dias said that the defence conceded the proof of the actus reus and whatever inference needs to be drawn on the mens rea, "which [we] can expect would be consistent with a finding of guilt". He submits that, for Mr. Dias, the real issue or fight was going to be at sentencing.
- [31] Presumably, in respect of sentencing, counsel objected to Y.L.'s evidence about I.L.'s emotional deterioration after they returned to Canada from Peru. He submits that during I.L.'s Statement, about three weeks after she returned from Peru, she did not present like a dead person as she had been described by Y.L. Counsel submits that, when Det. Rotherham asked I.L. about school and her activities in the interview, she presented as a lively, articulate, charismatic eight-year-old girl in the interview. Counsel for Mr. Dias said that the video recording was the best evidence of I.L.'s emotional, physical, and mental state. When I.L. was asked by Det. Rotherham about how she was feeling, she replied, "[p]erfect", "[y]eah, we're good", and "[n]ever better". He submits that this cast doubt on the trauma that Y.L. said I.L. experienced arising from the abuse.
- [32] Some of Y.L.'s evidence about I.L.'s emotional deterioration after the events in Peru was based on hearsay. However, her direct observations of I.L.'s emotional state may be considered by me as corroboration of I.L.'s allegations: *R. v. Kavanagh*, 2022 BCCA 225 at para. 42.
- [33] The fact that I.L. said she was fine when she spoke to Det. Rotherham does not mean that she was always fine. It is possible that I.L. was more affected when she was alone with her family than she appeared on the video. She may have been putting on a brave face when she was with Det. Rotherham. As a result, I am not prepared to discount all of Y.L.'s evidence about I.L.'s emotional deterioration after returning from Peru.

Substantive Reliability of the Statement

- [34] I have determined that I.L.'s Statement is substantively reliable. I will not repeat my findings on threshold reliability: VD#2 Reasons at paras. 81-129. Suffice to say that there was no evidence after the second voir dire that would lead to a different conclusion on the reliability of I.L.'s Statement. I find that the Crown has proven that the following events occurred:
- (a) Mr. Dias started touching I.L. in the summer of 2018 in the apartment she lived in with her grandmother, mother, and brother. She said it happened "[e]very time he would be coming to my house or he would be close to me" (page 25, lines 28, 30), around "10 times" (page 27, line 15; page 29, line 6).
 - (b) The touching occurred when she and her brother were playing in a hiding spot under a blanket in the living room (page 20, line 13-page 22, line 31; page 53, line 29-page 55, line 19).
 - (c) Mr. Dias "play[ed]" with the children but he "started touching" I.L. In the video recording, I.L. can be seen rubbing her thigh at this point (page 19, line 10, timestamp 13:45:10; see also page 22, line 31, timestamp 13:49:00).
 - (d) Mr. Dias would start at I.L.'s ankle--as she demonstrated in the video recording of her Statement--"on [her] legs" and then he would "go a bit higher up" to her private part. In the video, I.L. can be seen moving her hand up her groin area (page 29, line 31-page 30, line 3, timestamp 13:57:28; see also page 20, line 10).
 - (e) Mr. Dias touched her over her clothes (page 23, lines 9-14).
 - (f) The touching bothered her very much, and she tried to get him to stop by pulling and kicking, but it did not work (page 23, lines 25-31).
 - (g) Mr. Dias continued to do the same kind of things in Peru (page 32, line 30), except worse (page 29, lines 9-19; page 71, lines 8-26).
 - (h) In Peru, the touching occurred about five times (page 33, lines 12-21) maybe six (page 67, line 6), and while "[Y.L.]", her grandmother, was not around (page 38, lines 1-5; page 46, lines 11-13).
 - (i) Mr. Dias would interrupt her while she was eating (page 33, line 1; page 37, line 19) or watching TV (page 47, lines 13-25).
 - (j) I.L. would try to push him off, kick him, and hit him with a knife, but he kept doing it (page 33, lines 4-9; page 37, line 29).
 - (k) On one occasion, "he went through the private part", "it hurt very badly", a 9-out-of-10 in terms of amount of force he used, "[he] got the middle finger inside me", "it hurt for at least two days or something". At page 43, line 3-page 45, line 8, the context suggests this was over her clothing. However, at page 68, lines 10-20, I.L. seems to refer to the same incident as happening under her clothing.

- (l) Mr. Dias put his hand inside her pants, to her private part (page 56, line 32-page 58, line 17); this happened about three times in Peru (page 61, lines 1-10).
- (m) I.L. was unclear about how long each incident lasted. She variously said, "until [Y.L.] wakes up", "10 seconds or something? Four? No, I don't know how many minutes or seconds", I.L. agreed with Det. Rotherham's suggestion that it lasted a long time (page 48, line 24-page 49, line 8).
- (n) I.L. confirmed in a diagram, part of Ex. 9, that Mr. Dias touched various parts of her body over her clothes (marked in yellow) and under her clothes (marked in purple): see generally page 87, line 1-page 96, line 7.
- [35] The inability of children to describe, with precision, the time and place of an event, or even its details has been commented on in a number of cases.
- [36] In *R. v. Hernandez-Lopez*, 2020 BCCA 12, leave to appeal to SCC ref'd, 39090 (9 July 2020), the Court of Appeal cited a number of authorities discussing the special approach that should be taken with respect to children's evidence: see also *R. v. M.D.*, 2021 BCCA 339 at para. 56. In that regard, I.L.'s estimation of the number of times things occurred, and her description that things happened every time Mr. Dias came to her house in Vancouver, should be treated with caution. In my view, it is unlikely that I.L., who was eight at the time, would be able to specifically recall the number of times events occurred. What I can take from what I.L. said is that the touching happened with some frequency.
- [37] However, with respect to I.L.'s evidence about how often the touching happened in Peru, she was more systematic: she drew them out on a calendar, placed dots, and told Det. Rotherham which of those dots represented Mr. Dias touching her under her clothes.
- [38] I.L. is not entirely clear that when she said Mr. Dias "got the middle finger inside me" (page 44, line 9), she meant that Mr. Dias had his hand under her clothes and digitally penetrated her vagina. Fairly read as a whole, I conclude that she was saying that Mr. Dias' hand was over her clothes but that he was pushing really hard on her vaginal area, causing her pain.
- [39] With respect to the three times I.L. said that Mr. Dias put his hand under her clothes, it is unclear how long these incidents lasted. Based on her evidence, and her agreement that it lasted a long time, I conclude that these were not just momentary brushes.

Assessment of Credibility

- [40] The assessment of credibility is key to this case. My verdict must be based on an assessment of the evidence as a whole and whether, on such an assessment, I am left with a reasonable doubt as to Mr. Dias' guilt. Because the burden is on the Crown throughout, the assessment of credibility is not based on a choice between the Crown's and the accused's evidence: *R. v. Harrison*, 2022 BCSC 2422 at paras. 21-22, citing *R. v. Horton*, 1999 BCCA 150 at para. 20; *R. v. Vuradin*, 2013 SCC 38 at para. 21.

Difference between Credibility and Reliability

[41] There is a difference between the concepts of credibility and reliability. In *R. v. H.C.*, 2009 ONCA 56 at para. 41, the Ontario Court of Appeal explained that credibility has to do with a witness' veracity, and reliability with the accuracy of the witness's testimony: *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal to SCC ref'd, 36623 (17 March 2016); *R. v. Plehanov*, 2019 BCCA 462 at para. 51, leave to appeal to SCC ref'd, 39463 (8 April 2021). Accuracy engages consideration of the witness' 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: *H.C.* at para. 41, citing *R. v. Morrissey*, 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.); *R. v. J.M.*, 2021 BCCA 263 at paras. 52-53.

Evidence of Children

[42] In assessing I.L.'s interview by Det. Rotherham, it is necessary that I make allowances for I.L.'s age. In *R. v. W. (R.)*, [1992] 2 S.C.R. 122 at 133, 1992 CanLII 56, Justice McLachlin discussed a change in the approach to children's evidence due to the emerging sensitivity to the particular perspectives of children and how they may experience the world differently from adults. She wrote that, as a result, it may be wrong to apply adult tests for credibility to children's evidence; it was not surprising that details important to adults, like time and place, may be missing from children's recollections: *W. (R.)* at 134.

[43] There are certain considerations that apply to the assessment of children's evidence. For example, "we approach the evidence of children not from the perspective of rigid stereotypes, but on what Justice Wilson called a 'common sense' basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case": *W. (R.)* at 134, citing *R. v. B. (G.)*, [1990] 2 S.C.R. 30 at 54-55, 1990 CanLII 7308. Justice Wilson wrote in *B. (G.)* at 55:

While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. ... The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

[44] As Mr. Dias acknowledged, by not challenging the admissibility of I.L.'s Statement under s. 715.1 of the Code, it was given within a reasonable time after the incidents she described.

[45] In my VD#2 Reasons, I accepted the Crown's submission that there are features of I.L.'s Statement that suggest it should be accepted. These include that:

- a) The Statement was given to a person in authority: a police officer (para. 88);

- b) It was given in a relaxed atmosphere, and I.L. did not appear to be intimidated, her demeanor was relaxed, she was not afraid, and she was forthright (paras. 15 and 105);
 - c) I.L. understood the difference between the truth and a lie and she promised to tell him the truth (paras. 17, 86);
 - d) The interview was conducted in a safe space and in accordance with a protocol for interviewing children (para. 14);
 - e) For the key parts, Det. Rotherham used open-ended questions, without prompting (para. 15);
 - f) I.L. provided appropriate details (para. 104);
 - g) I.L. used child-appropriate language in describing how the touching made her feel (para. 104); and
 - h) She corrected Det. Rotherham when he misstated what she had told him (para. 90).
- [46] In addition, I.L.'s Statement was corroborated in a number of respects. I.L. told Det. Rotherham about using wet tissues to deal with the pain she felt in her private part after Mr. Dias pressed very hard. She gestured to her vaginal area and drew a circle around that area when she was asked to show where, on her body, Mr. Dias had pressed hard. Y.L. testified about seeing wet tissue in the bathroom wastebasket. Although I.L. said she did not bleed, Y.L. described blood on the tissue.
- [47] I.L. told Det. Rotherham about a gesture Mr. Dias made to warn her not to say anything when she and her grandmother confronted him about I.L.'s disclosure in Peru. Y.L. also testified about a gesture she saw Mr. Dias make. Although their descriptions of the gesture differed, I.L. and Y.L. both agreed that such a gesture was made.
- [48] Y.L. testified about I.L.'s disclosure to her of the alleged sexual misconduct by Mr. Dias in Peru, how Y.L. confronted him with the allegations and had I.L. tell him what she said he had done, the steps Y.L. took to report to the police on their return to Vancouver, her description of I.L.'s emotional state after the events, the circumstances of her surreptitious Recorded Conversation she had with Mr. Dias, and the various unsuccessful steps she took to have I.L. testify.
- [49] There were some parts of Y.L.'s evidence that were hearsay on which I have not relied. For example, Y.L. testified about what she learned from staff at I.L.'s school, after I.L. returned from Peru, and what they told her about how I.L. was coping.
- [50] The defence relied on what it described as Y.L.'s bias towards Mr. Dias. Counsel noted that in her police statement and at the preliminary inquiry, she referred to Mr. Dias by name but, at trial, she refused to do so. The defence also pointed to the difference between Y.L.'s demeanor in her direct evidence and during cross-examination.

- [51] I do not conclude that Y.L. was biased against Mr. Dias. She presented as a grandmother and guardian who was concerned about I.L. She clearly felt betrayed by a man she trusted, brought into her home, and allowed to have access to I.L. She gave her evidence as carefully and accurately as she could. She was prepared to admit all of the positive things Mr. Dias had done for her and her grandchildren, including picking the children up and dropping them off at school, watching them when she was going to be late, and providing her with money to pay for a lawyer in a dispute about custody or parenting of her grandson. Mr. Dias paid for their trip to Peru to stay in accommodation arranged by Y.L.
- [52] Her uncontradicted evidence is that, until I.L.'s allegations came to light, Y.L. cared deeply for Mr. Dias. He was the husband of one of her late friends. He was basically a member of the family. He frequently visited her home between January 1, 2018, and December 17, 2018, and shared meals with her and her grandchildren. She testified that her grandchildren were always delighted to see him and they thought of him as a grandfather. In I.L.'s Statement at one point, she referred to Mr. Dias as her grandfather and then corrected herself.
- [53] I note that in Y.L.'s recording of Mr. Dias, he agreed that he had been close to Y.L.'s family, and Y.L. relied on their close relationship when pleading with Mr. Dias to tell her the truth about what happened in Peru.
- [54] Y.L. testified about how she cared for Mr. Dias during various health crises, including when he suffered an eye infection after I.L. made her disclosure in Peru.
- [55] It was apparent from Y.L.'s evidence that she trusted Mr. Dias. I accept that Y.L. is angry with Mr. Dias' breach of her trust. She has come to hate him for what he did to I.L. She was very candid about her anger in her evidence and that she hates him. It was also clear that she wants justice and to see Mr. Dias convicted. She blames herself for giving Mr. Dias access to I.L. She was cross-examined about the implausibility of her evidence that she once warned Mr. Dias not to touch I.L. and that she kept two eyes on him, yet she left I.L. alone with him for up to five hours at a time in Peru. It was put to her in cross-examination that this was an inconsistency in her behaviour. She admitted it was. She said, "I kept no eyes. I trusted him blindly", and later she said, "I know, I agree with that, and that's something I will never forgive myself." I find her evidence plausible. She trusted Mr. Dias and did not suspect him of inappropriately touching I.L. She did not think him capable of doing what he did.
- [56] The fact that Y.L. trusted Mr. Dias does not detract from her credibility. It is not surprising that she trusted the man she described as her best friend.
- [57] In all the circumstances, Y.L.'s palpable dislike of Mr. Dias is understandable, and her increasing contempt for him is consistent with having to live with what Mr. Dias did to I.L. She has become angrier with time. I do not find that to be surprising or that it affected the credibility of her evidence.

- [58] Although the defence suggested that, by refusing to call Mr. Dias by name, Y.L. was putting on a show for the court, I do not agree. Instead, I conclude that she was being honest about her feelings. Despite her strong antipathy toward Mr. Dias, Y.L. gave her evidence in a fair and balanced way. She described Mr. Dias as nice, kind, and fun and as her best friend and confidante. She acknowledged that she had never seen Mr. Dias touch I.L. inappropriately. When she was asked if she had any reason to be angry with Mr. Dias before I.L.'s allegations, she testified, "[n]ot at all. I was very happy. That's why we left with him to Peru." Her answer made common sense.
- [59] As I said in my VD#2 Reasons, in cross-examination, Y.L. was asked about potential motives for her to persuade I.L. to lie about Mr. Dias.
- [60] As the Supreme Court of Canada said in *R. v. Gerrard*, 2022 SCC 13:
- [4] Absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, is a common sense factor that suggests a witness may be more truthful because they do not have a reason to lie. That said, when considering this factor, trial judges must be alive to two risks: (1) the absence of evidence that a complainant has a motive to lie (i.e. there is no evidence either way) cannot be equated with evidence disproving a particular motive to lie (i.e. evidence establishing that the motive does not exist), as the latter requires evidence and is therefore a stronger indication of credibility -- neither is conclusive in a credibility analysis; and (2) the burden of proof cannot be reversed by requiring the accused to demonstrate that the complainant has a motive to lie or explain why a complainant has made the allegations (*R. v. Swain*, 2021 BCCA 207, 406 C.C.C. (3d) 39, at paras. 31-33).
- [61] The absence of a motive to lie on the part of Y.L. or I.L. is not determinative. Mr. Dias does not have an onus to demonstrate that either had a motive to fabricate evidence. The absence of a demonstrated motive to fabricate does not necessarily mean that there was no motive. The absence of a motive to fabricate also does not conclusively establish that a witness is telling the truth. The presence or absence of a motive to fabricate evidence is only one factor to be considered in assessing credibility: *R. v. Swain*, 2021 BCCA 207 at para. 32.
- [62] During counsel's cross-examination of Y.L., he suggested that Y.L. had coerced I.L. to manipulate the prosecution, or to avoid a debt that she owed to Mr. Dias. It was suggested that Y.L. owed Mr. Dias money. Those suggestions were adamantly denied by Y.L., and were contradicted by other features of the case, including: Y.L.'s evidence that Mr. Dias was her best friend, she trusted him; he was like a grandfather to I.L.; and, initially, their time in Peru was the happiest time of their lives.
- [63] There was no evidence to support either suggestion. Even if Y.L. owed Mr. Dias money, Mr. Dias did not establish a link between any such debt and a motive for Y.L. to persuade I.L. to fabricate her allegations.

- [64] In this case, there is an absence of evidence that Y.L. had a motive to lie. That is a factor that supports, but is not conclusive of, her credibility. In this case, Mr. Dias' argument is that Y.L. influenced I.L. to make false allegations against him. He has no burden to prove that, as the burden always remains on the Crown to prove the elements of the offence beyond a reasonable doubt. I find that there is no evidence on which I could infer that Y.L. influenced I.L. to make the allegations.
- [65] At another point, Mr. Dias suggested that there was a power struggle between Y. L. and her daughter for I.L.'s affections, but there was no evidence on which such an inference could be drawn.
- [66] Mr. Dias was able to fully cross-examine Y.L. about her evidence in that regard, and she was not shaken in her evidence.
- [67] After considering her evidence and the submissions, I conclude that Y.L. was a reliable and credible witness.

Legal Principles

- [68] The accused is charged with three offences, one involving sexual assault and the other two involving sexual interference.
- [69] Mr. Dias is presumed innocent unless the Crown proves his guilt beyond a reasonable doubt. The burden of proving the elements of the offences rests upon the Crown and never shifts to Mr. Dias. However, the Crown is not required to prove each individual piece of evidence that makes up its theory beyond a reasonable doubt: *R. v. Morin*, [1988] 2 S.C.R. 345 at 360-361, 1988 CanLII 8; *R. v. Arp*, [1998] 3 S.C.R. 339 at paras. 64-75, 1998 CanLII 769; *R. v. Vallee*, 2022 BCCA 11 at para. 236, leave to appeal to SCC ref'd, 40087 (28 July 2022).

The Offences

- [70] Under s. 150.1(1) of the Code, since Mr. Dias is charged with offences under ss. 151 and 271, consent is removed as a potential defence where the complainant is younger than 16 years of age. As it applies here, s. 150.1(1) provides:

150.1(1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or is charged with an offence under section 271 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

- [71] I.L. was born on October 27, 2010, and, at the time of the alleged offences, was eight years old. Consent is not an issue in this case.

Sexual Assault

- [72] With respect to the charge of sexual assault in Count 1 of the indictment, s. 271 of the Code, provides that:

271 Everyone who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year

[73] Section 265(1)(a) defines an assault as including the non-consensual application of force intentionally to another person, directly or indirectly. Pursuant s. 265(2), the definition of assault applies to all forms of assault, including sexual assault.

[74] The essential elements that the Crown must prove beyond a reasonable doubt with respect to the offence of sexual assault against I.L. are:

- a) the identity of Mr. Dias as the offender who committed the alleged sexual assault;
- b) the time and place of the commission of the offence of sexual assault as set out in the indictment;
- c) that Mr. Dias applied force (including touched) I.L. directly or indirectly;
- d) Mr. Dias intended to touch I.L.; and
- e) the assault was of a sexual nature.

(See R. v. T.L.P., 2015 BCSC 618 at para. 18; R. v. Ewanchuk, [1999] 1 S.C.R. 330 at para. 23, 1999 CanLII 711.)

[75] The defence does not take issue with the fact that the Crown has proven the first four elements of the offence beyond a reasonable doubt on Y.L.'s evidence, including the Recorded Conversation with Mr. Dias, and through I.L.'s Statement.

[76] Thus, there is no issue about time, date, jurisdiction, I.L.'s age, and Mr. Dias' knowledge that I.L. was under 16 years of age. I also find that the Crown has proven beyond a reasonable doubt, through I.L.'s and Y.L.'s evidence that touching or contact occurred between Mr. Dias and I.L. on occasions occurring within the date range covered by Count 1 of the indictment.

[77] That leaves the issue of whether the Crown has proven beyond a reasonable doubt that the offence occurred in circumstances of a sexual nature as explained in R. v. Chase, [1987] 2 S.C.R. 293, 1987 CanLII 23. There, the Supreme Court of Canada said:

Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) [now s. 266] of the Criminal Code which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" (Taylor, *supra*, per Laycraft C.J.A., at p. 269). 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 (see S.J. Usprich, "A New Crime in Old Battles: Definitional

Problems with Sexual Assault" (1987), 29 Crim. L.Q. 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

Implicit in this view of sexual assault is the notion that the offence is one requiring a general intent only.

[Emphasis added.]

Sexual Interference

[78] In relation to the charges of sexual interference on Counts 2 and 3 of the indictment, s. 151 of the Code provides 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 16 years

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

[79] Sexual interference is a specific intent offence, requiring subjective proof that Mr. Dias touched I.L. for a sexual purpose. It differs from sexual assault, a general intent offence, that requires objective proof that the touching was of a sexual nature: *R. v. Campbell*, 2023 BCCA 19 at para. 40; *R. v. Michel*, [1994] B.C.J. No. 3308 at para. 4, 1994 CanLII 1336 (C.A.). The essential elements that the Crown must prove beyond a reasonable doubt with respect to the offence of sexual interference are:

- a) the identity of Mr. Dias as the offender who committed the alleged sexual interference;
- b) the time and place of the commission of the offence of sexual interference as set out in the indictment;
- c) I.L. was under 16 years of age at the time of the alleged sexual interference;
- d) that Mr. Dias touched any part of the body of I.L., directly or indirectly, with an object or a part of his body;
- e) that Mr. Dias intentionally touched I.L. for a sexual purpose and "for a sexual purpose" means for one or more of the following:

- i. Sexual gratification;
- ii. The violation of I.L.'s sexual integrity; or
- iii. The sexual domination of I.L.

(See T.L.P. at para. 14.)

[80] An accused's sexual purpose can be established by direct evidence, circumstantial evidence, or the nature of the touching itself: *R. v. D.M.*, 2022 BCCA 120 at para. 34, and the cases cited therein; *R. v. G.B.*, 2009 BCCA 88 at paras. 28-29. For example, the words spoken by the accused at the time of the touching, the location of the touching, and part of the body touched may all inform the sexual purpose analysis.

[81] As with respect to the offence of sexual assault, Mr. Dias does not take issue with the fact that the Crown has proven the first four elements beyond a reasonable doubt.

[82] That leaves the issue of whether the Crown has proven beyond a reasonable doubt that the touching was, subjectively, for a sexual purpose.

Analysis

[83] The Crown invites me to convict Mr. Dias of two counts of sexual interference and conditionally stay the charge of sexual assault. As set out above, during closing submissions, Mr. Dias invited a conviction.

[84] The central issues are whether the Crown has proven beyond a reasonable doubt, on the whole of the evidence, that the alleged acts that form the basis for the charges occurred and amounted to sexual interference or sexual assault. That issue depends on the ultimate credibility and reliability of I.L.'s Statement to the police, Y.L.'s evidence, and what Mr. Dias said to Y.L. in their Recorded Conversation. The defence did not challenge the admissibility of the Recorded Conversation nor the transcript of it.

[85] On January 1, 1988, the requirement for corroboration of children's evidence in sexual offences was abolished by the introduction of s. 274 of the Code. As a result, Mr. Dias may be convicted on the evidence of I.L. alone. In such cases, however, Justice Ker in *R. v. England*, 2021 BCSC 2585, notes:

[26] the assessment of credibility takes on importance. Justice O'Connor in *R. v. F.(L.)*, [2006] O.J. No. 4173, 2006 CanLII 34723 (O.N.S.C.) at para. 9, made the following comments:

[9] 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.

Events in Vancouver

- [86] I.L. told Det. Rotherham about Mr. Dias touching her in her apartment in Vancouver. I.L. said she and her brother created a hiding spot in the living room at the side of her mother's bed. She described it as small, with a blanket on top and she and her brother pretended that they were hiding. Mr. Dias was inside the hiding spot. He played with her brother to make him laugh, but Mr. Dias started touching her. He tapped her on the head softly and then started touching her.
- [87] In the video, I.L. can be seen rubbing her thigh and later touching her vaginal area, which she called her "private part". She said she tried to stop Mr. Dias, but he was too strong. No one saw it happen except her brother. She said that Mr. Dias touched her over her clothes, starting at her ankles and legs and then going up to her private part. She said that he never said anything and she was under the covers so she could not see what Mr. Dias was looking at as he was touching her. He put his hand through the holes in the covers, referring to the covers over the hiding spot.
- [88] Y.L. confirmed I.L.'s evidence about the hiding spot that I.L. and her brother created in the living room with a packing box and a blanket, pretending it was a house. She also confirmed that Mr. Dias played with the children while they were in the hiding spot. She testified that she saw him waving his hands in front of the hiding spot.
- [89] I accept I.L.'s description of what happened in Vancouver as reliable.
- [90] Nonetheless, while what she describes is the actus reus of the offence of sexual assault and sexual interference--unwanted touching of parts of her body--I cannot find that her evidence establishes that Mr. Dias touched I.L. in circumstances of a sexual nature or for a sexual purpose.
- [91] With respect to the charge of sexual assault, when viewed in light of all the circumstances, "the sexual or carnal context" of the touching would not be apparent to a reasonable observer: Chase at 302.

- [92] Mr. Dias tapped I.L. on the head and touched her ankle, moving up to her vaginal area over her clothes. She said he did so from outside the children's hiding spot, which, according to Y.L., consisted of a packing crate covered by a blanket. I.L. describes Mr. Dias reaching through the covers and that she did not know what he was looking at when he did so.
- [93] I.L. said in her Statement that Mr. Dias did not say anything while he was touching her and, as she was inside the hiding place, she did not see what he was doing or any gestures he was making.
- [94] On the evidence, I conclude that a reasonable observer, knowing that Mr. Dias was playing with I.L. and her brother while they were inside their hiding place, and knowing that I.L. could not see Mr. Dias when he was reaching through the covers, when taken as a whole, would not consider that the touching was objectively sexual in nature.
- [95] I also conclude that the evidence as a whole does not satisfy me beyond a reasonable doubt that Mr. Dias had a sexual purpose for the touching.
- [96] It is possible that the touching in the circumstances described, which I accept included touching of I.L.'s private part, was accidental. She did not say that the touching was accompanied by any words or gestures. In the circumstances, I cannot find beyond a reasonable doubt that the touching amounted to sexual assault. The situation in which the touching occurred appears to have been Mr. Dias reaching his hands through the blanket that the children had put on top of the box without seeing what he was doing or where he was touching them. It is possible that, in those circumstances, he accidentally came in contact with parts of I.L.'s body that would be considered sexual: Chase at 302.
- [97] For the same reasons, I find that the Crown has not proven beyond a reasonable doubt that Mr. Dias had the requisite specific intent with respect to the charge of sexual interference regarding the events in Vancouver. The Crown has not proven that the touching in Vancouver was for a sexual purpose.

Events in Peru

- [98] In her videotaped Statement to Det. Rotherham, I.L. said that when they were in Peru, when Y.L. was either sleeping or out buying groceries, Mr. Dias touched her private part both over and under her clothes. She said that on one occasion, he pressed down very hard, it hurt very badly for two days, and she put cold water on her private part, to make sure it did not bleed. At the end of the interview with Det. Rotherham, I.L. marked on a diagram where Mr. Dias had touched her, clearly showing that he had touched her breast and vaginal area, both over and under her clothing.
- [99] I.L.'s Statement about what happened in Peru, except as it related to Mr. Dias touching I.L. under her clothes, was corroborated by Mr. Dias' Recorded Conversation with Y.L.

Recorded Conversation

[100] On May 2, 2019, Y.L. and Mr. Dias met at Y.L.'s request. Y.L.'s recording of her conversation with Mr. Dias involved only the events in Peru. She did not ask, and Mr. Dias did not say anything, about touching I.L. in Vancouver.

[101] Unbeknownst to Mr. Dias, with police assistance, Y.L. was recording the meeting. Y.L. and Mr. Dias discussed their friendship, his role in Y.L. and her grandchildren's lives, and the time they spent together before the trip to Peru.

[102] Y.L. asked Mr. Dias what happened with I.L. in Peru. He responded at page 26-27, lines 940-953 of the transcript:

I play with girl, she likes - she puts her legs up and I grab them up and down that's it, that's it, nothing else. That's it, of course that, I touch everywhere but she likes me to play with her she came to me for that, not ah, not ah, I, I, I touch her leg and touch here, touch (indiscernible) they touch me, I touch (indiscernible). I touch when I grabbed her but she wants that, she wants me to play with her. Pick her up and down (indiscernible). N- nothing, nothing like - did you ask her did she take her pants off or something? with me? Never the way she was dressed that's the way I play and that's it okay nothing else (indiscernible).

[103] At page 27, lines 981-984, Mr. Dias said:

I never grab girl like to touch her leg or something or I touch her leg when I was playing with her, her bum or whatever. But I, I never touched girl between her legs like you say (indiscernible).

[104] Mr. Dias went on to say that he had no reason to touch an eight-year-old girl and that, when they were playing, I.L. never took her pants off. At page 33, line 1197-1201, Mr. Dias said:

I'm telling you, if I did touch with my finger in the girl - between her legs, I would tell you for to finish the thing I say that I'm sorry (indiscernible) playing (indiscernible). I didn't, I didn't touch. She never took under pants off (indiscernible).

[105] The discussion continued, and Mr. Dias denied that he did anything to I.L., except play with her. At page 41, line 1485, he said he never touched I.L. between her legs; and, at page 45, lines 1642-1648, he repeated that he did not touch I.L; and if he did, he would tell Y.L. "for us to finish" and apologize.

[106] At pages 46-47, lines 1682-1702, Y.L. asked Mr. Dias if he touched I.L. with her clothes on, and he acknowledged that when he was playing and grabbed her, he touched her on her bum and her legs. He said:

The went up and down and then I left and she come, then she (indiscernible) pick me up again (indiscernible). I didn't touch (indiscernible) girl between the legs (indiscernible).

[107] At pages 58-59 of the transcript, Y.L. pleaded with Mr. Dias to tell her the truth. She said that: all she wanted is honesty (line 2097), for him to be back home with her family and happy (line 2115), and that she just wanted the truth (line 2161).

[108] Mr. Dias then admitted that he did put his hand between I.L.'s legs. He said, at page 60, lines 2171-2199:

When I was playing, sometimes (indiscernible) I believe I, I touched, with with the clothing between the legs. I believe I touch her between the legs I, I pass my um, my hand in between her legs like, when we are playing.

[109] Y.L. asked him how, if he was holding I.L. up, he could pass his hand between her legs. He responded at page 61, lines 2219-2233:

So, um, ah, I believe in that time when I lift her down, I believe I passed my, my hand in, in the between her leg with the clothes on. When I left little girl when I lift her. I passed my hands between her leg, I believe that I can tell you. Yeah between her legs, when I lift girl down, then I, I pass, my hand ah between her legs.

[110] Y.L. then asked him how his hand could go between I.L.'s legs when he is lifting her up and moving her from side to side. He responds, "Yeah, because ah, I did that purpose maybe, ah": page 62, lines 2242-2268.

[111] Y.L. asked if he did it purposely and he meant to touch I.L.; Mr. Dias responded at page 62, lines 2250-2252:

Yeah. I, I believe I touched her like that. But not ah, the way she say. She's saying I pass my tongue, and use my finger.

[112] Mr. Dias agreed that he touched I.L. when they were playing. When he put her down, "I take my hands but I pass my hands (indiscernible) to the body. When I leave there": page 62, lines 2266-2267.

[113] At pages 62-63, Mr. Dias said that when he lifted I.L., he touched her between her legs and maybe touched her breast area. He said at page 63, lines 2292-2293:

I was not playing with her, I just passed the hand, but ah, I was not like play with her. Even with the clothes on, I was not playing like that ah, I just passed my hand in the body, yeah.

[114] Y.L. asked him how many times he did that; Mr. Dias responded, "Every time we play": page 63, lines 2300, 2302.

[115] Y.L. then asked why he would pass his hands between I.L.'s legs and over her body. Mr. Dias responded at page 64, lines 2316-2322:

Why. Because you know, why, because (indiscernible) when you are playing and she wants, and (indiscernible) I touch her more than supposed to. I touch her more than supposed to. Leave, leave my hands. Pass over here, and [up], with the clothes on.

[116] Y.L. then asked why he would touch her body, he responded that they were playing. He said at page 65, lines 2347-2369:

Yeah, when we are playing I touched her bum and I pass my hands up between her legs and up (indiscernible) with the clothes on.

[117] Mr. Dias said that he did that all the time when they played because I.L. did not mind. He said he was not playing with his hands even when I.L. had her clothes on.

[118] Y.L. asked Mr. Dias how he thought I.L. felt when he was doing that. He responded at page 65, lines 2379-2382:

Ah nothing, nothing ah, special. It was just she likes to, she likes ah, to do that when I lift her and pass my hands (indiscernible). Then she (indiscernible) pick me up again. It, it was like that. (indiscernible).

[119] Y.L. said that he knew it was wrong, and Mr. Dias responded at page 66, lines 2390-2397:

Oh well, to tell you the truth, I shouldn't do that, yeah (indiscernible). I shouldn't do that. I know [it was wrong].

[120] Mr. Dias then said, at page 66-67, lines 2420-2423, that he:

just passed that for the pleasure for her, because ah, she, she likes, when I do that I think. That's why we play and then, and then I, I always pass my hand, she liked that.

[121] Y.L. asked Mr. Dias what he meant when he said "the pleasure for her". He responded at page 67, lines 2427-2437:

Yeah because she did like when I pass my hand like this (indiscernible). She wants me to pick her up again. Ah, maybe for that. to play, and the same time, she (indiscernible) because she likes when I pass my hands like this.

[122] Y.L. asked Mr. Dias where he put his hands first. He responded at page 67, lines 2442-2454:

Ah, well I put (indiscernible) I just come between her leg, up, ... between her leg (indiscernible). to up here To the breast, yeah.

[123] The Recorded Conversation between Y.L. and Mr. Dias was oral only. At certain points, Mr. Dias appears to be gesturing and showing Y.L. what he meant. During her evidence, Y.L. demonstrated what Mr. Dias was showing her. She demonstrated Mr. Dias' hands coming up between I.L.'s legs to the vaginal area and then up to and touching her breast area.

[124] In summary, for more than half of the Recorded Conversation with Y.L., Mr. Dias admitted to touching I.L. but denied that anything inappropriate happened. He said he played with I.L., she liked it, she put her legs up and he grabbed them up and down. He denied that he ever touched her between her legs. However, after Y.L. pled with him to tell the truth, Mr. Dias agreed that he put his hand between I.L.'s legs, while Y.L. was out of the house, and that he did so on purpose every time they played. He acknowledged that he touched I.L.

more than he was supposed to and that he knew he should not do that. He said he did it for I.L.'s pleasure and because she liked it. He acknowledged that he started touching with his hands and came up between I.L.'s legs to her breasts.

[125] Mr. Dias's statement is inculpatory. He admits to sexually touching I.L., and his evidence corroborates I.L.'s Statement except with respect to whether he touched her under her clothing. In that regard, his statement is exculpatory.

[126] As explained in *R. v. Sanhueza*, 2020 BCCA 279, where the Crown seeks to tender an accused's out-of-court statement that contains both inculpatory and exculpatory parts, it must tender the entire statement, and the exculpatory parts are substantively admissible in favour of the accused: paras. 23-25, referring to *R. v. Graham* (1972), [1974] S.C.R. 206 at 213, 1972 CanLII 172; *R. v. Rojas*, 2008 SCC 56 at para. 37; *R. v. Fox*, 2023 BCCA 198 at para. 10.

[127] The trial judge must apply the *R. v. W. (D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93, framework and approach the statement as they would any other testimony for the accused: *Sanhueza* at paras. 32, 37. The Court of Appeal describes the assessment as it relates to mixed statements as, "[i]f the evidence [is] accepted, it raise[s] a reasonable doubt about the [accused's] guilt, or the judge [does] not know whom to believe because of the evidence, the [accused is] entitled to an acquittal": *Sanhueza* at para. 37.

[128] More generally, as it relates to evidence tendered by the accused, the *W. (D.)* framework is summarized as follows:

- a) If the evidence of the accused is believed, the accused must be acquitted;
- b) If the evidence of the accused raises a reasonable doubt--even if some or all of it is not believed--the accused must be acquitted;
- c) If the evidence of the accused does not raise a reasonable doubt but leaves the judge unable to decide whom to believe in assessing whether guilt has been established beyond a reasonable doubt, the accused must be acquitted; and
- d) If the judge is unable to determine whom to believe, the accused must be acquitted.

(See *R. v. J.H.S.*, 2008 SCC 30 at paras. 9-13.)

[129] In this case, I do not believe Mr. Dias' statements to Y.L. that he did not touch I.L. under her clothes nor was I left with a reasonable doubt with respect to them.

[130] When it comes to whether Mr. Dias' hands were under I.L.'s clothes, it is his word against hers. I.L. made a clear distinction between his conduct in Vancouver and his conduct in Peru. She described his conduct in Peru as worse.

- [131] I.L. did not exaggerate. She did not say that he always touched her under her clothing. She distinguished between him touching her in her private part as opposed to on her breasts. In particular, on the occasion on which she said Mr. Dias pressed down hard causing her pain, she did not say that he did so under her clothes.
- [132] Although, initially, I.L. said that Mr. Dias had not touched her under her clothing, her eventual disclosure that he did so does not detract from her evidence. Incremental disclosure by children is not unusual: *R. v. Ramos*, 2020 MBCA 111 at paras. 65-67, *aff'd* 2021 SCC 15.
- [133] As I have said, the absence of a motive to lie on the part of I.L. is not determinative. Mr. Dias does not have an onus to demonstrate that either I.L. or Y.L. have a motive to fabricate evidence, that the absence of a demonstrated motive to fabricate necessarily means that there was none, or finally, that the absence of a motive to fabricate conclusively establishes that they are telling the truth. The presence or absence of a motive to fabricate evidence is only one factor to be considered in assessing credibility.
- [134] In this case, the absence of a motive to fabricate, when considered along with all of the other indicia of reliability, is a factor that supports a conclusion that the Crown has proven the offence of sexual interference beyond a reasonable doubt.
- [135] With respect to I.L.'s allegations that Mr. Dias touched her under her clothes, I am unable to find that guilt has been established beyond a reasonable doubt. In the Recorded Conversation, Mr. Dias repeatedly denied touching I.L. under her clothes. Although I do not find that I.L.'s incremental disclosure detrimentally affects her credibility, she could not be cross-examined on this issue. I am unable to determine whom to believe based on the conflicting evidence, and thus, I cannot find that Mr. Dias touched I.L. under her clothes: *R. v. J.H.S.*, 2008 SCC 30 at para. 12, citing *R. v. C.W.H.*, 68 C.C.C. (3d) 146 at 155, 1991 CanLII 3956 (B.C.C.A.).
- [136] Cross-examination is an important, if not essential, feature of a criminal trial that ensures that an accused may make full answer and defence. In cases like this, the court is asked to find guilt notwithstanding the fact that Mr. Dias has been deprived of the right to cross-examine I.L. The inability to cross-examine in this case is not, however, fatal to a finding of guilt. To find otherwise would be to ignore that the law now allows, in limited circumstances, the admission of hearsay statements. Nonetheless, the lack of an ability to cross-examine requires me to be particularly vigilant in assessing both the credibility and reliability of the hearsay evidence in deciding whether the evidence as a whole establishes guilt beyond a reasonable doubt.

- [137] In this case, I am satisfied that the whole of the evidence, including I.L.'s hearsay statement--corroborated to the extent I described--and the content of Mr. Dias' Recorded Conversation with Y.L., is sufficient to establish the mens rea of the offence of sexual interference with respect to events in Peru. Those events amount to sexual interference regardless of whether Mr. Dias touched I.L. under her clothes.
- [138] During the Recorded Conversation, Mr. Dias initially denied any inappropriate touching of I.L. He then admitted to touching I.L. every time Y.L. was away, moving up her legs, to between her legs, and up to her chest. Mr. Dias acknowledged that he touched I.L. deliberately and that he knew what he was doing was wrong.
- [139] Mr. Dias said that he touched I.L., who was eight years old at time, to give her pleasure. The necessary specific intent may be inferred from the circumstances, including that Mr. Dias only touched I.L. when her grandmother was not in the apartment or was sleeping. He said he knew what he was doing was wrong.
- [140] The only rational conclusion that can be drawn is that Mr. Dias touched I.L. for a sexual purpose. I find that the touching was subjectively for a sexual purpose and that Mr. Dias violated I.L.'s sexual integrity.

Conclusion

- [141] Mr. Dias, please stand. I have found you not guilty of Counts 1 and 2 on the indictment on the basis that the Crown has not proven beyond a reasonable doubt that you touched I.L. in Vancouver between January 2017 to December 17, 2018, in circumstances of a sexual nature or for a sexual purpose.
- [142] Based on the evidence I have accepted, I find you guilty of Count 3 on the indictment on the basis that the Crown has proven, beyond a reasonable doubt, each element of the offence of sexual interference with respect to the events in Peru between December 18, 2018, and January 6, 2019. I find that you touched I.L. for a sexual purpose and violated her sexual integrity.

"MacNaughton J."

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