

CANADA / JUDGMENT

R. v. F.M.

2020 BCSC 120

COURT

Supreme Court of British Columbia

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2020 BCSC 120 R. v. F.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. F.M.,

2020 BCSC 120

Date: 20200124

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Registry: Duncan

Regina

v.

F.M.

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Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment

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(J. Gold on January 24, 2020 only)

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S.W. Sheets

Place and Dates of Trial:

Duncan, B.C.

December 2-6, 2019

Place and Date of Judgment:

Duncan, B.C.

January 24, 2020

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I. Introduction

- [1] In order to protect the privacy of the complainants, I will refer to the witnesses by use of their initials.
- [2] The accused (F.M.) is charged with two counts of touching a person under the age of 16 years for a sexual purpose, contrary to s. 151 of the Criminal Code, R.S.C., 1985, c. C-46 [Code].
- [3] Count 1 alleges that F.M. touched his step-daughter T.E. for a sexual purpose between September 1, 2015 and May 23, 2017.
- [4] At the time period covered by Count 1, F.M. was married to T.E.'s mother, M.M. The incidents within Count 1 are alleged to have occurred when T.E. was 11 to 13 years of age.

- [5] Count 2 alleges that F.M. touched his daughter I.M., a person under the age of 16 years, for a sexual purpose. I.M. is the daughter of F.M. and M.M. The incidents within count 2 are alleged to have occurred when I.M. was between 4 or 5 years of age, and 10 years of age.
- [6] The subject matter of the charges was reported to the RCMP on May 23, 2017. Soon after the reports were made, T.E. and I.M. gave videotaped statements to members of the RCMP pursuant to s. 715.1 of the Code. T.E. provided a statement on May 24, 2017, when she was 13 years of age. I.M. provided a statement on May 26, 2017, when she was 10 years of age. The videotaped statements were admitted into evidence at the trial, after a voir dire, pursuant to s. 715.1.
- [7] T.E. and I.M. testified at the trial and adopted their prior statements. The other Crown witnesses were M.M. and R.E., who is the older brother of T.E. and half-brother of I.M.
- [8] F.M. testified. He denied the allegations. There were no other defence witnesses at trial.

II. Background

- [9] M.M. has four children. The two eldest are from a relationship with K.E. They are R.E, a son, who is currently 18 years of age, and T.E., a daughter, the complainant in Count 1. She is currently 16 years of age. M.M. has two children from the relationship with the accused, F.M. They are I.M., a daughter, the complainant in Count 2, and a son, J.M. I.M. is currently 13 years of age, and J.M. is 10.
- [10] M.M and F.M. began cohabiting in 2007. At that time T.E. was three or four years of age and I.M. was one. They married in October 2009.
- [11] The Crown alleges that F.M. began sexually touching I.M. when she was 4 or 5 years of age, which would have been in 2010-2012. The Crown alleges that F.M. began sexually touching T.E. in September, 2015, when she was 11 years of age.
- [12] M.M.'s eldest child, R.E., resided with M.M. and then later with M.M. and F.M. until early 2014, at which time he went to reside with his father. The other three children resided with M.M. and F.M. at the material times. R.E. visited and stayed with his mother and F.M. every second week-end, typically.
- [13] The relationship between M.M. and F.M. was characterized by several separations. The separations would last for weeks or months. When F.M. was not residing with M.M., he resided at his grandparent's home on A. Road, where he had a bedroom.
- [14] After a period of separation, M.M. and F.M. moved to a three-bedroom two-storey duplex residence on F. Road, on June 1, 2015. T.E., I.M., and J.M. resided there with them. By then, R.E. was residing with his father. M.M. and F.M. separated for the final time in early 2017.
- [15] The Crown alleges that all but one of the instances of sexual touching of T.E. occurred at the F. Road residence, in the bedroom that T.E. shared with I.M., and in the living room.

- [16] The three bedrooms in the F. Road residence were located on the second floor. T.E. and her sister I.M. shared a bedroom, with separate beds. J.M., their younger brother, had his own bedroom, and M.M. and F.M. shared a bedroom. There was a kitchen and living room downstairs. A large television was in the living room. The living room also contained a couch with two reclining sections, a loveseat with two reclining seats, and a rocking recliner La-Z-Boy type chair.
- [17] The Crown alleges that many of the incidents of sexual touching of I.M. occurred in F.M.'s bedroom at his grandparent's residence on A. Road.
- [18] As noted, M.M.'s oldest son, R.E., came to stay with his mother M.M. and the rest of the family on alternate weekends. As he had no designated bed or bedroom, he typically slept on the couch, or on the bed in the master bedroom.

III. Overview of Evidence - The Witnesses

A. T.E.

- [19] T.E. stated that the incidents began on a specific weekend, coinciding with her mother's absence for a visit to a friend, Lane, in Alberta. (She did not name her mother's friend in her police statement, but she identified her mother's friend as "Lane" in cross-examination at trial.) She recalled that her mother left for Alberta on the Friday of the weekend and returned on Monday or Tuesday. F.M. was left in charge of T.E. and her siblings while her mother was away. R.E. was staying for the weekend. I.M. was at a friend's [K.] for the weekend.
- [20] T.E. could not provide a precise date for the weekend. However M.M.'s testimony reliably establishes that her absence for the visit to Alberta occurred September 25 to September 30, 2015. Thus, T.E. was 11 years of age at the time.
- [21] T.E. testified that on the Friday night, she went to bed early, possibly around 8 p.m. because she was tired, having gone to school that day. She woke up when F.M. entered her bedroom around 10 to 12 p.m. She was wearing a T-shirt and pyjama pants, with no underwear. F.M. touched her buttocks, her breasts, and penetrated her vagina with his fingers. She could tell that he had been drinking a lot.
- [22] In her police statement, T.E. referred to her "butt", her "boobs" and her "vagina". She said he was touching and grabbing her butt and her boobs. She said that he "shoved his finger in my vagina". She referred to this as "fingering" her. She suggested that she thought he used three fingers, but she did not see his fingers.
- [23] T.E. told F.M. to leave her alone and get out of her room, but he refused.

- [24] F.M. removed his belt, and forced her to stimulate his penis by moving her hand up and down on it repeatedly. In her police statement she said she thought this went on for half an hour. At trial, she said that this went on for a really long time, and when asked to elaborate, in terms of minutes, she said probably 20 minutes to an hour. She described severe stinging pain when she went to the bathroom afterwards. I infer she was referring to pain in her genitals.
- [25] The following day, the Saturday of the same weekend, F.M. touched her again when she was sitting on the couch in the downstairs living room of the residence. She was under a blanket. F.M. sat beside her and digitally penetrated her again, for about 20 minutes, while the blanket concealed the activity. Her brother R.E. was present.
- [26] After the Saturday couch incident, F.M. took T.E. to visit a residence where there was an outdoor swimming pool and a hot tub. The family of I.M.'s friend K. were staying there due to a flood at their own residence. The parents were also F.M.'s friends. While in the hot tub F.M. touched her arms and legs, and rubbed her thighs. The other persons present in the hot tub could not see because of the hot tub jets.
- [27] T.E. testified that after the first weekend, the touching incidents were repeated on many other occasions, most often in her bedroom, typically in the early morning hours. They followed a similar pattern. F.M. came into her bedroom in the early morning hours and entered her bed. He had been drinking. He would lay behind her. He touched or grabbed her buttocks and breasts, and digitally penetrated her vagina. On some of these occasions she tried to resist by yelling at F.M. or telling him to stop, and leave her alone, or hitting or kicking him or pushing him away. On other occasions she would pretend to be sleeping, because, as she explained, she "didn't know what to do."
- [28] She was forced to touch and stimulate his penis only on the first occasion.
- [29] T.E. testified that the incidents occurred frequently - at least once per week. In general, T.E. could not provide precise specifics, in terms of dates. However she gave a precise recollection as to the circumstances of the first weekend, and some specifics of the timing of the last incident.
- [30] T.E. stated that the final incident occurred in approximately early January 2017. She recalled that it was after the beginning of the New Year. This incident occurred when she was sleeping in her mother's bed. The timing coincided with the final separation of M.M. and F.M.
- [31] T.E. testified in cross-examination that the incidents went on for more than a year. This coincides with the known timing of the first weekend and T.E.'s testimony about when they ended. She also stated that some of the incidents occurred while she was in grade 7 at her elementary school, before the summer. This puts some of the incidents in the early part of 2016, before summer. She recalled that she was depressed, and tired due to being kept awake in the nighttime, and she missed a lot of school at the end of grade 7. The incidents

continued into the summer. The next year she went to a high school for grade 8. The incidents continued until January 2017. As noted, M.M. and F.M. separated finally at or around this time.

- [32] Almost every episode involved touching her and digitally penetrating her vagina.
- [33] While as noted most of the incidents were very similar to the others, and so T.E. was unable to recall anything distinctive about them, she was able to recall specifics about some of the incidents.
- [34] She recalled one occasion on the couch when the family was watching a movie. The movie was called *Conjuring 2*. It was a horror movie that had recently been released on Shaw cable. She and her mother, her younger brother and sister, and F.M. were watching the movie. She was not sure if R.E. was present. During the movie F.M. went outside to "have a smoke". When he returned, he sat next to her, put the blanket on both of them, and "did it then too". She was sitting on the loveseat, both sides of which recline. F.M. returned to the room, sat down beside her, under the blanket, and touched her in the usual way, including putting his fingers in her vagina. She testified that she did not know what to do. She did not say anything. She just sat there.
- [35] Another incident occurred in the living room as well. The family had watched a movie. T.E. placed a couple of her sister's gymnastic mats on the floor in order to watch the movie. She fell asleep on the mats. The next day she was lying on the mats under a blanket. Her sister was nearby. F.M. came in, lay down on the gymnastic mats, and touched her sexually under the blankets, including digital penetration.
- [36] On an early occasion she was in her room playing with her makeup and what she described as her EOS lip balm collection. She liked their smell. She was also using her phone. F.M. came in. He had been drinking again. He started with a normal conversation, but then he closed the bedroom door and locked it. He began touching her. He came up behind her, put his arm around her waist, and his hands down the front of her pants, on top of her underwear, and asked if "this feels good". She said no, and told him to get out. He left. Her mother was downstairs at the time. R.E. was in the home playing video games in J.M.'s bedroom. I.M. was not present.
- [37] The final occasion occurred in January 2017 when F.M. touched her in the same ways while she was sleeping in her mother's bed. Her mother had fallen asleep downstairs. She and her sister I.M. went upstairs to watch the television that was in her mother's bedroom. Her brother J.M. had been sleeping there. She moved him to his own bedroom. I.M. grew sleepy and left the room to go back to her own bed. T.E. was asleep. She awoke when F.M. came into the bed, which creaks and makes noises. When T.E. awoke she hit F.M. and challenged him, stating, "What are you doing?" and repeatedly told him to stop. He paused, but then resumed touching her sexually. He had been drinking alcohol, which she smelled. She thought that he was masturbating (in her police statement she said "jerking off or something") because before he left he was making noises and the bed was moving, while

F.M. was not touching her. She did not turn around to look at him, or what he may have been doing.

- [38] She added that he frequently drank what she thought was vodka. She described the bottles, and where F.M. kept them.
- [39] T.E. first revealed the touching she alleges to her sister I.M. on May 23, 2017, the day the matter was reported to the police by her mother. T.E. testified that her sister was pressing her to reveal her "biggest secret". She was afraid to say anything. She resisted but eventually revealed something to her sister, without details. Her sister said F.M. had touched her, too, on her "butt". I.M. urged T.E. to tell their mother. Both of them spoke to their mother, who called the police, who attended the residence. T.E. made her police statement the following day, at the detachment. T.E. stated that she had been "acting weird" and she was pretty sure her mother had noticed this. I.M. gave a statement to the police on May 26.

B. I.M.

- [40] I.M. was ten years of age when she gave her statement to the police on May 26, 2017, to a female officer, Constable Russell.
- [41] She testified that her father F.M. would put his hand down her pants, not in the front, but in the back, on her buttocks, inside her pants but outside of her panties. She said he "squeezes my butt". He had done so as recently as two weeks prior. He had been doing this since she was 4 or 5 years of age. It occurred at his grandparent's house on A. Road and at a previous residence on S. Road. It would occur when they were lying on his bed, watching a movie, or some other television show. Her brother J.M. was present at times. I.M. recalled telling him to stop a couple of times. She said that this occurred "often" and added that it occurred once or twice per week. He also sometimes touched her on the inner thigh, over her clothing, while they were driving together. This had occurred 3 or 4 times.
- [42] I.M. testified that before disclosing the touching to her mother and to the police, she had not thought that the touching by her father was inappropriate. She thought F.M. touching her thigh was "weird".
- [43] However when her mother asked her if her father had ever touched her inappropriately, she said that he had, and that he had touched her butt, and her thigh.

C. R.E.

- [44] R.E. is now 18 years of age.

- [45] He confirmed that at the material times he would typically stay at the F. Road residence on alternating weekends. He had no designated place to sleep, so most often he slept on the couch, and sometimes he slept in his brother's room in his bed, or in his mother's bed, if they were not occupying the bed. F.M. resided at the house at times. F.M. would sleep on the couch, sometimes with the youngest child J.M., or with M.M. in her bedroom. On a few occasions when R.E. slept in his mother's bed he would wake to find F.M. there too.
- [46] R.E. recalled one occasion in which he observed F.M. sleeping in T.E.'s bed. R.E. had slept in his mother's bed that night. In the morning R.E. got up to go to the bathroom, located at the end of the hallway. His mother had already left for work. He passed the open door to the girls' bedroom. He noticed that F.M. was in the bed with T.E. He went into the room to wake F.M. up. He asked him why he was sleeping there. F.M.'s response was to the effect that he had nowhere else to sleep. F.M. exited the bed. T.E. remained asleep. Both T.E. and F.M. were clothed.
- [47] R.E. testified that he thought the matter was a little bit weird but did not think too much of it. He was not aware of any allegations or suspicions of inappropriate activities at the time. He did not discuss the matter with anyone.
- [48] He was uncertain of the timing of this event. He thought it was about a year before May 2017.

D. M.M.

- [49] M.M. confirmed that her relationship with F.M. was intermittent. At times he resided with her and sometimes not. F.M. moved into the F. Road residence when she moved there June 1, 2015. They split up in April 2016 but the relationship continued intermittently thereafter, with F.M. continuing to stay at the residence at times. When they were separated F.M. had custody of I.M. and J.M. every second weekend. Sometimes he also had T.E. with him. They had entered into a custody agreement in 2013 which they followed during periods of separation.
- [50] She testified to the somewhat haphazard sleeping arrangements at the F. Road residence.
- [51] M.M. testified that she went to visit her friend Lane in Grande Prairie, Alberta in September 2015. She indicates that she was away for five days, from September 25 to September 30, 2015. This was the only time she was away, and the only trip to Alberta that she took. The calendar shows that September 25, 2015 was a Friday, and September 30, 2015 was the following Wednesday. She left F.M. in charge of the children while she was absent.
- [52] Therefore, on the basis of M.M.'s evidence, the dates of the weekend T.E. identified in her evidence are reliably established. There is no reason to doubt the accuracy of M.M.'s testimony about this.

- [53] M.M. described how the allegations came to her attention. The evidence as to statements made to her by T.E. and I.M. was not adduced for proof of the contents of the statements or to bolster their credibility, of course.
- [54] M.M. had developed concerns about T.E.'s mood and behaviour prior to the disclosure. She noticed that T.E. had been "grumpy", angry, and distant, seemingly sad or depressed, and was isolating herself in her room, for some months before the disclosure. On one or more occasions she asked T.E. if anything was wrong. T.E. said a girl at school was bothering her. M.M. and T.E.'s father K.E. discussed obtaining counselling for T.E. about a week prior to her disclosure. This had not been implemented prior to the disclosure.
- [55] M.M. had not noticed any behavioural problems with I.M.
- [56] On the day that T.E. and I.M. disclosed the allegations against F.M, M.M. returned home from shopping, and received a text message from T.E. to come upstairs. T.E. and I.M. were in their bedroom. T.E. was upset, and said that she had to talk about something really bad, that would make M.M. angry and upset. She said that F.M. had "raped" her. She also described being touched by F.M., including touching her vagina, and that he had made her touch his penis. The conversation was brief, and M.M. did not seek much detail. M.M. called the police. Soon after she spoke to I.M., downstairs. She asked I.M. if anything had happened to her. I.M. said that F.M. had touched her bum, and her thigh. RCMP Constable Houlgate attended. He took T.E.'s statement at the detachment the next day.
- [57] She testified that F.M. drank alcohol excessively and that he favoured vodka and beer. She denied frequent or excessive alcohol consumption on her part.

E. F.M.

- [58] F.M. denies ever touching T.E. or I.M. sexually. He testified that he could not recall ever sleeping in T.E.'s bed, and added that it would be weird and inappropriate for him to do so. He states that her allegations are lies, and he would never do such things. He states that he would never touch a child sexually.
- [59] F.M. confirmed that his relationship with M.M. was intermittent, until the final separation, but that when they were apart he would still visit her residence frequently and stay overnight. When separated he and M.M. would still do family activities with the children.
- [60] He states that he slept on the couch or in M.M.'s bed. Sometimes his son J.M. slept with him on the couch. He confirmed that the sleeping arrangements in the home could be called "flexible". He states that it was to some degree a "first come, first served" arrangement.
- [61] He states that he had a queen size bed in his bedroom at his grandparent's residence, and that I.M. and J.M. would sleep with him there. There was a television in the room, and he and the children would watch movies while lying on the bed. He denies ever putting his hand down I.M.'s pants, or squeezing her buttocks. He states that it is possible he put his hand on I.M.'s leg, but not in a sexual manner.

- [62] F.M. recalled that M.M. was away for a weekend in Alberta, but he recalled nothing exceptional about the weekend. He said it was just a regular weekend with the kids. He thought that he and M.M. were not together at that time. This does not matter, as he does not deny that the children were in his care that weekend. Consistent with T.E.'s evidence, he recalls that I.M. was sleeping over at her friend K.'s house but that due to a flood at their home her family was at the residence with the pool and hot tub. He mentioned his friend A. who I infer would be K's father.
- [63] He denies touching T.E. in the hot tub at the other residence that weekend. He states he does not recall being in the hot tub. He denies touching T.E. under blankets while watching a movie or when he and T.E. were lying on I.M.'s gym mats in the living room. He testified that he does not recall watching the movie "Conjuring 2" but confirms that the family watched movies together frequently. He denied touching T.E. in her room when she was smelling lip balms.
- [64] He concedes that he was drinking excessively ("more than I should have") at the relevant time. He favoured vodka or beer. He says that M.M. drank regularly too, but not as much as he did.
- [65] He agreed that he and M.M. probably separated in January 2017.
- [66] He testified that after he separated with M.M. he began dating a woman named M. He states that there was hostility between himself and M.M. about M. He states that M.M. did not like M. He referred to a couple of incidents where there was some kind of confrontation involving M.M., M., and himself. The description of these incidents was not detailed.
- [67] F.M. testified that M.M. threatened him. He says she said she "wanted to see him dead or in jail." He testified that, "Me and M. - is what set this whole thing off." He suggests that the reason he is accused of these offences is connected to his relationship with M.
- [68] On cross examination F.M. agreed that M.M. had expressed concerns about drug use by M. and that M.M. objected to or had concerns about him having the children in her company.

IV. Legal Principles

- [69] In the circumstances of this case the Crown must prove these elements of the offence of "sexual interference" under s. 151 of the Code, beyond a reasonable doubt:
1. that the person touched was under the age of 16 years;
 2. that the accused touched the person; and
 3. that the touching was for a sexual purpose.
- [70] The first two elements form the actus reus of the offence. The specific intent to touch for a sexual purpose forms the mens rea: *R. v. Trachy*, 2019 ONCA 622, at para. 70. *R. v. Michel*, [1994] B.C.J. No. 3308 (C.A.), at para. 4.

- [71] There is no issue that T.E. and I.M. were under the age of 16 years.
- [72] In this case the Crown's case on each charge rests primarily on the testimony of the complainants. The accused testified, denying the allegations.
- [73] Given these circumstances, I adopt my recent comments in *R v. Eddy*, 2019 BCSC 704:
- [69] I am obliged to remind myself of the relevant principles relating to the presumption of innocence and the Crown's burden of proof in a case such as this, where the credibility of the witnesses is key. I discussed these principles recently in *R. v. Conway*, 2019 BCSC 489, at paragraphs 33 to 36.
- [70] I am mindful that the role of the trier of fact is to assess the entirety of the evidence keeping in mind the burden on the Crown to prove the defendants' guilt beyond a reasonable doubt. I am entitled to accept all, some or none of what a witness says: *R. v. W.D.A.Z. (Y.C.J.A.)*, 2018 BCCA 180 at para. 70.
- [71] The suggested instruction in *R. v. W.D.*, [1991] 1 S.C.R. 742 at 758, 63 C.C.C. (3d) 397, is well-known:

...

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

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

Thirdly, 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.

[See also para. 27 of *R. v. Meyn*, 2003 BCCA 401, leave to appeal ref'd S.C.C.A. No. 470].

- [72] More recently, in *R. v. Dick*, 2018 BCCA 343, the Court of Appeal has stated:
- [27] The three-step process outlined in *W.(D.)* provides a framework for analysing credibility where an accused testifies. Its purpose is to help ensure that the decision-maker does not unintentionally fall into the trap of choosing between believing the evidence of the Crown or that of the defence: *R. v. L.(C.J.)*, 2004 MBCA 126 (CanLII) at para. 34. As the judge correctly noted in this case, there is nothing sacrosanct about the *W. (D.)* formula and it need not be followed slavishly: *Dinardo* at para. 23. What matters is that the principle of reasonable doubt is clearly respected and there is no risk that the burden of proof was shifted unintentionally. In some circumstances, this may be apparent even in the absence of an explanation for the rejection of an accused's testimony, particularly where that testimony involves a bare denial and credible contradictory evidence is accepted: see, for example, *R.E.M. and Vuradin*. However, in other circumstances, an articulated explanation of why the testimony of an accused is disbelieved and why it does not raise a reasonable doubt may be necessary for the pathway to the verdict to be discerned: see, for example, *S.J.D. and L.(C.J.)*.

[74] As I noted in *R. v. Conway*, 2019 BCSC 489:

[36] However, the W. (D.) questions "should not have attributed to them a level of sanctity or immutable perfection that their author never claimed for them." 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. Also, the jury must be made to understand that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt: *R. v. J.H.S.*, 2008 SCC 30, at para. 13.

[75] As noted by the Court of Appeal in *Dick* (quoted above), there may be cases where a considered and reasoned acceptance beyond a reasonable doubt of the testimony of a complainant is a valid explanation for rejection of the evidence of the accused, in particular in a case where the testimony of the accused consists of a general denial of the allegations, which may of necessity lack details: *R. v. D.(R.)*, 2016 ONCA 574, at paras. 6-22.

[76] I accept that, as the defence notes, there may be cases in which the court is unable to decide whom to believe, and therefore must be mindful of the additional step or instruction beyond the three instructions suggested in *W.D.*, as noted by Wood J.A. in *R. v. C.W.H.*, [1991] B.C.W.L.D. 2371, 68 C.C.C. (3d) 146, at para. 24:

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 of the evidence, you are unable to decide whom to believe, you must acquit.

[77] However the C.W.H. instruction is not required in every case turning on credibility: *R. v. M.R.H.* 2019 BCCA 39, Savage J.A. dissenting at para. 28, appeal allowed, dissenting decision of Savage J.A. affirmed, 2019 SCC 46.

[78] The essential requirements are that the trial judge's instructions (1) must not leave the jury with the impression that it has to choose between the two versions of events - as an either/or choice between the evidence of the Crown or the evidence of the defence, and (2) the charge, when read as a whole, must not leave the jury under any misapprehension as to the correct burden and standard of proof to apply: *M.R.H.*, at para. 25.

[79] There is no longer a presumption that the testimony of children is always less reliable than that of adults, and that corroboration is required: *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at para. 24. *W.R.* also notes that it could be wrong to apply adult tests for credibility to the evidence of children: para. 25. The standard which would be applied to an adult's evidence is not always appropriate in assessing the credibility of young children: *R v. F. (C.C.)*, [1997] 3 S.C.R. 1183, at para. 48. However, in *W.(R.)* McLachlin J. further stated:

[26] As Wilson J. emphasized in *B. (G.)*, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty

of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that 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.

- [27] 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.
- [80] These authorities and others having to do with the evaluation of the evidence of young children were recently referenced again in *R. v. Hernandez-Lopez*, 2020 BCCA 12.
- [81] Although the W.(D.) steps begin with reference to the credibility of the accused, there is no requirement that my analysis follow the same structure: *R. v. Y. (C.L.)*, 2008 SCC 5.
- [82] Each count on the indictment is a separate charge. The counts must be considered separately. Similar fact reasoning is not permitted. Accordingly: (1) evidence properly admissible in relation to each count may be considered in relation to that count only; (2) a finding of guilt for one offence is not evidence of guilt for another count; and (3) I must not engage in propensity reasoning, by inferring from evidence of misconduct or discreditable acts relating to one count that the accused is a person whose character or disposition makes it more likely that he committed an offence alleged in another count: *R. v. Rarru*, [1995] B.C.W.L.D. 2002, 107 C.C.C.(3d) 53 at 54, Rowles J.A. dissenting at para. 98, appeal allowed, dissenting decision of Rowles J.A. affirmed, 2 S.C.R. 165; *R. v. Farler*, 2006 NSCA 42, at paras. 30-32, per Cromwell J.A.; *R. v. A.L.*, 2020 BCCA 18, at para. 190. However, in assessing the credibility of each witness, including the accused, the trial judge is entitled to consider the totality of the evidence given by that witness: *R. v. P.E.C.*, 2005 SCC 1, at para. 1.

V. Analysis - Count 1

- [83] The issue is whether the Crown has proven the allegations beyond a reasonable doubt. In practical terms, the issue is whether the actus reus of the offence has been established. If so, given the nature and circumstances of the touching alleged, there is no room for doubt about mens rea, that is, the sexual purpose of the touching.
- [84] I found T.E. to be a very credible and reliable witness. Her testimony was very persuasive. There are no reasons to discount any essential aspects of her testimony. In short, I have no difficulty accepting her evidence.
- [85] There are many reasons for this.
- [86] As noted, she gave her video-recorded statement to the police on May 24, 2017, when she was 13 years of age. She related events going back to September of 2015, when she was 11 years of age. The last episode she referred to was in or about January 2017. Thus, the events were relatively recent.
- [87] The interview was appropriately conducted. She freely and spontaneously related the material events to the police officer with little or no suggestion, or leading.
- [88] The degree of detail she provided both in quantity and in content was very appropriate to the circumstances she related, and to all of the surrounding circumstances. Her description of events was entirely appropriate and believable in the context of a 13-year-old girl describing such events, occurring when she said.
- [89] Although of course I must be very careful about putting too much weight on the demeanour of a witness, there was nothing about her demeanour in giving her statement or her testimony at trial that raised any concerns about her truthfulness. She was factual, and fair. Her testimony at trial was clear, articulate and responsive to the questions asked. Where she was able to provide details, she did, and where she could not, she did not. She made no attempt to exaggerate her ability to recall. At the same time, she displayed a good ability to recall details. The extent to which she recalled details or not made sense in the circumstances, and remained quite consistent throughout her testimony. She was not argumentative. There were no signs of embellishment.
- [90] On the contrary, she did not embellish her evidence where she might have had she been dishonest. She stated that F.M. had forced her to touch his penis on only the first occasion. She denied seeing his penis. She described circumstances suggesting masturbation, but denied actually seeing him masturbate.
- [91] Her evidence as to the timing of the events is believable, and is internally and externally consistent with other evidence. That is, her evidence is consistent with her own testimony about the timing, and matches well with the other evidence. She states that the first episodes occurred on the weekend, when her mother was away, and ending in January 2017 with the final separation. She could not provide precise timing of the weekend she spoke of but her

other testimony is consistent with the September 2015 date her mother provides. For example, she recalled that some incidents occurred before the summer, and that she had missed school because she was so fatigued. She said the incidents continued in the summer. This testimony is consistent with incidents occurring in the spring and summer of 2016.

- [92] Her testimony contains abundant detail, that is consistent with other evidence, consistent with actual memories, and completely inconsistent with fabrication.
- [93] For example, with respect to the September 2015 weekend when the incidents began, she recalls that her mother was away in Alberta. She was accurate about that, and even recalled the name of the friend. She recalled that I.M. was staying with her friend that weekend, whose family was staying at the house with the pool and hot tub. She was left in F.M.'s care for the weekend. She testified to the activities that took place that weekend. Her description of the events on the Saturday was also very detailed. She recalled being told to bring her bathing suit, staying for a few hours, the persons who were present, and specific activities such as playing with face masks in the parents' bathroom, watching a movie and having popcorn.
- [94] It is practically inconceivable that as an 11-year-old child she would save up all this detail in order use it to make fabricated allegations 20 months later. The same is true for the other specific incidents she described. It is not believable that when she gave her statement to the police as a 13-year-old child in May 2017, she would fabricate allegations utilizing so much verifiable circumstantial detail about events that had occurred so long in the past.
- [95] She provided other credible detail inconsistent with fabrication. She gave the name of a specific movie the family was watching, *Conjuring 2*. She describes unique and unusual details such as about smelling her lip balms in her room. She stated that the incidents occurred when F.M. had been drinking, and that he drank vodka. As a 13-year-old, she was able to accurately identify the type of alcohol he consumed, and describe the bottles. The fact that he favoured vodka is supported by the testimony of M.M. and of F.M., who conceded overconsumption of alcohol on his part, as noted.
- [96] At trial, at age 16, she was uncertain about her age when the incidents began. She thought the incidents began when she was 12 years of age, when in fact she would have been 11, but this is essentially just a minor error in calculation.
- [97] Details were lacking in areas where I would expect them to be. For example, with respect to other specifics of times and dates. As she said, most episodes followed a familiar and consistent pattern, so one would not expect more specifics. However she provides details about several specific episodes or occasions, in addition to the details about the first weekend. She recalled a greater level of detail concerning the final incident, occurring in her mother's bed, in January 2017. This included that her mother had fallen asleep downstairs, that she and her sister wanted to watch television in her mother's bedroom, that she had to move J.M., and that her sister left the bedroom.

- [98] Her description of the sexual touching was appropriate to the age of the child. In her statement, she described F.M. touching her boobs, her butt, and fingering her. She said that he had made her touch his private area. She described this as best she could. She provided necessary detail about what she meant in relation to these descriptions.
- [99] The defence notes that when she first disclosed the incidents to her mother, she said that she had been "raped". However she did not say that there had been sexual intercourse. At trial, at age 16, she testified that at the time she had not understood the meaning of the word "rape." She denied alleging "rape" as a way to exaggerate severity. This is clearly true. Had she wanted to allege actual sexual intercourse, she could have. In her police statement the next day she did not say that her vagina had been penetrated by F.M.'s penis and she did not say that she had been "raped" by F.M. Her inaccurate reference to "rape" when she first disclosed the incidents is well explained and does not detract from her credibility. To the contrary, her vocabulary error is appropriate for her age at the time.
- [100] There is some important corroborative evidence. As noted, R.E. observed F.M. sleeping in T.E.'s bed one morning. R.E. was a very credible witness, and I accept his evidence about this incident, including that he went into the room to wake F.M. up, and asked him why he was sleeping there. The incident was unusual enough that R.E. recalled it later. R.E.'s evidence contradicts the evidence of F.M. that he could not recall ever sleeping in T.E.'s bed, and that it would have been inappropriate to do so.
- [101] R.E. noted that both F.M. and T.E. were clothed. This was not inconsistent with T.E.'s testimony. She testified that on the one occasion in which she was forced to fondle F.M.'s penis, he forced her to put her hand under his clothes. She could hear him take his belt off, and she felt the bed shaking as he pulled his pants down a bit. She did not say that he had removed her clothes on the other occasions.
- [102] T.E. also recalled an instance when R.E. had seen F.M. in her bed and had some kind of discussion or confrontation with him about it. She stated that R.E. had been sleeping in her sister's bed when this happened, whereas R.E. states that he walked by the open door when he noticed F.M. in the bed. This is a minor discrepancy, particularly considering that T.E. could have been asleep prior to this. The important point is that both witnesses testified about R.E. seeing F.M. in T.E.'s bed one morning and having a discussion with him about it.
- [103] There is also a degree of corroboration in the evidence of M.M. and of T.E. herself about her behaviour in the weeks or months leading to her disclosure. Her mother was so concerned that she had discussed with T.E.'s father obtaining professional help for T.E. Not much could be inferred from this evidence standing alone, but in the context of all of the other evidence, it is consistent and supportive of T.E.'s evidence.

- [104] The defence questions the reliability of R.E.'s testimony. The defence argues that M.M. ought to have noticed F.M. in T.E.'s bed when M.M. went to the bathroom (located at the end of the hall) earlier that morning. It is not clear that she ought to have. It is also possible that F.M. did not go to T.E.'s bedroom until after M.M. had left for work. As I have said I consider R.E.'s testimony about this credible and reliable.
- [105] A key argument of the defence is that T.E.'s allegations are not credible, because if they were true, someone else within the crowded household would have noticed something, besides R.E., particularly given the number and frequency of the incidents that T.E. testified about.
- [106] While this argument is essentially speculative, it must be carefully considered. However, it does not cause me to have any doubt about T.E.'s testimony. As a regular although intermittent resident of the household F.M. could easily find opportunities where the risk of detection would be minimized. He would be familiar with everyone's habits and schedules. M.M. worked full time, with regular hours of work. It appears she often slept downstairs on the couch. It is clear that she and F.M. did not sleep together consistently. R.E. was present only every second weekend. In any event, the fact is that R.E. witnessed F.M. in T.E.'s bed, which F.M. denies. I have no hesitation accepting the evidence of R.E. on this point, and rejecting the evidence of F.M.
- [107] T.E. testified about occasions when F.M. touched her sexually while other family members were present, such as when the family was watching a movie, in particular, the episode when the family was watching *Conjuring 2*. She described the incident in detail. She said, credibly in my view, that she did not know what to do. She did not react. She "just sat there" as she said. Her sister I.M. was present on the occasion when she was touched while lying on the gym mats in the living room.
- [108] The defence argues that T.E.'s testimony that F.M. touched and even digitally penetrated her vagina when other family members were present is not credible. I do not agree. The risk of detection was not as great as one might think, because by the time this occurred it must have been clear to F.M. that T.E. was not going to speak out or report what was happening. This was clear after the first weekend. The activity took place under covers when the family was preoccupied with the movie. Had she cried out, F.M. would have been able to deny that anything had occurred.
- [109] These were many occasions when T.E. could have spoken out, but did not.
- [110] In my view her failure to do so is eminently understandable, and really requires no explanation, although it is explained.
- [111] She was cross-examined as to why she did not speak out when the touching began, or later. It is a stereotypical assumption that stories of abuse are probably fabricated unless the abuse is immediately reported: *R. v. Find*, 2001 SCC 32, at para. 102, per McLachlin J. No presumptive adverse inference may be drawn against a complainant who does not disclose

sexual abuse immediately. No inference should be drawn regarding a complainant's credibility that is based on assumptions about how a victim of sexual assault is supposed to react to the assault: *R. v. A.D.G.*, 2015 ABCA 149, at paras. 32-33. It can be an error of law to assess a sexual assault victim's credibility based solely on expectations as to how a stereotypical victim will react: *R. v. Thompson*, 2019 BCCA 1, at para. 52; *R. v. Wopatshu Ukumu*, 2019 ONSC 5626, at para. 22.

- [112] T.E.'s reluctance to report the incidents is understandable, and I draw no inference adverse to her credibility based upon her failure to report immediately, or earlier than she did.
- [113] Clearly, she was reluctant to report the matters. She delayed reporting until she was pressed by her sister. Her behaviour around that time suggests that she was troubled.
- [114] She could not herself fully explain why she did not speak out earlier. However, she testified that she was afraid. She noted that during the first weekend she was in F.M.'s care, with no other adult present. She also testified that she was afraid she would not be believed, and that if she reported to her mother, F.M. would hear about it, and she would have to continue to live in the same household as F.M. These concerns makes sense. The difficulty of making serious allegations against her own step-father, her mother's husband, is obvious. It is noteworthy that she reported the incidents only after her mother and F.M. had been separated for some months.
- [115] There are other understandable reasons why T.E. would not report the touching earlier, beyond what she said herself about that. These include her youth, confusion about what was happening, and general uncertainty about what to do.
- [116] As noted, F.M. testified that M.M. said she wanted "to see him dead or in jail" and that the reason the allegations of T.E. and I.M. were made was somehow connected to his relationship with M. In effect he contends that M.M. colluded with the complainants to make false allegations against him. No such suggestion was made to any of them, and counsel for F.M, did not make a submission along this line. However counsel argues that animosity between M.M. and F.M. as it related to M., or the fact of the separation of M.M. and F.M., could somehow be connected to the allegations, and could create motives to fabricate. I do not accept these theories.
- [117] There is no evidence of any collusion as between M.M. and either complainant. I accept the evidence of M.M. that she was unaware of any incidents until they were reported to her by her daughters on May 23, 2017. She reported the matters to the police immediately.
- [118] T.E. agreed in cross-examination that she did not like M. She gave some reasons for this. It was not suggested to her or in submissions that her dislike for M. would provide a motive to fabricate allegations against F.M. She denied that her dislike of M. had anything to do with what her mother thought about M. She denied the suggestion in cross-examination that she fabricated the allegations against F.M. because she was upset or angry that F.M. had left her mother and begun a relationship with M. She said, convincingly, that she could not have

cared less. She denied saying that she missed F.M. and that she wished her mother and F.M. would reconcile. Manufacturing allegations as a means to encourage reconciliation would certainly make no sense.

- [119] I do not accept that T.E. manufactured allegations out of spite, or that she had an ulterior motive of any kind. The opposite is true. These are painful, difficult accusations for her to make. She had nothing to gain by making them.
- [120] The evidence of M.M. provides no support for any motive on the part of T.E. to fabricate allegations. She denied the threat against F.M. that he testified about. She denied being angry about F.M.'s relationship with M., although she did not want her children to associate with her.
- [121] The defence notes that there is no evidence of physical injury to T.E. arising from the incidents. There is no medical or other evidence from which I could infer that there ought to have been evidence of physical injury. I note that T.E. reported the incidents several months after they ended, so I can infer that any physical evidence would probably no longer exist.
- [122] The defence argues that T.E. did not refuse to associate with F.M. after the incidents ended, and after the separation. T.E. would seek rides to school from F.M.
- [123] I place no weight on this evidence. Again, the behaviour of T.E. should not be measured against stereotypical assumptions as to how a victim would or ought to behave, such as not associating with the perpetrator. Beyond this, the incidents T.E. complains of did not occur in F.M.'s vehicle. With the exception of the hot tub touching on one occasion, they all took place in the residence, typically in T.E.'s bedroom. Therefore she would have had little reason to fear accepting a ride in F.M.'s vehicle. She also needed transportation to school and did not believe she had good alternatives.
- [124] In her police statement T.E. stated that her mother had seen F.M. in T.E.'s bed on one occasion, and her mother later asked her about this. She testified at trial that on two occasions her mother had asked her if F.M. had "done anything" to her. She believed that her mother meant something sexual. She denied that anything had occurred. M.M.'s testimony conflicts with this evidence to some degree. M.M. denies that she asked T.E. if F.M. had done anything sexual to her. M.M. denied seeing F.M. sleeping in the girls' bedroom, or that anyone had ever said anything to her to that effect. She had no prior suspicions about improper behaviour on the part of F.M. in relation to T.E. However, M.M. testified that she was concerned about T.E.'s behaviour and had asked her on more than one occasion whether anything was wrong or was bothering her.

- [125] This is not a matter of a discrepancy in T.E.'s evidence. It appears that T.E. misunderstood the basis of her mother's concerns. The evidence about their conversations can be reconciled on this basis. If T.E. mistakenly believed that her mother saw F.M. in her bed, this could well lead to a misunderstanding on her part as to the nature of her mother's concerns. The two witnesses perceived the same conversations differently.
- [126] In summary, I conclude that T.E.'s evidence is credible and reliable. I have no reason to doubt her evidence.
- [127] I provided an overview of F.M.'s evidence previously.
- [128] I reject F.M.'s evidence that no sexual touching of T.E. took place.
- [129] In addition, there is no part of F.M.'s evidence that raises a reasonable doubt as to his guilt in relation to count 1. Nor does F.M.'s testimony, despite being rejected, raise a reasonable doubt about his guilt.
- [130] Understandably, given the nature of the case, his testimony was brief, and consisted mainly of denying the truth of the allegations. The brevity and limited scope of F.M.'s testimony would leave little room for obvious flaws and inconsistencies. The primary reason I reject F.M.'s testimony, and find that it does not raise a reasonable doubt, is that I accept the substantial and credible contradictory evidence, primarily but not exclusively of T.E., who I consider to be completely credible.
- [131] As Doherty J.A. observed in *R. v. D. (J.J.R.)*, 215 C.C.C. (3d) 252, 218 O.A.C. 37 (Ont. C.A.):
53. An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.
- [132] This reasoning was applied in *R. v. D. (R.)*, 2016 ONCA 574, at paras. 19-20. See also Dick, which I referred to previously.
- [133] However, in addition, as noted, I specifically reject F.M.'s denial of being in T.E.'s bed on the occasion R.E. testified about. F.M.'s evidence that he was never in her bed is a lie.
- [134] I reject F.M.'s testimony to the effect that his relationship with M. and/or the hostility between himself and M.M. somehow resulted in the charges. This assertion lacks any credibility. It is unsupported by any other evidence, and is contrary to the other evidence. These theories were invented by F.M. This further diminishes his credibility.
- [135] I must also consider whether, on a consideration of the whole of the evidence, there is any reasonable doubt about whether the Crown has proven its allegations. No part of the other evidence in the case or the evidence as a whole raises a reasonable doubt about F.M.'s guilt. This is not a case where the additional instruction from C.W.H. applies.

[136] Accordingly, I find that the Crown has proven the charge in count 1.

[137] Count 1 sets out a single charge. I find that the incidents began in late September 2015 and continued frequently until early January 2017. The exact number of incidents is unknown, and difficult to estimate. T.E. testified that it happened at least once per week, but she could not say how many times in total. She thought probably not "hundreds" of times. I accept the evidence of T.E. that the sexual touching took place on many, many occasions. All of them took place at the residence, most often in T.E.'s bedroom but also in other areas of the home, such as the living room and her mother's bed.

[138] T.E. testified that F.M. persistently touched and grabbed her body, particularly her thighs, in the hot tub at the friends' house on the Saturday of the weekend her mother was away, when the sexual touching began. She testified that initially only she and F.M. were in the hot tub. Others joined them. She testified that the bubbles from the jets obscured his conduct. Although the touching was unwanted and improper, and likely had a sexual purpose, there is room for reasonable doubt on that element in relation to this single instance. This conclusion in no way affects my overall finding of guilt on count 1, based upon the many proven incidents of sexual touching that took place at the family residence.

VI. Analysis - Count 2

[139] I summarized the evidence of I.M. and F.M. previously.

[140] As noted, the Crown alleges that F.M. touched I.M. sexually by touching and squeezing her buttocks on numerous occasions, and touching her inner thigh on several occasions. The Crown alleges that F.M. touched and squeezed I.M.'s buttocks, beneath her pants, but over her underwear, as I.M. stated.

[141] F.M. conceded that he may have put his hand on I.M.'s leg in a fatherly way, but denied that this was sexual in nature. He denied ever touching either daughter sexually. He denied putting his hand down the back of I.M.'s pants and touching or squeezing her "butt cheek" as she described it. In other words, her buttock or buttocks.

[142] I accept I.M.'s testimony that F.M. in fact did touch and squeeze her buttocks on a regular and frequent basis. She was a credible witness. Her description of the touching and the circumstances in which it occurred was appropriate for her age when she gave the statement to the police. There are no inconsistencies in her evidence.

[143] In her evidence at trial I.M. was confident in confirming that the touching occurred as she described it in her statement and in her evidence. She confirmed her testimony that it had been happening for several years, since she was 4 or 5, and continuing until the disclosure when she was 10. There was nothing inconsistent or implausible about her evidence. There were no signs of embellishment. The touching she describes is limited in scope. In summary, I firmly believe that she is telling the truth.

- [144] The defence argues that while I.M. may believe she is telling the truth, the circumstance of her disclosure suggest that she could be confabulating.
- [145] I.M. described the circumstances relating to T.E.'s disclosure to her about F.M. Her sister used the word "rape" in describing the incidents to her mother, but then told her mother that F.M. had not put his penis in her vagina. I.M. did not know what "rape" meant. In her presence T.E. said that F.M. had touched her in her vagina. Her mother asked her if F.M. had ever touched her inappropriately, anywhere. She disclosed the touching.
- [146] From this, it is argued that T.E.'s disclosure of touching and "rape" could have prompted or suggested to I.M. that she also had been touched in inappropriate ways by F.M.
- [147] I.M. conceded in cross-examination that at the material times she did not know or recognize that F.M.'s touching of her buttocks was inappropriate. This was consistent with her police statement in which she said that, at least when it started at age 4 or 5, she did not know it was wrong. However, she told him to stop on a couple of occasions. At trial she insisted that she always knew it was weird. She testified at trial that she should have said something, but did not.
- [148] I do not accept that there is any possibility I.M. invented her allegations based upon suggestion or hearing her sister's disclosure. In my view it is understandable that I.M. would disclose the touching for the first time in answer to her mother's direct questioning. It also makes good sense that as a 10-year-old girl I.M. would recognize only then that the touching was not just weird, but wrong.
- [149] The defence argues that I.M.'s testimony in the police statement is unreliable. The defence argues that the officer used leading questions. The manner in which the statement was taken was generally very appropriate. The instances of arguably leading questions are minor and insignificant. Inexplicably, the primary video camera was not maintained on I.M. at all times. However the audio quality is good. In my view nothing significant in terms of I.M.'s visual demeanour was lost due to the substandard video.
- [150] The defence argues that the presence of I.M.'s younger brother J.M. in the bed makes the allegations unlikely. I do not agree. The nature and circumstances of the touching is such that F.M. could easily do it without being noticed. J.M. was only eight years of age, and younger. He may in fact have noticed but not thought anything of it. There is no reason to infer that F.M. would be deterred by the fear of detection or disclosure by J.M.
- [151] I reject F.M.'s testimony that the touching and squeezing of I.M.'s buttocks never happened. F.M. was not a credible witness generally, for the reasons I have previously given, and his denial of this conduct is also not credible. No part of his evidence nor any part of the evidence as a whole gives me any reason to doubt that the touching occurred as I.M. described it.

- [152] As noted, the Crown must also prove beyond a reasonable doubt that the touching was for a sexual purpose.
- [153] This is not firmly established in the case of the touches of I.M.'s thigh. In general this kind of touch would not be considered sexual in the context of a father-daughter relationship. The surrounding circumstances of these touches (that is, in the car, while driving) do not suggest sexual touching.
- [154] The defence does not suggest that touching and squeezing of I.M.'s buttocks could have had a non sexual purpose. The essential issue is whether it occurred. Nonetheless, the Crown must prove this element beyond a reasonable doubt.
- [155] A number of factors lead me to conclude beyond a reasonable doubt that the touching was for a sexual purpose: (1) the part of the body touched, and the nature of the touching; that is, touching and in particular squeezing of the buttocks; (2) the part of the body used to touch; namely, the accused's hand; (3) consistently touching and squeezing the buttocks under the clothing, that is inconsistent with innocent touching; (4) habitual, frequent touching, occurring over a period of years; (5) the surrounding circumstances; namely, occurring in the bed of the accused; and (6) the absence of any plausible innocent explanation for the touching.
- [156] In conclusion, I find that the Crown has established, beyond a reasonable doubt, all elements of the offence charged in count 2.

VII. Conclusion

- [157] Mr. M., would you please stand. For the reasons I have set out, I find you guilty of both charges.

[Discussion re arrangements for sentencing.]

"Verhoeven J."

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