

CANADA / JUDGMENT

R. v. Gerrard

2020 BCSC 1833

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Supreme Court of British Columbia

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2020 BCSC 1833 R. v. Gerrard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gerrard,

2020 BCSC 1833

Date: 20201117

Docket: X082016

Registry: New Westminster

Between:

Regina

v.

Robert Matthew Gerrard

Restriction on publication: s. 486.4(2.2) C.C.C

Before: The Honourable Justice Shergill

Oral Reasons for Judgment

Counsel for Crown:

M. Fortino

Counsel for Accused:

M. Beckett

Place and Date of Trial:

New Westminster, B.C.

September 21-24, 28, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 17, 2020

Table of Contents

I. Overview.. 3

II. Background Facts. 3

III. Count 1. 5

A. J.I.'s Testimony. 5

1. Foot Incident 5

2. Bedroom Incident 6

B. J.I.'s Aunt 7

C. J.I.'s Mother 9

D. The Accused. 11

E. The Accused's Wife. 12

IV. Count 2. 14

A. S.C.'s Testimony. 14

1. Computer Incident 15

2. Truck Incident 15

3. Bedroom Incident 16

4. Post Offence Conduct 16

B. S.C.'s Mother 17

C. The Accused. 19

D. The Accused's Wife. 20

V. Applicable Legal Principles. 21

A. Reasonable Doubt 23

B. Credibility and Reliability. 24

C. Adults Testifying to Childhood Events. 25

D. Sexual Assault Cases. 26

VI. Analysis of Count 1. 27

VII. Analysis of Count 2. 35

VIII. Verdict. 38

I. Overview

- [1] The accused, Robert Gerrard, is charged with the sexual interference of two persons under the age of 14, contrary to s. 151 of the Criminal Code, R.S.C 1985, c. C-46 [Code]. The matters were originally set to be tried separately, but due to the factual interrelationship between the disclosures of the two complainants, the Crown has preferred a new indictment which combines the different counts. In joinder of the two matters, the Crown does not seek to rely on the separate incidents as count-to-count similar fact evidence.
- [2] Count 1 of the indictment alleges that J.I. was sexually touched by the accused between January 01, 1995 and December 31, 1997, when she was between the ages of 10 and 12.
- [3] Count 2 alleges that S.C. was sexually touched by the accused between January 01, 1995 and December 31, 1999, when she was between the ages of four and eight.
- [4] Mr. Gerrard's evidence puts him in the general circumstances described by both the complainants. However, he denies committing the alleged acts, and challenges the credibility and reliability of each complainant.

II. Background Facts

- [5] The following are the uncontroverted facts in this case. Unless otherwise indicated, all events referred to are within the time period for each count set out in the indictment.
- [6] J.I. was born in 1985 and is currently 35 years old. S.C. was born in 1991 and is currently 29 years old. The accused was born in 1960 and is currently 60 years old.
- [7] The accused and his wife, Lorraine Gerrard, along with their children, T.G. and S.G., were friends of J.I.'s and S.C.'s families. S.G. is the same age as J.I., and T.G. is three years younger than J.I.
- [8] S.C.'s mother, Ms. C., was best friends with the accused's wife. The women socialized at each other's homes and also outside of the home. Ms. C. would frequently bring S.C. to the Gerrard home. Ms. C. and Ms. Gerrard had regular outings for bingo, during which it was common for the accused to babysit the children at his home.

- [9] J.I.'s mother, Ms. I., was friends with the Gerrards. Ms. I.'s ex-husband, R.I. (who is also J.I.'s father), had a falling out with the accused in the 1980s. However, the Gerrards continued to remain friends and socialize with Ms. I. and her children.
- [10] J.I. and S.G. were friends. They played together and sometimes slept over at each other's homes.
- [11] S.C.'s older brother and T.G. would play together. Because S.C. was much younger, she often played on her own or tagged along with the older children while they were playing. There were times when S.C. was alone playing with the accused on the computer. The accused had, on at least one occasion, been alone with S.C. outside of the home when he took her to a rock-climbing gym in Surrey, B.C.
- [12] During the time periods alleged in the indictment, the accused and his family lived in a split-level home in Surrey. On the main floor of the home, there was a living room, dining room, kitchen, and family room. The dining room was separated by a wall from the kitchen. The family room was sunken approximately four feet from the kitchen. The family room had sliding glass doors that lead out to a patio in the backyard. On the upper floor of the house were three bedrooms, which belonged to S.G., T.G., and Mr. and Ms. Gerrard. Exhibit 1 fairly depicts the layout of S.G.'s room.
- [13] J.I. reported her allegations to the police in 2017. She provided a statement to Constable Yung of the Surrey RCMP on November 22, 2017, and testified at a preliminary inquiry on July 22, 2019.
- [14] S.C. reported her allegations to the police a few months after J.I. Constable Yung took her statement on January 16, 2018. On August 20, 2019, S.C. testified at a preliminary inquiry.
- [15] I turn now to the evidence relating to each offence.

III. Count 1

- [16] J.I. claims that she was sexually touched by Mr. Gerrard on two separate occasions, during a single weekend sleepover at the Gerrard home. At the time, J.I. was under the age of 14.

A. J.I.'s Testimony

- [17] J.I. testified that between the ages of 10-12, she had a very close friendship with S.G. That friendship ended after a weekend sleepover at the Gerrard home.
1. Foot Incident
- [18] J.I. testified that she had gone to the Gerrards' split-level home on a Friday, with the intention of staying there for the entire weekend. Both of S.G.'s parents were home. Ms. Gerrard had a friend over and they were getting ready to go out that evening.

[19] J.I. recalls that she and S.G. were "roughhousing" in the living room after coming inside from playing in the backyard. It was still light outside. The accused was sitting on a couch in the living room, while J.I. and S.G. wrestled on the floor. At some point during the girls' play, J.I. recalls the accused touching her vagina with his foot, over her clothes. At first, she did not think anything of it. However, the accused touched her vagina at least once or twice more, at one point rubbing his toes up and down on her vagina and asking her "do you like that" or "does that feel good", to which she replied "no". The touching stopped after she said no. J.I. brushed the incident off, and recalls later going upstairs with S.G. to play in S.G.'s bedroom.

2. Bedroom Incident

- [20] J.I.'s next memory is going to bed in S.G.'s room. She and S.G. were sharing the same bed. S.G. was sleeping next to the wall and J.I. was on the outside. The bed was in the corner of the room near the window. J.I. drew and labelled Exhibit 1 to illustrate what the room looked like, and the positioning of furniture, herself and S.G. inside the bedroom. J.I. recalls that she was wearing a blue t-shirt with two red stripes, and underwear.
- [21] J.I. said she woke up early on Saturday morning to the accused coming into the bedroom. At first, she ignored the accused. She was tired and closed her eyes to go back to sleep. However, the accused came up to her and started tickling her back and moving his fingers up and down her spine. At the time, J.I. was lying on her right side facing S.G. The accused started to kiss her neck. J.I. became frightened, and froze. She kept her eyes shut. The accused reached over and started touching her left-breast over top of her shirt. He rubbed around the area of her areola and nipple. This was the first time that J.I. had ever experienced her nipple getting hard. At that stage in her life, she was beginning to develop and was going through puberty.
- [22] The accused then tried to put his hand under her shirt, but J.I. had her arm clenched down. She remembers feeling terrified. When he could not lift her arm up, the accused went back over top of her shirt to touch her breast. He then started to move his hands down her body towards her underwear. J.I. squeezed her legs tightly together. The accused managed to place his hands inside her underwear, and tried to push her legs open. At this time, his hand was about one inch from her vagina. The accused was crouched down on the side of the bed. J.I. believes that he was trying to reposition himself, when he hit the bedside table. The table was made of brass and glass, and made a lot of noise. S.G. woke up and turned around. She asked her father why he was in her room. The accused got up quickly and immediately left, shutting the door behind him. At this point, J.I. was crying hysterically.
- [23] J.I. does not recall much after that, except that she did not want to leave the bedroom. She recalls speaking to Ms. Gerrard later that day, and telephoning her aunt to come pick her up. J.I. was still upset when her aunt, Ms. R, arrived at the Gerrard home to pick her up early from the sleepover. When they were in the car, Ms. R. asked J.I. what was wrong. J.I. again became hysterical. She believes that she told her aunt that the accused had touched her. Ms. R. drove J.I. to a medical clinic where Ms. R.'s friend was a nurse and the friend's husband

was a doctor. However, J.I. did not speak to anyone at the clinic. J.I. kept crying and eventually Ms. R. took J.I. back to Ms. R.'s residence.

- [24] J.I.'s mother arrived at Ms. R.'s house. Ms. I. tried to talk to J.I. about what happened. J.I. does not recall what words were exchanged between them, but remembers that her mother tried to encourage J.I. to go to the police. J.I. declined, as she did not feel ready to go to the police at that time.
- [25] After the events of that weekend, J.I. refused to have any further dealings with the Gerrards. Aside from seeing S.G. briefly at a social occasion, J.I. did not interact with the Gerrard family again and did not go to their home. J.I. recalls telling her mother to call Ms. C. to tell her not to bring S.C. over to the Gerrard home.
- [26] J.I. did not speak of the events that happened at the Gerrard home in any detail to anyone until she made a report to police in November 2017. She was prompted to make a report to the police when her mother told her that the accused had touched S.C. inappropriately.

B. J.I.'s Aunt

- [27] Ms. R. is J.I.'s mother's sister. She testified that one time when J.I. was around 11 or 12 years old, she received a phone call from J.I. saying "auntie come get me". Ms. R. was in bed at her home when she received the call. J.I. was sobbing so hard it was hard to understand her.
- [28] As a result of that phone call, Ms. R. went to pick up J.I. This is the first time she had ever picked J.I. up from the Gerrard home. When she arrived at the accused's home in Surrey, J.I. was already at the door with Ms. Gerrard. Ms. R. asked what was wrong and J.I. walked right past her to Ms. R.'s car. Ms. R. spoke to Ms. Gerrard, who told Ms. R. what she thought had happened. Ms. R. returned to her car, where J.I. was seated. She was crying and wanted her mother.
- [29] Ms. R. drove towards Cloverdale where she lived. During the car ride, J.I. was crying quite a bit, at times teary, sobbing, or very quiet. Ms. R. had never seen J.I. react in this way and felt something was "dreadfully wrong". She was "very very upset." J.I. wanted her mother, who was on a camping trip at Cultus Lake. Ms. R. did not have children of her own, and had never dealt with such an upset child before. Ms. R. decided to take J.I. to a friend's medical clinic to ask her for advice on what to do with the crying child, and to also get help to get a hold of J.I.'s mother.
- [30] When they arrived at the clinic, J.I. told her aunt "don't tell them anything". Ms. R. recalls thinking "you have not told me anything." Once inside the clinic, Ms. R. tried to contact J.I.'s mother. Thirty minutes to an hour later, she was able to reach Ms. I. Through this time, J.I. continued to want her mother and remained mostly quiet, at times teary and crying a little bit. Ms. R. did not recall if she took J.I. back to her house, but at some point, she got J.I. into her mother's care.

- [31] Ms. R. believes that this event occurred in the summer, perhaps July or August. At the time, Ms. R. was working as a registered nurse doing shift work. Ms. R. could not pinpoint the day, but noted that it could not have been a Sunday, as she was not at church, and the medical clinic was open.
- [32] Ms. R. was very close to J.I. She testified that J.I.'s demeanor that day was "drastically different" from the happy, bubbly, cheerful child that she knew. She had never seen J.I. cry like that before.
- [33] In cross-examination Ms. R. testified that she had thought about taking J.I. to "the cop shop," but thought it was best for her to get J.I. to her mother.

C. J.I.'s Mother

- [34] Ms. I. testified that J.I. is the middle of three children born to her and Mr. I. Ms. I. and Mr. I. separated prior to 1995, after which the children lived with their mother.
- [35] Ms. I. testified about her close relationship with the Gerrard family. They were trusted family friends and the two families did many activities together. Mr. I. and the accused were also business partners, but had a falling out in the 1980s. Despite this, the Gerrard family continued to maintain a close friendship with Ms. I. and her children. S.G. was one of J.I.'s best friends and the two girls often slept over at each other's homes.
- [36] Ms. I. testified that she had a seasonal campsite at Cultus Lake, which she and the children frequented regularly between May to September each year. The family spent weekends there when the children were in school. In July and August, they spent most weeks there, with short trips home to "cut the grass" or "switch kids".
- [37] Ms. I. recalled dropping J.I. off at the Gerrard home one Friday after Ms. Gerrard had returned home from work. Ms. I. was heading to Cultus Lake for the weekend and the plan was for J.I. to spend the weekend at the Gerrard home and be picked up on Sunday afternoon. This was the first time that Ms. I. had seen the Gerrards' new split-level home, and Ms. I. recalls getting a brief tour before heading out to Cultus Lake with her younger son.
- [38] Around noon on Saturday, a park official told Ms. I. that her sister was urgently trying to get in touch with her. Ms. I. called Ms. R. from a pay phone. Ms. R. told her she had received a call to pick J.I. up, and that J.I. was very upset and Ms. I. needed to come back. Ms. R. said that the accused had been inappropriate with J.I. Ms. I. drove to Cloverdale. Her heart was pounding as she did not know what had happened.
- [39] When Ms. I. got to her sister's house, she heard J.I. whimpering and crying. Ms. I. went upstairs. When J.I. saw her, she started crying even more. Ms. I. hugged her and asked her what happened. J.I. did not tell her anything. Ms. I. knew something had happened, but did not know what it was. Ms. I. called the police. She told the police that her daughter was upset because someone had been inappropriate with her. She gave the police Mr. Gerrard's

name. Ms. I. testified that she was placed on hold, but hung up as J.I. kept saying that she did not want to talk to anyone. After comforting her daughter some more, Ms. I. took J.I. home.

- [40] Ms. I. called Ms. Gerrard on Sunday evening. She told her that J.I. was upset and crying, and asked Ms. Gerrard what had happened. Following her conversation with Ms. Gerrard, Ms. I. did not have any further substantive interactions with the Gerrard family. Under cross-examination, Ms. I. denied that Mr. I.'s criminality was the reason for her discontinuing contact with the Gerrards.
- [41] Ms. I. was introduced to S.C.'s mother, Ms. C., by Ms. Gerrard in the 1980's. Ms. I. and Ms. C. socialized at gatherings held at the Gerrard home. At J.I.'s request, Ms. I. told Ms. C. that J.I. wanted her to keep S.C. away from the accused.
- [42] Ms. I. described J.I. as a happy child, but this changed after that weekend at the Gerrard home. For months afterwards, J.I. was clingy and reluctant to leave her mother's side.
- [43] J.I. did not speak about the incident to her mother until just before going to the police around 2017. After J.I. went to the police, Ms. I. learned that S.C. also had gone to the police.
- [44] Ms. I. was not able to pinpoint the exact date when these events transpired. Under cross-examination, Ms. I. testified that she believes that the incident happened during July or August in 1996 or 1997. Ms. I. agreed that during this time, she did not see the Gerrards as often as she had before, due to work commitments and an eye condition which affected her driving.

D. The Accused

- [45] Mr. Gerrard testified that he is 60 years old and in poor health. He has asthma, hay fever, diabetes and high cholesterol. He was hospitalized for two strokes - one in 2014 and the second in 2017. The second stroke was more serious and has left him with some short-term and long-term memory impairment. Short-term memory issues center around names, places, and directions. He described his long-term memory issues as "sometimes it takes me a while to remember things. I do forget, but it usually comes back in a couple of minutes". However, Mr. Gerrard testified that he has never forgotten a significant memory or incident in the past.
- [46] Mr. Gerrard testified that he knew J.I. through her parents. He and Mr. I. were good friends, but had a falling out in 1982. Despite that, he and Ms. Gerrard (his wife of 36 years) remained friends with Ms. I.
- [47] J.I. and S.G. were friends and J.I. would come over to the Gerrard home. J.I. slept over on more than one occasion.

[48] Mr. Gerrard testified that on occasion, he would roughhouse with the children, tickling them under their armpits or feet until they squealed. However, Mr. Gerrard did not have a specific memory of roughhousing with J.I. and S.G., though he believed he might have done that. Mr. Gerrard denied ever placing his foot on J.I.'s vagina or asking her if it felt good. Mr. Gerrard agreed it was possible that he accidentally touched J.I.'s vagina with his foot in the context of play, but did not have any memory of this.

[49] Mr. Gerrard recalls only one remarkable occasion when J.I. had slept over and he went to wake the girls up. He described it thus:

A. I went to wake them up and she turned and looked at me and it was a little weird, I took it a little funny. That's about all.

[50] Mr. Gerrard explained further that he had gone in to wake up the girls for breakfast. He said he went to "push on" and "shake them" and demonstrated a waving gesture. He rubbed on J.I.'s back and she looked at him. J.I. appeared to be sleeping and her eyes were closed. When asked what J.I. did in response to his rubbing, the accused said:

A. She rolled over and looked at me, it was kind of weird the way she looked at me. Hard to describe, but it was a little weird that's all, I did not think a lot of it at the time.

[51] Mr. Gerrard said that no words were exchanged between him and J.I., and that S.G. did not do or say anything. After J.I. gave him "the look", he left S.G.'s room and did not even get a chance to wake up S.G. Immediately thereafter, he went to his wife, and said "I told her that I thought somebody had done something to [J.I.]".

[52] When asked what he meant by that, he stated:

A. That's where I went right away, my mind went straight to there, which is probably not correct, but that's what it did. That was from the look that she gave me, that she didn't trust me. It was disconcerting, and she did not say anything, but I left and went to see Lori who was still asleep, so I woke her up, and I said I think someone has done something wrong with this kid and then that was the end of the conversation. I went downstairs. I had no proof, I couldn't say anything.

[53] Mr. Gerrard did not recall what his wife said to him after he told her what happened with J.I. Mr. Gerrard recalled going downstairs after talking to his wife. He does not know what his wife did after he told her about the "look" that J.I. gave him. Mr. Gerrard denied knowing if J.I. was crying, or that she was refusing to leave S.G.'s bedroom, though he admitted that both things were possible. Shortly afterwards, J.I.'s aunt came to pick J.I. up early from the sleepover.

[54] Mr. Gerrard agreed that he had been very present in J.I.'s life, but that she then suddenly stopped visiting. When asked if that was odd, he said "not that one, because her father was not a great person I did not want to be around him."

E. The Accused's Wife

- [55] Ms. Gerrard has known Ms. I. since they were teenagers. Although they used to be friends and see each other regularly, they are no longer friends and have not seen each other socially in years.
- [56] Ms. Gerrard confirmed that her family lived in a split-level home during the relevant time period. S.G. and J.I. were close friends, though Ms. Gerrard did not consider them to be best friends. Sleepovers between S.G. and J.I. were not a regular occurrence at this time, though it is possible that J.I. slept over at the Gerrards' split-level home. Ms. Gerrard would have been home during sleepovers, which were held during weekends.
- [57] Ms. Gerrard testified that she did not recall Mr. Gerrard ever coming to tell her that something was wrong with J.I. during a sleepover. She does not remember J.I. crying hysterically during a sleepover, and said that if this had occurred, she would have remembered it. She also did not recall any occasion when Ms. R. came to pick up J.I. early from a sleepover. Ms. Gerrard knew Ms. R. as being Ms. I.'s sister, but was not personally close to Ms. R.
- [58] When asked if there was ever a discussion between her and Mr. Gerrard where he had done something to make J.I. upset, she said "no, I would definitely remember a discussion like that".
- [59] Ms. Gerrard also did not recall an abrupt cessation in 1995-1997 of J.I. attending their residence or spending time with S.G., saying that J.I. did not play any significant part or role in S.G.'s life at that time, noting that "I don't even know, during that time, where she even would have lived".
- [60] Ms. Gerrard also denied an abrupt cessation of her relationship with Ms. I., saying that it faded out long before those years. Ms. Gerrard explained that they started to drift apart as their values changed and they had less in common. She pointed out that she had concerns about how Mr. and Ms. I. supported their lifestyle.
- [61] In cross-examination, Ms. Gerrard corroborated the accused's testimony regarding the impact that the strokes have had on his memory, characterizing it as: "significant over the last few years, it was not perfect before but it is very bad now." She noted he struggles with appointments, places and the concept of time, meaning that when writing cheques, he would sometimes ask her about the day, month and year.

IV. Count 2

- [62] The original indictment for Count 2 spanned the time period from 1997 to 1999. However, following the testimony of the complainant, the Crown applied to amend the indictment for Count 2 to conform to the evidence. I granted the application pursuant to s. 601 of the Code.

- [63] S.C. testified about three incidents of sexual touching by Mr. Gerrard when S.C. was under the age of 14. The computer incident and the bedroom incident are alleged to have occurred in the Gerrard home. The third incident is alleged to have occurred in Mr. Gerrard's truck.
- [64] Crown counsel concedes that the evidence does not support a conviction on the basis of the computer incident. However, Crown counsel submits that both the truck incident and the bedroom incident have been proven beyond a reasonable doubt, and that either of these incidents is sufficient to ground a conviction on Count 2.

A. S.C.'s Testimony

- [65] S.C. testified about three occasions when she says she was sexually touched by Mr. Gerrard. She believes the events happened in 1998 over the course of a few months when she was seven years old. Under cross-examination, S.C. could not recall in what order the three alleged offences occurred, or which of the three incidents occurred first. S.C. also admitted in cross-examination that she could have been as young as four years old when these events transpired.
- [66] S.C. described a close family relationship with the Gerrard family. Due to the relative ages of her siblings and the Gerrard children, S.C. often found herself playing alone or being the "tag along" younger child when visiting the Gerrard home. Ms. C. and Ms. Gerrard frequently went out to bingo in the evenings, leaving S.C. at home with the accused. S.C. said that she stopped going to the Gerrard home when she was 12 years old, after her mother caught her kissing T.G.
- [67] S.C. went to the police in January 2018 about her allegations against Mr. Gerrard after learning that J.I. had come forward. S.C. explained that she had been holding onto the events for a long time. When J.I. came forward, S.C. felt that it was time for her to do so as well. J.I. did not tell S.C. what she had said to the police. They discussed their own experiences, but "not in detail".

1. Computer Incident

- [68] S.C. recalled one occasion when she was playing mah-jong solitaire on the Gerrards' computer while seated on the accused's lap. The computer was located in the dining room of the Gerrard home. There was a blanket covering her and Mr. Gerrard. She recalled there being some space between her body and that of Mr. Gerrard. While Mr. Gerrard's hands were behind her, she felt wetness on her lower back, close to the top of her buttocks. She was unsure as to what happened and thought that perhaps Mr. Gerrard had peed in his pants. She recalled him wearing jeans and hearing a zipper after she felt the wetness.
- [69] S.C. did not see the accused's hands while she was playing the computer game. After she felt the wetness and heard the zipper, she got off his lap. She does not remember what she did after that.

2. Truck Incident

- [70] S.C. testified that she would sometimes go to the park, the rink, and rock climbing when she was with the Gerrards. She remembers a specific incident when the accused took her rock climbing alone. She was alone with the accused in his truck. The truck was white. It was dark out, but she could see inside the truck because of the street lights. During the drive to the rock climbing gym called Vertical Reality, Mr. Gerrard took out his penis and told her to touch it. She was afraid and did not touch it. Mr. Gerrard then took her hand and placed it on his penis. Her hand made contact with the accused's penis for a few seconds before S.C. pulled it back. S.C. recalls seeing Mr. Gerrard pull his penis from his jeans.
- [71] The two then went to Vertical Reality. The trip there and back was quick, and she does not know if they stayed to climb.
- [72] Under cross-examination, S.C. could not recall if Mr. Gerrard's penis was circumcised or not, though she recalled it being erect when she saw it. S.C. explained that the truck incident was S.C.'s first experience with a male penis.
- [73] S.C. did not know the make or model of the accused's truck, or whether it was a standard or an automatic, though she remembered it having two individual seats, rather than a bench seat. She told the Court that she had little familiarity with trucks at the time of the allegation.

3. Bedroom Incident

- [74] The third incident described by S.C. was alleged to have occurred in Mr. and Ms. Gerrard's bedroom. S.C. recalled Mr. Gerrard taking her to his bedroom, and lying down on the bed. He told her to come on the bed, and then moved her so that she was straddling him. Mr. Gerrard told S.C. that it was his birthday and she had to give him a special kiss. He told her to put her tongue in his mouth, which she did. The kissing did not last long. She did not know where her mother was at the time, or where the other children were.
- [75] Under cross-examination, S.C. was unable to describe any details about her surroundings, such as what the bedroom or the comforter looked like.

4. Post Offence Conduct

- [76] S.C. testified that she continued to go over to the Gerrard house until she was 12 years old. Her contact with the Gerrards ended after she made a disclosure to her mother that something had transpired between her and Mr. Gerrard. S.C. did not provide her mother with any specifics. The disclosure happened after Ms. C. caught S.C. kissing T.G. at the S.C.'s home. S.C. admitted she was embarrassed that she and T.G. had been caught kissing, but denied that she made the disclosure so that she could take attention off of herself.

- [77] S.C. testified that she may have told her mother some details of her allegations against Mr. Gerrard, while she was intoxicated as a teenager. However, she had no recollection of doing so.
- [78] S.C. testified that she tried to kill herself in her mid-twenties. Her suicide attempt was partly because of what the accused had done to her, and partly because of a failed romantic relationship.
- [79] S.C. acknowledged that she invited the Gerrards to her mother's 50th birthday party, which was being held at a restaurant. However, S.C. had no recollection of speaking to Mr. Gerrard on that occasion.

B. S.C.'s Mother

- [80] Ms. C. corroborated S.C.'s testimony about the close relationship between the two families. Ms. C. would go to the Gerrard home at least once a week, taking her children with her. She and Ms. Gerrard were very close. They would visit at each other's homes, or take their children to the park, swimming, or rock climbing at the Vertical Reality gym. S.C. often played by herself in the same room as the other children. Once per week, Ms. C. and Ms. Gerrard would leave the children with the accused, and the two would go out for three to four hours to play bingo.
- [81] During the relevant time, the accused drove a white truck that had two seats and a canopy on the back. He often wore blue jeans.
- [82] When S.C. was around 11 years old, Ms. C. caught her kissing T.G. in the washroom of Ms. C.'s home. Ms. C. was upset and took S.C. aside. She asked S.C. why she would let T.G. do that to her. S.C. told her that "she figured he would do what he wanted anyway because his dad always did." Later, after dropping T.G. at his home, Ms. C. tried to get S.C. to elaborate on her earlier comments. S.C. got very upset and did not tell Ms. C. anything. This is the first time that Ms. C. heard S.C. suggest any wrongdoing on the part of Mr. Gerrard. Ms. C. made a decision not to take S.C. back to the Gerrard home as a result of this disclosure.
- [83] Under cross-examination, Ms. C. testified that when S.C. was a teenager, she told her mother that when she went rock climbing, Mr. Gerrard exposed himself to her when they were in a truck. She also told Ms. C. that when Ms. C. and Ms. Gerrard would go to bingo, S.C. would sit on Mr. Gerrard's lap at the computer and he would touch her inside her clothes. Ms. C. testified that these statements were made while S.C. was intoxicated. Ms. C. brought these disclosures up with S.C. when she was sober, at which time S.C. told her that they did not happen.
- [84] Ms. C. continued to maintain a friendship with Ms. Gerrard despite the disclosures made by S.C. Ms. C. said she was polite to Mr. Gerrard when she saw him, but did not trust him. On one occasion, Ms. C. travelled to Las Vegas with Ms. Gerrard and some other friends. Mr. Gerrard was also present, though Ms. C. did not learn that he would be attending until after

the plans had already been made. However, Ms. C. stated that even if she had known in advance that Mr. Gerrard was coming to Las Vegas with them, she would likely have still gone on the trip.

- [85] Ms. C. knew J.I. and her mother, who was friends with Ms. Gerrard. During one of her routine phone conversations with Ms. Gerrard, Ms. C. learned that something had upset J.I. when she was visiting the Gerrard home. Ms. Gerrard told this to Ms. C. around the time that the incident was said to have occurred, which would have been when J.I. was 12 or 13 years old. Ms. C. did not recall Ms. I. telling her any details about what happened with J.I., though it is possible.
- [86] Ms. C. described S.C. as an outgoing and physically active child. She figure-skated, was happy, and played with friends. However, when she was seven years old, S.C. began to have issues at school and started to wet her bed. S.C.'s teacher spoke to Ms. C. about S.C.'s lack of participation in class and her being very quiet. It was surmised that S.C.'s family's multiple moves had affected S.C. negatively. It was not until she was around 12 years old, that S.C. finally came "out of her shell".
- [87] Ms. C. testified that S.C. organized her 50th birthday party where both the Gerrards were in attendance. However, S.C. was intoxicated at the party and when Ms. C. confronted her about her intoxication, S.C. told her that it was the only way she could get through the event knowing the accused was there.
- [88] In 2016, S.C. attempted suicide. Ms. C. was in the hospital with S.C., when she was contacted by Ms. Gerrard. Ms. C. told Ms. Gerrard that S.C. had attempted suicide, and, if she wanted to know what was happening to S.C., Ms. Gerrard "needed to speak to her husband and find out what he was doing to my daughter 15 years before that while we were at bingo." After that communication, the relationship between Ms. C. and Ms. Gerrard cooled significantly.
- [89] In 2018, Ms. C. learned that J.I. had decided to go to the police. However, she did not discuss it with S.C. or J.I.

C. The Accused

- [90] Mr. Gerrard testified that there were occasions when S.C. played on the computer with him, while she was seated on his lap. These would occur when she found herself alone with no-one else to play with. She sat on his lap because she was too small to reach the computer on her own. However, other people would be present when he played games on the computer with S.C. He remembered eating and drinking when seated at the computer. Mr. Gerrard denied touching himself while S.C. was seated on his lap at the computer.

- [91] Mr. Gerrard admitted to being alone with S.C. once in his truck when taking her to Vertical Reality to go rock climbing. He testified that he had originally planned to take both girls, but S.G. had "ended up doing something else", so he took S.C. alone. Mr. Gerrard said that it was light out when he drove S.C. to the facility. They went inside the gym and climbed for about 45 minutes. He then he took S.C. home.
- [92] Around this time, Mr. Gerrard drove a white F150 two-wheel drive 5-speed truck. It was a standard-drive vehicle with the gear shift on the floor in between the driver and the passenger. The truck had a bench seat for the driver and passengers. There was a seatbelt for a third person to sit in the middle. Though it was possible for a third person to sit on the bench seat, a cut-out in the middle seat area for the gear shift would make it uncomfortable.
- [93] The accused agreed that S.C. sat in the front seat of the truck on the way to Vertical Reality. However, he denied exposing his penis to S.C., or placing S.C.'s hand on it. Mr. Gerrard did not agree that S.C. would be within arm's length reach of him while seated in the truck, saying "it's a big truck and she's a little person and I'm short." He agreed that it was possible that S.C. could have moved into the middle seat and would have been within reach of his arm, but denied that this occurred.
- [94] Mr. Gerrard denied the bedroom incident in its entirety, saying that S.C. had never been in his bedroom.
- [95] Mr. Gerrard testified that he had had only positive experiences with S.C. and that she would have no reason to be upset with him. Contrary to his initial testimony, the accused agreed in his cross-examination that he was fairly present in S.C.'s developmental years, but that when she was 11 or 12 years old, she suddenly stopped coming around. He attributed the change to the breakdown of S.C.'s parents' marriage.
- [96] Mr. Gerrard said that he saw S.C. at her mother's 50th birthday party. She said "hello" and introduced a friend to him. The conversation was brief and insignificant and was not long enough for him to determine if she was intoxicated or not.
- [97] Mr. Gerrard denied knowing about S.C.'s suicide attempt.

D. The Accused's Wife

- [98] Ms. Gerrard described her close relationship with the C. family, and Ms. C. That relationship changed when Ms. C. sent Ms. Gerrard a message telling her to ask her husband what he did to S.C. They re-established their friendship some months later when Ms. Gerrard learned that Ms. C.'s son had been killed. However, their friendship finally ended after S.C. made these allegations to the police.

- [99] When her relationship with Ms. C. was good, it would not be uncommon for them to be on the back patio of Ms. Gerrard's home while they chatted and smoked. Ms. Gerrard said that she never observed her husband playing with S.C. on the computer. She would not have been able to see in the dining room from the back patio, nor would she have been able to hear what was going on in that room.
- [100] Ms. Gerrard agreed in cross-examination that sometimes the accused would babysit the children. There were times when S.C. would be alone in the house with the accused when Ms. C. dropped S.C. off before the two women left for bingo.
- [101] Ms. Gerrard stated that she did not notice any abrupt cessation of S.C. coming over when she was around 11 or 12. Rather, S.C.'s contact with the Gerrard family gradually decreased when she became a teenager.
- [102] Ms. Gerrard denied ever telling Ms. C. that J.I. had been upset at her home saying "no, I would remember something like that."

V. Applicable Legal Principles

- [103] I turn now to the statutory framework and legal principles that apply to cases of this nature.
- [104] The accused is charged with sexual interference under s. 151 of the Code. The wording of the provision which was in effect at the time of the alleged offences, is as follows:
151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.
- [105] Sexual interference is a specific intent offence. It requires subjective proof that the accused touched the complainant for a specific purpose: *R. v. Campbell*, 2020 BCSC 1423 at para. 54.
- [106] The actus reus of this offence is committed when the accused touches the body of a complainant who is under the age of 14, directly or indirectly, with a part of the accused's body or an object. The mens rea of the offence requires that the Crown prove that the accused's touching was accompanied by a specific intent to touch for a sexual purpose: *R. v. Michel*, [1994] B.C.J. No. 3308 (C.A.) at para. 4.
- [107] There is no dispute that both the complainants were under 14 years of age and the accused was at least 20 years older than them during the periods in question. Thus, neither the defence of consent nor the close-in-age exceptions apply: *Campbell* at para. 57.
- [108] Similar fact reasoning is not permissible in this case: *R. v. F.M.*, 2020 BCSC 120 at para. 82. As each count on the indictment is a separate charge, I must assess it independent of the other to determine if the Crown has met its burden of proof in each instance. 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 NS.C.A 42, at paras. 30-32, per Cromwell J.A.; *R. v. A.L.*, 2020 BCCA 18, at para. 190

(F.M. at para. 82)

- [109] The evidence of one complainant cannot bolster the credibility or reliability of the other complainant. 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: F.M. at para. 82, citing with approval, *R. v. P.E.C.*, 2005 SCC 19, at para. 1.

A. Reasonable Doubt

- [110] The accused is innocent until proven guilty. This means that the Crown must prove beyond a reasonable doubt that Mr. Gerrard committed each count of sexual interference.
- [111] In *R. v. Lifchus*, [1997] 3 S.C.R. 320 at paras. 36-39, the Court explained that proving a case beyond a reasonable doubt does not require proof to an absolute certainty: "it is not proof beyond any doubt nor is it an imaginary or frivolous doubt." Rather, reasonable doubt exists where there is doubt that is "based on reason and common sense". Reasonable doubt must be logically connected to the evidence or absence of evidence.
- [112] If there are reasonable inferences other than guilt that can be drawn from the facts, the Crown's evidence will fall short of meeting the "proof beyond reasonable doubt" standard. Gaps in evidence can also result in inferences other than guilt. But all such inferences must be reasonable based on the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense: *R. v. Rochemont*, 2017 BCSC 930 at para. 105; and *R. v. Villaroman*, 2016 S.C.C 33.
- [113] The guidance provided by the Court in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, for sexual assault jury trials has often been relied on in judge-alone sexual offence trials where the accused and complainant provide competing versions of events. The Alberta Court of Appeal recently conducted an extensive review of the *W. (D.)* instruction in *R v. Ryon*, 2019 ABCA 36. The Court noted that the burden of proof remains on the Crown throughout and, subject to specific defences such as those found in s. 16 of the Criminal Code, the accused person is never required to prove their innocence or disprove the evidence led by the Crown. The appellate court suggested revised instructions at para. 51, the salient points of which are as follows:

- a. If the jury believes the accused's evidence denying guilt (or any other exculpatory evidence to that effect), or if they are not confident they can accept the Crown's version of events, they must acquit.
- b. While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit.
- c. Even if the jury completely rejects the accused's evidence (or where applicable, other exculpatory evidence), they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or where applicable, other exculpatory evidence) cannot be taken as proof of the accused's guilt.

[114] This approach was recently endorsed by Justice Kent in *R. v. Swain*, 2019 BCSC 1300 at paras. 59-60.

[115] A trier of fact may accept all, some, or none of a witness's evidence, and may assign different weight to different parts of a witness's evidence that it has accepted: see *Rochemont* at para. 106.

[116] The principles surrounding reasonable doubt apply not only to each element of the offences alleged, but also to the credibility and reliability of witnesses. There may be circumstances where the trier of fact does not fully believe the accused's version of events, and finds the complainant's version to be more credible, but remains uncertain as to what actually happened. In that situation, there is a reasonable doubt, the benefit of which must go to the defendant, even where the complainant's version is more plausible or believable than the accused's version: see *R. v. Nyznik*, 2017 ONSC 4392 at paras. 12 and 14.

B. Credibility and Reliability

[117] Only evidence that is both reliable and credible can support a finding of guilt beyond a reasonable doubt. Reliability has to do with the accuracy of a witness's evidence, such as whether they have a good memory, if they are able to recount the details of the event, and whether the witness is an accurate historian: *Nyznik* at para. 15.

[118] In contrast, credibility centers on the witness's veracity. A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are relating, but nevertheless be proven to be mistaken in their recollection. Although honest, their evidence is not reliable: *Nyznik* at para. 15.

- [119] Determining credibility of a witness requires the court to consider a number of factors, such as internal and external consistency of the witness's evidence, motive to fabricate, the inherent plausibility of the evidence in the context of the case as a whole, and demeanour: Swain, at paras. 48-49.
- [120] However, the use of a common-sense approach to credibility assessment can be dangerous because it can mask reliance on stereotypical assumptions. The trial judge must guard against relying on stereotypical assumptions when assessing the evidence: Swain, at para. 49.
- [121] Trial judges are also cautioned against making credibility assessments based on demeanour alone: R. v. S. (N.), 2012 SCC 72 at paras. 99-107. This is because the manner in which a witness testifies is a notoriously unreliable measure of credibility. A witness's physical health, personality, cultural and social upbringing, and comfort level with testifying in a courtroom setting, are but some of the things that may affect their demeanour, thereby making it difficult to interpret: R. v. Tom, 2014 BCSC 2660 at para. 6.

C. Adults Testifying to Childhood Events

- [122] Bearing in mind that the accused cannot be subjected to a different standard than the complainant (see R. v. Roth, 2020 BCCA 240 at para. 47), every witness, irrespective of age, is an individual whose credibility and evidence should be assessed according to criteria appropriate to their mental development, understanding, and ability to communicate: R. v. A.M., 2014 ONCA 769 at para. 9.
- [123] While the presence of inconsistencies on peripheral matters, such as time and location should be considered in the context of a witness's age at the time of the events about which they are testifying, where an adult testifies about events occurring when they were a child, their credibility should generally be assessed according to the criteria applicable to adult witnesses: A.M. at para 11. See also R. v. W. (R.), [1992] 2 S.C.R. 122 at para. 27.

D. Sexual Assault Cases

- [124] Finally, I turn to principles related to cases involving offences of a sexual nature. Our courts have unequivocally rejected the use of rape myths and discredited stereotypes to assess a complainant's credibility. Twin myths reasoning is forbidden. Nor is it appropriate to assume that sexual assault victims will react to abuse in any objectively identifiable way. There is no inviolable rule on how victims of sexual assault will behave: R. v. D. D., 2000 S.C.C. 43 at para. 63.

- [125] 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. Shearing*, 2002 S.C.C. 58 at para. 121. It cannot be assumed that a victim of sexual assault will "usually" scream and yell, physically resist and fight back, report the sexual assault immediately to her family or to authorities, or avoid the perpetrator of the sexual assault.
- [126] In *R. v. A.R.D.*, 2017 ABCA 237, aff'd 2018 S.C.C. 6, the Alberta Court of Appeal at para. 63 stated that an assumption or expectation about the post-abuse conduct of a victim, "standing alone, will never give rise to an adverse inference against the credibility of the complainant."
- [127] However, as Crown counsel correctly noted in this case, this does not mean that no consideration whatsoever can be given to the timing of the disclosure of abuse. Delayed disclosure may have significance in some cases. What is important is that the trier of fact avoid any stereotypical reasoning when evaluating such evidence: *R. v. A.D.G.*, 2015 ABCA 149 at para. 32.
- [128] Evidence of a complainant's post-offence emotional state is admissible and may be used to support a complainant's evidence of a sexual assault: *R. v. Varcoe*, 2007 ONCA 194 at para. 33.

VI. Analysis of Count 1

- [129] I begin first with an assessment of the accused's evidence. In so doing, I am mindful of the fact that the allegations occurred more than two decades ago, and that the passage of time between the alleged offences and this trial presents this Court with unique and recognized challenges: see for example, *R. v. D. L.*, 2017 ONSC 6481 at paras. 126-134.
- [130] The presumption of innocence requires me to acquit Mr. Gerrard unless the Crown establishes his guilt beyond a reasonable doubt. There is no obligation on Mr. Gerrard to prove his innocence, or to disprove any of the Crown's evidence. But in circumstances such as these, where the accused has chosen to testify, I must assess the credibility of his exculpatory statements: *Swain* at para. 66.
- [131] I note at the outset that, contrary to the assertion of defence counsel, merely placing himself in the general circumstances of the events does not enhance Mr. Gerrard's credibility. In my view, such a concession, standing on its own, has no impact one way or another on an accused's credibility. It is only when the concession is seen in the context of the whole of the evidence that its exculpatory value can reasonably be assessed.

- [132] Defence counsel says that Mr. Gerrard was not a "perfect" witness, explaining that his poor health and age have affected his short and long-term memories. Counsel submits "[a]t times during his testimony he seemed genuinely confused and to struggle, though he also made reasonable and fair concessions and seemed to be making an attempt to do his best. While not a perfect witness, he remained faithful to the core assertion of his denials. His evidence that puts him in the general circumstances alleged bolsters his credibility".
- [133] A witness's testimony is not required to be perfect in order to be found credible or reliable. Memory and recall can vary substantially from person to person. In addition to age and health, one's ability to recall a specific event can be affected by the mere passage of time, individual personality traits such as one's attention to details, the manner in which a question is posed, or the occurrence of events that might trigger the memory. However, even after considering these variables, including Mr. Gerrard's age, health, and the passage of time, there exists discrepancies in his evidence which are not explained by poor memory.
- [134] I also reject the suggestion that Mr. Gerrard was genuinely confused or struggled while giving his testimony. I am satisfied that on all material matters, Mr. Gerrard fully understood the questions that were being asked of him and gave considered answers.
- [135] I did not find Mr. Gerrard to be a credible witness and reject his version of events of what transpired in the bedroom between him and J.I. His evidence was inconsistent, fraught with contradictions, implausible, unreliable, and not supported by the other defence witness. While Mr. Gerrard made some concessions, they were frequently made only after initial avoidance, obfuscation, and defensiveness.
- [136] In Mr. Gerrard's initial account of the bedroom incident, he minimized what had transpired. He described the look that J.I. gave him as "a little weird", and that he did not think much of it. Yet his later evidence suggests quite the contrary. The "look" troubled and "spooked" the accused enough that he immediately left S.G.'s bedroom and went straight to his wife, to wake her up and tell her about it.
- [137] Mr. Gerrard's description of the "look" does not accord with what he describes having occurred in the bedroom. In response to him innocently rubbing J.I. on her back to wake her up, he says that J.I. gave him a look that was entirely unexpected. He later stated she appeared scared, fearful and perhaps even shocked.
- [138] Mr. Gerrard's subsequent actions after getting the "look" are also telling, as they are entirely inconsistent with his original plans to get the kids up for breakfast. At first, he could not recall if breakfast had been made, despite this being the reason for him going to wake up the girls. He later testified that breakfast was not ready when he went to wake up the girls, and had no recollection of making breakfast afterwards. He also had no recollection of where he went after speaking to his wife, stating, "I don't know where I was. I could have been anywhere. I could have went to the bathroom. I could have went to look in the freezer. I could have went with my tools because it's a weekend, I have to sharpen blades".

- [139] I also find it peculiar that the accused did nothing to follow-up with J.I. though he had concerns that "someone has done something wrong with this kid". Despite describing J.I. as being "like family", he did not follow up with his wife or her mother to see how she was faring after leaving early from the sleep over.
- [140] I turn now to Ms. Gerrard's testimony. I have placed little weight on it, for a number of reasons. Ms. Gerrard's stated recall of events was so vague as to make much of her evidence unreliable. She could not recall Ms. R. picking up J.I. early from a sleepover, even though all of the other witnesses, including Mr. Gerrard, confirmed that this did happen. Ms. Gerrard also had no recollection of the accused waking her up to tell her about the look that J.I. had given him, noting that she would "definitely remember a discussion like that". This evidence directly contradicts the testimony of Mr. Gerrard.
- [141] I also did not find Ms. Gerrard to be a credible witness. She struck me as someone who loved her husband and did not want to confront the truth. Her evidence was designed to criticize J.I. and to protect the accused. She seized on opportunities to comment on Mr. I's criminal past, the change of values between her family and J.I.'s family, and her concerns that J.I.'s family appeared to be living beyond their means. She tried to distance her family from J.I.'s family by, for example, minimizing the close relationship between J.I. and S.G., or herself and J.I.'s mother in the face of credible evidence that indicated that the girls had been very close.
- [142] I turn now to J.I.'s evidence. It is the position of the defence that J.I. is an unreliable and dishonest witness for reasons including that: she had a virtually blank memory of details immediately surrounding the incidents; her evidence contained various inconsistencies and omissions; there were discrepancies between her evidence and that of the other Crown witnesses; and her testimony demonstrated a carelessness with the truth, including over matters about which an honest witness is unlikely to be mistaken, thus raising concerns about her credibility.
- [143] The evidence does not support these characterizations of J.I.'s testimony. I found J.I. to be a credible witness. Her evidence was clear, generally consistent except on minor points, delivered without bias, and in many instances corroborated by other evidence.
- [144] I accept J.I.'s evidence as to the general timing of the bedroom incident, i.e., that it occurred early on a Saturday morning, in either 1996 or 1997, when she was around 11 or 12 years old. Though J.I.'s belief that the incident occurred in May or June is slightly inconsistent with her mother's and aunt's evidence that the event transpired in July or August, the difference of a few months is minor and peripheral.

- [145] Similarly, J.I.'s lack of memory regarding the events prior to or after the incident do not detract from her credibility or reliability as to what occurred in the bedroom. Given her age at the time, I do not find it unusual that she would not recall details such as: who dropped her off at the Gerrard home; what time she arrived; and what she did in the hours leading up to or following each incident.
- [146] J.I. was cross-examined on her evidence in chief that during the bedroom incident, she may have vocalized to the accused, "don't touch me". Her testimony from her preliminary inquiry was put to her, where she stated "I was just crying uncontrollably and I feel like I was saying don't touch me". J.I. explained that she used the words "I feel" because she was not sure if she had vocalized those words. I find this explanation is credible and do not see any inconsistencies in this evidence.
- [147] I do not find that J.I.'s credibility or reliability are diminished because she could not remember all the details surrounding the bedroom incident such as if S.G. said anything to her, especially considering her emotional state at the time.
- [148] The details that J.I. did provide are compelling and add to her credibility and reliability as a witness. She was able to recall the layout of the bedroom despite the fact that she had only been to the split-level home once or twice. Her detailed account of what transpired in the bedroom is also consistent with the events that transpired afterwards.
- [149] I note also that prior to the incident, there was nothing that happened between J.I. and the accused that would give rise to animosity towards him. There is no evidence of conflict or issues with the Gerrard family. There was nothing in the evidence to suggest that J.I. had any negative association with Mr. Gerrard, aside from the acts complained of.
- [150] J.I. was cross-examined on whether she told her aunt that the accused had done something "inappropriate" to her. She stated that she told her aunt that "Bob was touching me", but does not believe she used the word "inappropriate". She agreed with her preliminary inquiry evidence where she said she could not be certain if she told her aunt that the accused had touched her, but stated "I know I definitely said something which is that he touched me". This explanation had a ring of truth to it and I find it credible.
- [151] Defence counsel takes issue with J.I.'s statement to the police that the accused had not touched her underneath her clothing, and argues that this contradicts her evidence at trial. J.I. explained that by "clothes" she meant that he did not touch her under her shirt. However, she maintained that he did put his hand inside her underwear, though he did not touch her vagina. I accept this explanation as being credible and do not find any inconsistency.
- [152] It was also put to J.I. that the details regarding the accused kissing her on the neck, touching her nipple and areola, and her nipple getting hard, were not contained in her police statement. She agreed that her police statement was vague on those details, though she noted that the reference to breasts in her police statement included the nipple and

areola. J.I. explained that this was the first time that she had really talked about these events. She did not prepare prior to attending the police station as to what she needed to say. Further, while she knew the officer was asking for details, there were some things she did not recall until she was asked specific questions. I accept this explanation and do not find that the omission of these details to the police was a reflection of dishonesty. It is not unusual for a complainant relaying a traumatic event for the first time to omit some details in the initial recounting of the event. It is also not unusual for a memory to be triggered by the later posing of a specific question.

- [153] My conclusion that J.I.'s account of the bedroom incident is credible and reliable is also supported by the evidence of Ms. R. and Ms. I. Mr. Gerrard's assertion that nothing untoward happened in S.G.'s bedroom is entirely inconsistent with the description of the events given by Ms. R. The description by Ms. R. of collecting a hysterical and inconsolable J.I. early from a sleepover at the Gerrard home is consistent with J.I.'s testimony.
- [154] While there were some discrepancies in the evidence of Ms. I. and Ms. R., they were minor and attributable to the passage of time. These discrepancies did not alter my view of their credibility as witnesses, or the overall reliability of their evidence.
- [155] There was some discrepancy as to whether Ms. R. told Ms. I. that J.I. went to a clinic and whether there had been sexual intercourse. However, this discrepancy does not affect my view of the credibility of Ms. I.'s evidence. It is likely that on learning that Ms. R. had taken J.I. to a medical clinic immediately after leaving the Gerrard home, Ms. I. surmised that J.I. had been examined for sexual assault. While this raises some concerns about the reliability of her memory on the fine details of what transpired, it is on a peripheral matter and does not affect my view of her testimony overall.
- [156] I reject defence counsel's alternate explanation of what might have transpired to upset J.I. as being implausible. J.I. admitted that when she was younger, she had gotten upset during sleepovers and asked to come home. However, there was no evidence to suggest that this had occurred near the relevant time period or that J.I. still felt that way about sleepovers during that time. In fact, J.I. testified in cross-examination that she believed "the Gerrards w[ere] the first friend I started having sleepovers with."
- [157] I also reject the suggestion that J.I. was imbedded or corrupted with a false memory based on her aunt's suspicions of her being touched inappropriately. Nor do I accept that there has been contamination of Ms. R.'s or Ms. I.'s evidence. I accept J.I.'s evidence that she told her aunt that Mr. Gerrard had touched her, but did not provide her with any details. Insofar as there is a discrepancy between Ms. R.'s evidence on this point and J.I.'s, I do not consider it to be a reflection on either witness's credibility.
- [158] I also reject the suggestion that J.I.'s negative relationship with her father influenced her testimony. Ms. I. denied that there was any sexual misconduct on the part of J.I.'s father toward J.I. and there is no evidence to suggest otherwise.

- [159] Similarly, I reject any suggestion that there was any collusion between J.I. and S.C. There is no credible evidence that supports such an assertion.
- [160] Defence counsel also raised concerns about the overall credibility of J.I. when she, as defence counsel interprets, first said that the foot incident was the worst thing that had happened to her, and contrasting that with her evidence later that if that is all it was, she would probably not be in court today. I did not understand J.I. to be referring specifically to the foot incident when giving the former testimony. Rather, I understood this statement to refer to what she experienced that weekend, and more specifically, in the bedroom.
- [161] In summary, I accept J.I.'s version of events of what occurred in S.G.'s bedroom. Specifically, I find that Mr. Gerrard touched J.I.'s breast and pelvic area in the manner she described. The incident occurred during a sleepover early on a Saturday morning around July or August, when J.I. was around 11 or 12 years old. While Mr. Gerrard was committing the offence against J.I., he bumped into the night table, causing a loud noise which woke up S.G. Mr. Gerrard immediately left the room. In order not to be caught, Mr. Gerrard concocted a story to tell his wife so that he could explain why J.I. was so upset.
- [162] I therefore conclude that Crown counsel has also proven beyond a reasonable doubt that Mr. Gerrard touched a part of J.I.'s body with his own, when J.I. was under the age of 14. The Crown counsel has also proven beyond a reasonable doubt that the touching was done for a sexual purpose. The evidence I have accepted supports a finding of a specific intent beyond a reasonable doubt. The nature of the acts committed is such that they could only have been committed with intent. There is no other plausible explanation for Mr. Gerrard to have touched J.I.'s breasts and pelvic area unless he had an intention to do so for a sexual purpose.
- [163] My finding on the bedroom incident is sufficient to support a conviction on Count 1.

Foot Incident

- [164] Though I found J.I.'s evidence on the foot incident to be credible, I have concerns about the reliability of her evidence on this issue, such that her evidence leaves me with reasonable doubt about whether Mr. Gerrard touched J.I.'s vagina with his foot, for a sexual purpose.
- [165] While I conclude that Mr. Gerrard's foot did touch J.I.'s vaginal area while she was playing with S.G., and that Mr. Gerrard did utter words along the lines of what is described by J.I., I am not able to conclude beyond a reasonable doubt that the touching was intentional.
- [166] The touching and words spoken by Mr. Gerrard occurred in the context of play, making it possible that the touching was accidental. Mr. Gerrard's evidence that he would sometimes tickle the children while they were playing, is plausible, and leaves me with reasonable doubt as to the meaning of the words attributed to Mr. Gerrard when the girls were playing in the living room while he was present.

- [167] There were also some discrepancies or inconsistencies between J.I.'s evidence at trial, and her statements to the police or at the preliminary inquiry, which causes me to have concerns about the reliability of her evidence. For example, there are discrepancies over the number of times the accused touched her vagina with his foot, whether she ate that day, and whether Ms. Gerrard had a friend over that evening.
- [168] Taken individually, the above discrepancies are not significant, and some, such as what she ate that day, relate to peripheral matters. However, considered as a whole, they raise concerns about the reliability of J.I.'s memory regarding the foot incident, and lead me to conclude that there exists reasonable doubt as to whether Mr. Gerrard intentionally touched J.I. for a sexual purpose when she was playing with S.G. in the living room.
- [169] My view of the reliability of J.I.'s evidence in relation to the foot incident does not affect my view of the reliability of her evidence in relation to the bedroom incident. In my view, the bedroom event was a separate incident for which there is clear, reliable, and credible evidence supporting the fact that it occurred in the manner relayed by J.I.

VII. Analysis of Count 2

- [170] Crown counsel concedes, and I find, that reasonable doubt exists with respect to the computer incident, such that it cannot form the basis for a conviction on Count 2. While I accept that S.C. experienced a wetness on her back on one occasion while she was playing at the computer with the accused, the evidence is insufficient to establish what caused the wet spot.
- [171] Before I turn to the truck incident and the bedroom incident, I wish to comment on the evidence in general. Much was made of S.C. inviting the accused and his wife to her mother's 50th birthday party. Insofar as this evidence falls into myths about how victims of sexual abuse are expected to behave, I place no weight on it. The fact that S.C. invited the accused's wife and the accused to her mother's 50th birthday party does not mean that S.C. was not sexually touched by the accused.
- [172] Similarly, I make no adverse findings of credibility against Ms. C. simply because Ms. C. continued a relationship with the Gerrards even after the incidents had been disclosed to her by S.C. Just as one cannot predict how victims of sexual abuse may behave, one cannot predict how parents or close family members may react to a disclosure of abuse. Human beings are inherently complex. Feelings of guilt, denial, or a lack of willingness to confront the truth are but some reasons which may explain a parent maintaining a relationship with their child's alleged abuser or their spouse. They have no bearing on the veracity of the allegations made by the complainant.

- [173] I also put no weight on evidence given by Ms. Gerrard about S.C.'s drug use or her assertion that she previously made false allegations of rape. There was no evidence to suggest that S.C. had previously perjured herself. Further, Ms. Gerrard's testimony regarding S.C.'s drug use was unnecessary and gratuitous. It was designed solely to malign S.C.'s character. A complainant is not made unworthy of belief simply because she may have had substance misuse or mental health issues.
- [174] I turn now to S.C.'s evidence. I found S.C. to be an honest witness. S.C.'s credibility was exemplified in her carefulness when testifying in court. She did not embellish her account and took care to only testify about what she could recall. For example, when asked if she told the police that the computer incident happened more than once, she described her feelings when she spoke to the police, and that post police-interview, she recalled only one incident with any certainty.
- [175] Though I find S.C. to be credible, I have serious concerns about the reliability of S.C.'s evidence, for a number of reasons.
- [176] First, there is wide variance in the ages during which the events could have transpired. Though she believed she was seven years old at the time, S.C. admitted in cross-examination that she could have been as young as four years old. Ms. C.'s explanation as to why she believed the events occurred when S.C. was seven years old (ex. time of bed-wetting and personality changes) leaves significant doubt as to whether the incident did in fact occur when S.C. was seven years old.
- [177] Relevant to S.C.'s age, I accept that there is no longer a presumption that the testimony of children is always less reliable than that of adults, and that corroboration is no longer required. However, generally speaking, common human experience suggests that the ability of a four year old to accurately memorialize an event is weaker than that of a seven year old. Thus, depending on the age of S.C. when the event was experienced, there may arise real concerns about whether these early childhood events are being accurately recalled: W.(R.) at paras. 24-26.
- [178] Second, there are inconsistencies between her testimony at trial and her police statement, which suggest frailty of memory. For example, in her police statement, S.C. told the officer that she saw Mr. Gerrard do up his pants after the computer incident. In her testimony in court, she said she only heard the zipper. S.C. was unable to satisfactorily explain the discrepancy.
- [179] Third, S.C.'s evidence lacks sufficient details regarding the bedroom incident and the truck incident. I accept that given her young age and lack of sexual experience at the time, her inability to recall details such as whether Mr. Gerrard's penis was circumcised does not detract from the strength of her evidence. However, the vagueness of her testimony and inability to recount details of the events leads me to have doubt about whether she accurately recollected the events. For example, S.C. did not provide any details such as whether Mr. Gerrard took out his penis while the truck was moving or parked. Similarly, the

evidence about what occurred in the bedroom was delivered vaguely, making it difficult to ascertain if S.C. had a complete memory of the event. I accept that the instances S.C. described in the truck and the bedroom were relatively brief and uncomplicated, somewhat explaining the lack of detail. Regardless, her evidence leaves me with reasonable doubt.

[180] Having come to that conclusion, I find it unnecessary to address Mr. Gerrard's evidence in detail in relation to Count 2, except to say that I did not find him to be credible, when assessing his evidence as a whole.

[181] Thus, after careful consideration of the whole of the evidence, I conclude that there is reasonable doubt about whether the truck and bedroom incidents occurred, such that I am unable to find a conviction on Count 2.

VIII. Verdict

[182] On Count 1 of the Indictment, I find Mr. Gerard guilty.

[183] On Count 2 of the Indictment, I find Mr. Gerard not guilty.

"Shergill J."

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