
CANADA / JUDGMENT

R. v. M.A.M.

2001 BCCA 6

COURT

British Columbia Court of Appeal

DECIDED

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Citation:

R. v. M.A.M.

Date: 20010105

2001 BCCA 6

Docket: CA026261

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

M.A.M.

APPELLANT

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall

P. H. Harrison

Counsel for the Appellant

R. W. Gurlay, Q.C.

Counsel for the Respondent (Crown)

Place and Date of Hearing:

Vancouver, British Columbia

October 4, 2000

Place and Date of Judgment:

Vancouver, British Columbia

January 5, 2001

Written Reasons by:

The Honourable Madam Justice Rowles

Concurred in by:

The Honourable Madam Justice Newbury

Dissenting Reasons by:

The Honourable Mr. Justice Hall (P. 26, para. 52) Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Overview

- [1] The appellant was convicted in Youth Court of sexual assault. The main issue on his appeal from conviction is whether the learned trial judge erred in permitting the complainant to testify upon a promise to tell the truth.
- [2] In my opinion, the trial judge erred in concluding that under s. 16 of the Canada Evidence Act, R.S.C. 1985, c. C-5, the complainant could give evidence upon a promise to tell the truth and, for that reason, I respectfully disagree with the result reached by my colleague, Mr. Justice Hall, on this appeal.
- [3] In ruling that the complainant could testify, the trial judge relied, in part, on the opinion of the complainant's mother as to the child's understanding of a promise. In my view, the trial judge ought not to have relied on the mother's opinion in reaching a conclusion as to the child's testimonial competence. When the child's responses to questions put to her during the competency inquiry are examined, the responses do not show that the complainant had an understanding of the moral requirement to tell the truth.
- [4] The trial judge stated that she would have reached the same verdict even if she had not found the complainant competent to testify. However, if the complainant had not been found competent to testify, the videotaped interview of the child would not have been admissible under s. 715.1 of the Criminal Code. If both the videotaped interview and the

complainant's evidence were excluded from consideration, the balance of the evidence adduced at trial falls well short of establishing to the criminal standard that the appellant committed the offences charged.

- [5] Had the trial judge concluded that the complainant was not competent to testify, the Crown might well have argued that the complainant's statements to a police officer during the videotaped interview would have been admissible under the exception first recognized in *R. v. Khan*, [1990] 2 S.C.R. 531. Whether the statements would have been admissible as meeting the reliability and necessity tests, and what weight might be accorded to the statements if they were admitted, are not issues that can properly be determined on this appeal. In other words, this is not a case in which the curative provision in s. 686(1)(b)(iii) of the Criminal Code could be applied. See *R. v. Rockey*, [1996] 3 S.C.R. 829.
- [6] In my opinion this appeal must be allowed and a new trial ordered.

II. Background

- [7] The complainant, E.T., and the appellant are first cousins. E.T. was born on 28 January 1993. At the beginning of the time period alleged in the three counts with which the appellant was charged, E.T. was two years of age and the appellant was twelve. At the end of the time period, E.T. was four years, nine months old. When the trial began, E.T. was five years, nine months old.
- [8] Other than the complainant's evidence, there is no direct evidence of any sexual misconduct on the appellant's part. There is evidence of opportunity and circumstantial evidence of an incident at a family dinner in 1996.
- [9] The complainant's mother, D.T., testified that after a family Thanksgiving dinner in 1996, the adults were having coffee at the kitchen table and the appellant and the complainant were playing in the appellant's bedroom which was just off the kitchen. D.T. said she noticed the lights go off in the appellant's bedroom and the door close until it was slightly ajar. After one or two minutes she went into the bedroom and found the appellant laying on his back in his bed and saw her daughter as a lump under the covers. D.T. removed her daughter and saw that her pants were below her bottom.
- [10] Following the Thanksgiving dinner, the complainant's mother questioned her daughter about whether there had been any inappropriate physical contact by the appellant. The complainant, who was then only three years, nine months old, did not disclose any misconduct on the part of the appellant.
- [11] About a year after the 1996 Thanksgiving incident, the complainant said certain things that prompted her parents to call the police. On 9 November 1997, the complainant and her younger sister were being bathed by their father when the father observed the complainant sucking her sister's belly. The father told the child that she should not allow someone to suck on her and that she should not suck another person's body. After going to bed, the

complainant told her mother that she wanted to use the bathroom. While seated on the toilet, the child uttered the words "Dad's pee-pee". The complainant then told her mother of the appellant's alleged acts. Only sometime after 9 November 1997 did the mother learn of the father's observations of his daughter when she was being bathed.

- [12] The complainant's mother asked the child to repeat her remarks to her father. When E.T. did not name the person the father asked for the person's identity. E.T. answered and the mother then took E.T. to her bedroom where she asked E.T. more questions. The parents called the police that night.
- [13] On 10 November 1997, E.T. gave a videotaped statement to Sergeant Vreeman. A second statement was attempted on 19 March 1998, but the video machine failed and only an audio recording was made. At trial, the videotaped statement was admitted into evidence under s. 715.1 of the Criminal Code. The Crown did not tender the 19 March 1998 audio recording but E.T. was cross-examined on it.
- [14] During the videotaped interview, E.T. said that she had sucked the appellant's "pee-pee" at the home of her aunt (the appellant's mother) and at her grandparents. E.T. first said the incidents started at her aunt's house when she was three years old and then she said they started when she was two. E.T. said the incidents took place in the appellant's bedroom when they were on the appellant's bed and under a blanket.
- [15] The transcript of the videotaped statement taken by Sergeant Vreeman contains the following questions and answers:

CV: Okay. And can you tell me exactly what happened again? ET: Uhm, like he pulled down his panties and pulled down his pants -- CV: Hmm-hmm. ET: -- and I had to suck on his pee-pee. But I didn't know what else to do so -- so I kinda like -- that's all what happened -- CV: Okay. ET: -- and then [J.] or and my mom -- or a adult came in the room and he quickly pulled up his panties and his pants. CV: That wasn't very nice. ET: And then he was lying. CV: He lied about it? ET: Yeah. CV: And what did he say? ET: Uhm, oh, she was not sucking on anything at all.

- [16] Later in the videotaped statement, E.T. said that no one ever came in when this was happening.
- [17] E.T. told the police officer that when they were under the blankets, the appellant said nothing to her and that the appellant never took her clothes off. When asked whether the appellant ever touched her anywhere, E.T. responded, "He touc[h] -- kinda touches me a little bit". When asked where she was touched, E.T. said, "I don't know. Anywhere." In response to the question, "Was he holding you anywhere or?" E.T. said: "Just I was sitting down." When E.T. was asked, "And so he'd be sitting how? How would he be?" she responded, "Like I was sitting through his knees" and, "Then I'd just suck on his pee-pee."

[18] When Sergeant Vreeman asked how many times this happened, E.T. at first said that she didn't know. Almost immediately she was asked the same question again and responded: "Like one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen times, and then it keeps going more." E.T. was later asked:

CV: Okay. And you said before that happened you thought about thirteen times? ET: Yeah. CV: Can you -- ET: Like one, two, three, four, five, six, seven, eight, nine, ten, eleven -- CV: And you -- ET: -- eleven it happened.

[19] E.T. was permitted to give her evidence by closed circuit television pursuant to s. 486(2.1) of the Criminal Code. She did not ascribe any dates to any incident of a sexual nature with the appellant and some of her testimony was in conflict with her videotaped statement.

[20] The appellant testified and denied having engaged in any sexually inappropriate behaviour with the complainant.

[21] The trial judge rejected the evidence of the appellant and concluded that the allegations in the three counts charged had been proved beyond reasonable doubt. On the basis of the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729, conditional stays were entered on the first two counts, which charged sexual touching contrary to s. 151 of the Criminal Code and invitation to touch for a sexual purpose contrary to s. 152, and a conviction was entered for sexual assault.

[22] Under a heading "Findings of fact", the trial judge said, in part:

I have considered all of the evidence in making these findings of fact, including the videotape, [E.]'s testimony at trial, and [D.T.]'s testimony. I would have reached the same conclusion had I found [E.T.] incompetent to testify, and accordingly been deprived of her testimony. III. Grounds of appeal

[23] In addition to his submission that the trial judge erred in finding that the complainant could testify upon her promise to tell the truth, the appellant contends that the verdict was unreasonable and in that regard has referred to some of the trial judge's reasoning in arriving at her verdict. In light of the conclusion I have reached on the main issue, I do not propose to consider this ground.

[24] The judge's statement that she would have reached the same conclusion had she found E.T. incompetent to testify does require comment, however. The only direct evidence of any sexual misconduct came from the complainant in the form of her testimony and a videotaped interview of the complainant. If the complainant had not been found competent to testify, the videotaped interview could not have been introduced into evidence under s. 715.1 of the Criminal Code. That section provides:

715.1 In any proceeding relating to an offence under section 151, 152 ... 271 ..., in which the complainant or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged

offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness, while testifying, adopts the contents of the videotape. [25] It is clear both from the wording of the section and from the decision in *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419, in which the Supreme Court of Canada considered a constitutional challenge to s. 715.1, that the complainant must testify if a videotaped interview of a complainant or witness is to be introduced into evidence.

[26] If both the videotaped interview and the complainant's evidence were excluded from consideration, the balance of the evidence adduced at trial would not support a guilty verdict on any of the offences charged.

[27] I turn now to the main ground of appeal. It is the appellant's submission that the learned trial judge erred in finding that E.T. understood the meaning of a promise and erred in permitting E.T. to testify on promising to tell the truth.

[28] Under the Canada Evidence Act there are three distinct ways in which a witness may express his or her moral responsibility to tell the truth: the oath, the affirmation and the promise. The declaration of a witness that he or she will tell the truth is an essential element of the person's competence to testify before a court.

[29] Section 16 of the Canada Evidence Act provides, in part:

16. (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
- (a) whether the person understands the nature of an oath or a solemn affirmation; and (b) whether the person is able to communicate the evidence.
- (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation. (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth. (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

[30] In the present case, no issue was or is taken with the trial judge's conclusion that the complainant was able "to communicate the evidence" as set out in the majority judgment in *R. v. Marquard*, [1993] 4 S.C.R. 223 at 236, 85 C.C.C. (3d) 193 at 219:

Testimonial competence comprehends: (1) the capacity to observe (including interpretation); (2) the capacity to recollect; and (3) the capacity to communicate: McCormick on Evidence (4th ed. 1992), vol. 1, at pp. 242-48; Wigmore on Evidence (Chadbourn revision 1979), vol. 2, at pp. 636-38. The judge must satisfy him- or herself that the witness possesses these capacities. Is the witness

capable of observing what was happening? Is he or she capable of remembering what he or she observes? Can he or she communicate what he or she remembers? The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable. The enquiry is into capacity to perceive, recollect and communicate, not whether the witness actually perceived, recollects and can communicate about the events in question. Generally speaking, the best gauge of capacity is the witness's performance at the time of trial. The procedure at common law has generally been to allow a witness who demonstrates capacity to testify at trial to testify. Defects in ability to perceive or recollect the particular events at issue are left to be explored in the course of giving the evidence, notably by cross-examination. [31] In *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 at 362 (B.C.C.A.), Finch J.A., giving the judgment for the Court, reviewed the jurisprudence under s. 16(3) of the Canada Evidence Act:

[60] The present section requires a promise to tell the truth. That promise implies not only an understanding of the difference between telling the truth and telling a lie, but also of the nature of a promise.

* * *

[63] The differences between the old and new s. 16 of the Canada Evidence Act were carefully analyzed by Doherty, J.A. in *R. v. Farley* (1995), 99 C.C.C. (3d) 76 (Ont. C.A.). At 83, he said: In my opinion, the standard enunciated in *Khan*, supra, at p. 206 [quoted in para. 58, supra] should be applied in the present s. 16(3). A proposed witness who can communicate the evidence should be allowed to testify under s. 16(3) only if he or she "understand[s] the duty to speak the truth in terms of everyday social conduct". In the context of a witness called to describe a prior event, an understanding of the duty to speak the truth entails an appreciation by the witness that he or she must answer all questions in accordance with the witness's recollection of what actually happened. [64] This issue has recently been considered by the Supreme Court of Canada in *R. v. Rockey* (21 November 1996) File No. 24784 at paras. 25-27 (per McLachlin J.). McLachlin J. speaks of a requirement that the child understand that there is a moral obligation to tell the truth on promising to do so (at paras. 25, 27): Two requirements must be met to establish testimonial competence under s.16: the ability to communicate the evidence and the ability to promise to tell the truth: *R. v. Farley* ... [E]ven if this [first] requirement were met, the case for Ryan testifying would founder on the requirement of s. 16(3), the ability to promise to tell the truth. Dr. Sas's evidence was unequivocal: Ryan did not understand what it meant to promise to tell the truth. I agree with Doherty J.A. in dissent that it is not necessary that the witness be able to define the word "promise" in some technical sense; what is required is that the witness understand the obligation to tell the truth in giving his or her evidence. I respectfully part company from Doherty J.A.'s conclusion, however, that it cannot be said that "a reasonable trial judge would necessarily have found Ryan to be incompetent to give evidence" (p. 667 O.R.). On this point, I share the view of the majority of the Court of Appeal. Ryan, as noted above, did not understand the concepts of truth or lying. Nor could he articulate a promise. "A promise is a promise is a promise, and he could not bring into it the context that is

entailed in a promise." The only inference that can be drawn from this evidence is that while Ryan understood the difference between what is "so" and "not so", he had no conception of any moral obligation to say what is "right" or "so" in giving evidence or otherwise. In these circumstances, no judge could reasonably have concluded that Ryan was able to promise to tell the truth. [Emphasis [of Finch J.A.].] [65] It is therefore clear that a child witness who does not understand the nature of an oath or solemn affirmation may be permitted to testify under s. 16(3) only if she promises to tell the truth and, in doing so, understands the difference between truth and falsehood, and understands the duty to tell the truth as to what she saw or recalls.

[32] In this case, the trial judge held a voir dire to determine whether the complainant was competent to testify. The voir dire began on 6 November 1998. In response to questions from both the judge and Crown counsel, E.T. said that she did not understand what it meant to promise to do something. The following is an extract from the transcript of Crown counsel's examination of the complainant:

Q Do you know what it means to promise to do something? A No. Q No? Have you ever given your mom a promise? A No. Q How about have you ever promised to clean up your room? A I don't know. * * * Q But you don't ever -- you don't know what it means to promise to do something? A No.

[33] After hearing submissions, the trial judge said that she was satisfied that E.T. was able to communicate the evidence but said "there is an issue with respect to whether or not she has to understand what it means to promise". The judge invited counsel to provide more extensive submissions on that question and adjourned the case over for that purpose.

[34] When the case resumed on 30 November 1998, Crown counsel sought leave to reopen the inquiry into E.T.'s testimonial competence. The Crown's application was granted and the following day, both the complainant's mother, D.T., and E.T. were called by the Crown on the voir dire.

[35] The complainant's mother, D.T., testified that after the 6 November court hearing she had been told that if E.T. "... was unable to promise to tell the truth then she would not be able to testify". D.T. stated that she subsequently explained to her daughter what it means to promise to do something.

[36] D.T. gave this evidence:

Q And describe to the Court what you did then in dealing with the issue of promise with E.T. A I asked her if she knew what a promise was and she said no. So I explained it to her. I said, "A promise is that if you say you're going to do something then you have to do it." I then gave her a couple examples. I said, "If Mommy and Daddy promise to take you to the Game Farm then we have to do that because we promised to do it." The other example was in her giving a promise and that if she promised that she would go quickly to the bathtub after dinnertime then she had to carry through with her promise and do that. Q Okay. Did you ever relate promise to the court

process with [E.]? A The only thing I said in relation to the court was that, "If you promise to tell the judge the truth then you tell the judge the truth."

[37] When E.T. was recalled, the trial judge asked her these questions:

Q What's a promise? A What you say and then you have to do it. Q Okay. I didn't really hear that. What did you say? A What you say, you have to do. Q Okay. So if you say something you have to do it? A Yeah. Q Can you give me any examples of that? A What are examples? Q Well, do you ever -- have you made a promise to anyone? A Yeah. Q Who have you made a promise to? A Well, I -- remember. Q You don't remember? Do you have a best friend? A Yeah. * * * Q If I were to -- I'm trying to think of a promise. If I were to tell you that I was going to stop talking and yet keep on talking to you, would that be keeping a promise? Would I be keeping my promise to you? A No. Q No. And what would you think of me if I weren't to keep my promise after I'd promised -- if I'd told you? A I don't know what you mean. Q Okay. Well, is it a good thing or a bad thing for me not to keep my promise? A I still don't know what you mean. Q Okay. If I were to tell you that I was going to stop talking, and yet I kept blabbing away to you, would that be keeping my promise or would it be breaking my promise? A Breaking your promise. Q And if I were to break my promise to you what would you think of that? A I don't know that question. Q Okay. Would it be -- is breaking -- if I were to break my promise to you would that be a good thing or would it be a bad thing? A Bad thing. Q Okay. If you were to promise me as the judge that you would talk to me, and then not talk to me, would that be keeping your promise or would it be breaking your promise? A I don't know what you mean. Q Okay. Let's say you were to make a promise to me. Let's say you were to promise to me that you were going to tell me the truth, and you didn't tell me the truth. Would that be a good thing or would it be a bad thing? A Bad thing. Q Why would it be a bad thing? A I don't know. I don't really know what you mean. Q Okay. If you were to promise to tell me the truth would you keep your promise? A Yeah. Q Why? A Because. Q Because why? A I don't know why. I don't really know what you're saying.

[38] Crown counsel then asked E.T. some questions:

Q Now you've heard a lot of talk about this word promise, right? And in order to -- it may be that you're asked to promise to tell the judge the truth. A Mm'hmm. Q If you promise to tell the judge the truth would you tell the judge the truth? A Yes. Q And is it important to tell the judge the truth? A Yes. Q Why is it important? A I don't know. Q What is the judge's job? A I don't know that. Q Well, who's the judge going to -- who does the judge hear from? Who talks to the judge? A Me. Q Anybody else? A Yeah. Q Who? A I don't know. Q Well, why is the judge going to hear from you? A I don't know. * * * Q Okay. All right, so your dad works on the farm, [D.] takes care of you. Do you know what my job is? And do you know what a court is? A Uh-uh. Q What happens at court? A I don't know.

[39] The trial judge then asked further questions of E.T.:

Q Is it important for you to tell me the truth about what [M.] did? A Yeah. Q And what about if you were to tell me any lies about -- about [M.]? A I don't know what you mean. Q Well, if you talk to me and tell me things about [M.] are you going to tell me the truth or are you going to tell me lies?

A The truth. Q Are you going to tell me any make believe stories or any lies? A No. Q Why not? A I don't know what you mean. Q Okay. Well, why -- you tell me that you're going to tell me the truth about [M.], you're not going to tell me any lies. A Yeah. Q Why -- why aren't you going to tell me any lies? A I don't know what you mean. Q Why should I believe that you won't tell me lies? A I still don't know what you mean. Q Okay. What don't you understand? A Lots of things. Q If you were to tell me lies about [M.] what might happen? A I don't know. Q If you were to -- when you talk to your parents do you tell the truth or do you tell lies? A The truth. Q Do you always tell the truth? A Yeah. Q Do you maybe sometimes tell lies? A No, I don't tell lies. Q Why not? A I don't know what you mean. Q Well, why don't you tell lies to your parents? A Because it's bad. Q And what would happen if -- what do your parents -- what would happen if your parents caught you telling lies? A I don't know. Q Okay. But you don't tell lies to your parents because it's bad? A Yeah. Q All right. And how about if you were to talk to me and tell me things about [M.], why wouldn't you tell me lies? A I still don't know what you mean. Q Well, you've said it would be bad to tell your parents lies. A Mm'hmm. Q You just said "mm'hmm". Is that a "yes"? A Yes. Q Okay. Well, would it be -- I'll see whether you understand me when I say that. Would it be more bad or would it be less bad for you to tell me lies? A I don't -- still don't know what you mean. Q Okay. Well, you say you wouldn't tell your parents lies? A Yeah. Q Because it would be bad. A Uh-huh. Q Would it be a bad thing or a good thing for you to tell me, the judge, lies? A I still don't know what you mean.

[40] Following the judge's questions, defence counsel asked E.T. these questions:

Q And as far as what you think, the truth is things that you are told by your parents, right? A Mm'hmm. Q And do you have any other understanding of what the truth means? A No. Q Do you have any other understanding of what a promise is other than what your mother told you? A No. Q What do you think a promise is? A I don't know.

[41] At the conclusion of the competency hearing on 1 December, the trial judge ruled that E.T. could testify on giving her promise to tell the truth. In arriving at that conclusion, the trial judge said, in part:

I will turn then to s. 16(1)(b). In making my ruling I rely on the evidence of [E.T.] herself, also on the evidence of her mother. And I will say that I observed both witnesses very carefully and I am relying very much on that observation. * * * I have certainly the mother's evidence before me that -- and here I note that in making this statement she said it with a fair degree of emphasis, that [E.T.] is very clear that it is wrong not to tell the truth. I also have the mother's evidence that she instructed [E.T.] that, "If you promise the judge to tell the truth you have to do it." And I have [E.T.]'s own evidence that her job in court was to tell the truth about what [M.] did. * * * I, after weighing all of the evidence, am indeed satisfied that [E.T.] understands the difference between truth and falsehood. And I am also satisfied on a balance of probabilities that she is indeed committed to telling the truth on this occasion. And on that basis I will allow her to give evidence in this case on giving her promise to tell the truth. [42] That deference must be accorded to the decision of the trial judge as to whether a witness is competent to testify is not in dispute: see *R. v. Marquard*, supra, S.C.R. at 237-38; C.C.C. at 220, in which McLachlin J., as she then was, said:

It has repeatedly been held that a large measure of deference is to be accorded to the trial judge's assessment of a child's capacity to testify. Meticulous second-guessing on appeal is to be eschewed. As Dickson J. (as he then was) put it (at p. 135) in the oft-cited case of *R. v. Bannerman* (1966), 48 C.R. 110 (Man. C.A.), aff'd [1966] S.C.R. v, a trial judge's discretion in determining that a child is competent to testify "unless manifestly abused, should not be interfered with." [43] While deference is owed to the trial judge's discretionary determination of whether the requirements of s. 16(3) of the Canada Evidence Act have been met on the facts of the case, that discretion cannot be used erroneously to dilute the requirement that the potential witness understand the moral requirement to tell the truth.

- [44] In this case, the appellant submits that the trial judge erred in relying on the evidence of the complainant's mother to support her conclusion regarding E.T.'s competence. The appellant argues that using the mother's perceptions of what her daughter understood to assess the child's testimonial competence is analogous to permitting evidence in the nature of oath-helping. In other words, just as the views of another as to whether a witness is telling the truth are excluded from evidence, so should the opinion of another going to the question of a witness's testimonial competence be excluded.
- [45] The appellant's complaint is not that the complainant's mother took steps to instruct the complainant about what a promise is; the complaint is that the trial judge used the mother's evidence of what her daughter understood in determining whether the complainant could give evidence upon a promise to tell the truth.
- [46] In my respectful view, the trial judge erred in taking into account the mother's evidence as to what the complainant understood when she came to determine the complainant's testimonial competence. It was the trial judge's duty or function to determine whether the complainant was competent to give evidence upon a promise to tell the truth and that determination ought to have been based on the judge's own observations and evaluation of whether the child understood the duty to tell the truth.
- [47] There is no dispute that the inability to define a promise in some technical sense is not determinative of whether a potential witness understands the duty to speak the truth: *R. v. Rockey*, [1996] 3 S.C.R. 829 at 845. As well, it is important to recognize that care must be taken to avoid measuring a child's answers by an adult standard.
- [48] In this case, E.T.'s response to the judge's initial question, "What is a promise?", was "What you say and then you have to do it." That is the meaning or definition of promise given to E.T. by her mother before the voir dire resumed. The appellant does not suggest that the complainant's answer was inadequate. What the appellant points to is the further questioning of E.T. which, he submits, demonstrates a lack of understanding of the connection between making a promise to do something and having to do it and making a promise to tell the truth and having to do so in court.

[49] E.T. was questioned on her knowledge of truth and falsehood and the answers to those questions showed that E.T. was capable of distinguishing truth from falsehood. But as Finch J.A. pointed out in *R. v. Ferguson*, *supra*, a promise to tell the truth implies not only an understanding of the difference between telling the truth and telling a lie, but also the nature of a promise. I agree with appellant's counsel that a review of the responses E.T. gave to the questions she was asked do not support a conclusion that E.T. understood the moral obligation or duty to tell the truth.

[50] In my opinion, E.T. should not have been permitted to give evidence upon a promise to tell the truth and, for the purposes of determining the appeal, E.T.'s evidence must be excluded.

[51] In the result, I would allow the appeal and order a new trial.

"THE HONOURABLE MADAM JUSTICE ROWLES"

I AGREE:

"THE HONOURABLE MADAM JUSTICE NEWBURY"

Reasons for Judgment of the Honourable Mr. Justice Hall:

[52] On December 12, 1997, the appellant, a young offender, was charged with three offences: two counts of sexual touching and one count of sexual assault. These offences were alleged to have occurred between January 28, 1995 and November 9, 1997. The alleged incidents occurred at the home of the appellant's parents and at the home of the grandparents of the complainant and the appellant. The appellant, M.M., and the complainant, E.T., are first cousins. The mother of the appellant and the father of the complainant are sister and brother. The appellant was born on September 29, 1982 and the complainant was born on January 28, 1993.

[53] The period covered by the charges commenced with the second birthday of the complainant. On 28 January 1995, the complainant was two years old and the appellant was twelve years and four months old. The end of the period covered by the charges is 9 November 1997 the date of the alleged disclosure by, the complainant, of sexual abuse. At that time, the appellant was fifteen years, one month and some days, and the complainant was four years, nine months and some days.

[54] The trial in Youth Court commenced on November 6, 1998. It continued thereafter on various dates in November and December 1998 and concluded in the spring of 1999. When the trial commenced, the appellant was just over 16 years old and the complainant was five years and nine months. After hearing evidence and argument, the Honourable Judge Rounthwaite concluded that the allegations had been proven beyond a reasonable doubt. Conditional stays of proceedings, based on the multiple transaction rule, were entered on the sexual touching charges. A conviction was registered against the appellant for the sexual assault of his young cousin. The appellant was placed on probation for two years. The appellant has appealed from the findings of guilt made with respect to all of the charges.

- [55] There are certain age provisions found in the sexual touching sections that are applicable in this case. Thus, the appellant could only be found guilty of these offences if the acts alleged occurred after his fourteenth birthday -- that is 29 September 1996. The judge concluded that on the occasion of a family dinner in October 1996, the appellant had committed these types of offences and a sexual assault upon his young cousin. As well, the judge found that the appellant had also committed such acts before and after October 1996. It was argued, in the factum of the appellant, that it was inappropriate for the court to have found the appellant guilty of these offences and the sexual assault offence given the state of the evidence. However, this argument was not much pressed in oral submissions. The crux of the argument appeared to be that Parliament intended the sexual touching provisions to be more specific types of offences. Therefore, if the conduct would have infringed the sexual touching provisions, then the court should have only found the appellant liable for those offences (based on the state of the proof) and should not have found the appellant guilty of the sexual assault offence. In essence it appears to me that the argument advanced is a species of abuse of process argument, the point being that, with respect to the sexual touching charges, the appellant would have been able to advance a defence not available to him with respect to the sexual assault charge of which he was found guilty.
- [56] I am not persuaded that this is a valid line of argument. It appears to me, in any event, that this argument would fail because the judge accepted the evidence that an incident occurred at the family dinner -- a time when the argued defence would not apply to the sexual touching charges. The Court suggested, to counsel, that the real issue in this case was whether or not the sexual assault conviction registered by the learned trial judge, was sustainable. This depends on certain evidentiary considerations and, since it appears to me to be the key question at the heart of this appeal, I propose to deal with the appeal on that basis.
- [57] In addition to the above noted argument, the grounds of appeal argued are that the learned trial judge erred in allowing the complainant to testify, upon giving a promise to tell the truth, and that the findings of guilt are unreasonable or cannot be supported by the evidence.
- [58] During the time covered by the charges, the families of the appellant and the complainant resided in the Abbotsford area within a few kilometres of each other. The grandparents of the two cousins also resided in the same general area. The grandparents have two sons and one daughter. The eldest son is not involved in these proceedings. Their second son, B., and their daughter, S., his younger sister, are the parents respectively of the complainant and the appellant. The evidence disclosed that, although S. may have had a certain degree of estrangement from her parents for some period of time between 1991 and 1996, generally, the relationship between the two siblings, B. and S., and their respective spouses was a friendly one. The families were frequently in the company of each other and occasionally took camping trips together. The complainant accompanied her family on these camping trips. At times, the complainant was with her paternal - or maternal grandparents in the

company of the appellant, and, on a fairly regular basis, she was babysat by either her aunt S. or by the appellant's elder sister.

- [59] In general terms, the theory of the Crown was that the assaults by the appellant upon his young cousin occurred either in a basement bedroom located at the grandparents' house or in his parents' residence.
- [60] The grandmother testified at the trial. She was careful to assert in her testimony that she kept a quite vigilant eye upon her grandchildren. This assertion was corroborated by a neighbour and long time friend of the grandmother. However, it appears that there certainly would have existed an opportunity for assaults to be perpetrated upon the complainant, by the appellant, during the times that they were together at their grandparents' house. Likewise, there would have been opportunities for this sort of conduct during periods when the complainant was at the appellant's house and probably on camping trips as well. Still, it must be observed that the evidence, concerning the camping trips situation, was sufficiently confusing that I would think it rather doubtful that a safe conclusion could be drawn about any untoward conduct which may have occurred during any camping trip. An unfortunate effect, of the charges and the subsequent legal proceedings, has been that the hitherto good relations between the two families have been severed. It appears that the grandparents may also be largely estranged from the family of the appellant.
- [61] The evidence suggests that, prior to a family dinner at Thanksgiving in October 1996, there was no particular suspicion, by the parents of the complainant, that there was any inappropriate sexual contact occurring between the two cousins. There was some evidence adduced, concerning a crying tantrum that the complainant had when in the care of her grandmother before that date, but it seems to me that the evidence is inconclusive. On the occasion of the family dinner in the fall of 1996, (which has been referred to as having occurred in October and in November but which I would think probably occurred in October 1996 since that is when our Thanksgiving falls), certain observations were made that later took on a more sinister significance.
- [62] Both the parents of the appellant and the parents of the complainant gave evidence at the trial. All agreed that the four parents, the appellant and his older sister, the complainant and her younger sister, and their grandmother were present at the dinner. After the dinner, the appellant's older sister may have left the house to deliver some food to her grandfather who was in the hospital. The grandmother may have accompanied her older granddaughter on this trip. After dinner, while the two sets of parents were having coffee, the appellant and the complainant went into the appellant's bedroom. His bedroom is adjacent to the kitchen area where the adults were seated. Sounds of the cousins, apparently playing, came from the room for some time but there came a point when the complainant's mother noted that the lights were off in the room and she could not detect any sound coming from the room. She became concerned at this situation and went into the bedroom. The mother of the complainant described the matter as follows:

A What happened was myself, my husband and the mother and father were sitting in the kitchen after dinner having a cup of coffee. [E.] was playing with [M.] in his bedroom right off the kitchen. I noticed the door closing then the light went off, the door closed some more. And I thought that that was inappropriate and I sort of nudged my husband to go and get her. And he didn't respond so I went into the bedroom. And [E.] was in the bed under the covers and [M.] was in the bed also. I got [E.] out and brought her right into the kitchen. Her pants were partly down and her panties were partly down. Q All right. Now when that incident occurred in November of 1996 did you call the police? A No. We did not.

[63] The complainant's father agreed that his wife had come out of the bedroom carrying his daughter whose clothing was partially pulled down. He and his wife and their children, after collecting their coats, left the appellant's house. He said there was no particular conversation between the adults. He testified that the appellant's father called his son, more than once, to come from the bedroom. When the appellant came out, he "stood behind the stove kind of rubbing his eyes, pretending he was sleeping and - and just looked pretty - well, he wasn't looking good, no". In response to a question concerning the demeanour of the appellant at the time, he testified, "he looked thoroughly embarrassed".

[64] The appellant's father testified about the evening. He recalled the incident when the complainant's mother, D.T., came out of the bedroom with her daughter. He testified:

Q Did you observe the clothing of D. T. or E.T.? A Not of D. or E. I knew there was -- she was wearing all her clothes.

He said his son came out of his room behind them and that, when he asked his son what was going on, his son replied, "Nothing". Apparently, the next day, as a result of certain suggestions being made by the parents of the complainant that he had learned from his wife, he once again interrogated his son as to whether anything unusual had happened. Again, he was assured nothing had happened.

[65] The appellant's mother also testified at trial. She testified that she recalled her sister-in-law coming out of the bedroom with her daughter, the complainant. She said she had noticed nothing out of the ordinary with respect to the complainant's clothes. Asked if there was any conversation involving her son, the appellant, she said that the appellant "was in his door way and my husband asked him what was - what happened, and he said he didn't know". She recollected there was no further conversation and that, thereafter, the complainant's family left.

[66] The appellant testified that, prior to the entry into the room by D.T., he had been playing beside his bed with the complainant. He denied that he had been under the covers with his cousin or that anything untoward had occurred then or at any time. The trial judge did not accept this evidence of the appellant.

[67] After returning home, D.T. questioned her daughter as to whether anything untoward had occurred and got the response that the two had been playing under the covers. At this point in time, the matter was not further pursued by the complainant's parents. About a year later, on November 9, 1997, when the complainant's father was bathing her and her younger sister, he noticed the complainant sucking on the abdominal area of her younger sister. He admonished E.T. that this was not appropriate conduct. A short time later that evening, E.T. disclosed to her mother that there had been inappropriate sexual contact between her and her cousin, the appellant. This was promptly disclosed to the police and soon, thereafter, the complainant was interviewed by a police officer. Consequent upon this, the charges were laid.

[68] At the trial, the complainant testified on the basis of a promise to tell the truth. The videotape of an interview between the complainant and the investigating police officer was also entered as evidence. The key findings of the trial judge were expressed as follows:

At various times, M.M. would lie on the bed and place his cousin E. between his knees. He covered them both with blankets. He made her suck his penis, causing it to become hard, red and wet. He touched her as well. He told her they were playing a game; he told her she was sucking his thumb. He told her not to tell anybody, not to tell the police. E. did not like to participate. This happened some time during the years 1995 to 1997, in M.'s bedroom and at their grandparents' house. It happened more than once in each location. E. was two to four years of age, M. eleven years older. M. was approximately six foot one in height, two hundred and forty pounds. Specifically, in October or November, 1996, after their Thanksgiving dinner, M. closed the bedroom door and turned off the light. He lay on his bed, placing E. between his knees. He covered her with blankets, with the intention of having her suck his penis. D.T. walked in. I have considered all of the evidence in making these findings of fact, including the videotape, E.'s testimony at trial, and D.T.'s testimony. I would have reached the same conclusion had I found E. incompetent to testify, and accordingly been deprived of her testimony. [69] The appellant argued that the judge erred in concluding that E.T. understood the meaning of a promise and in permitting E.T. to testify at the trial on promising to tell the truth. The appellant further argued that the findings of guilt were unreasonable or could not be supported by the evidence.

[70] In a case where witnesses of tender years are called to give evidence, difficulties may often be encountered that are not usually found in an "adult witness" case. The common law has wrestled with these problems over a long period of time.

[71] Before 1988, section 16 the Canada Evidence Act read as follows:

16.(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. (2) No case shall be decided upon such evidence alone, and it must be

corroborated by some other material evidence. [72] The relevant portions of the present section 16 reads as follows:

16.(1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine [1] whether the person understands the nature of an oath or a solemn affirmation; and

[2] whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation. (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth. (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify. [73] The modern era of the often difficult consideration of when a child of tender years should be permitted by a court to testify commenced with *R. v. Bannerman*, [1966] 48 C.R. 110 (Man. C.A.). In that case, the appellant had been charged with and convicted of having sexual relations with a 12 year old girl and her 13 year old brother. One of the issues that arose was whether or not the children ought to have been permitted to testify. The boy was sworn and the girl was permitted to give evidence unsworn. Miller C.J.M. concluded, in his dissenting reasons, that the boy ought not to have been sworn. However, he did not need to address the evidence of the girl because of certain admissions made by the appellant. He concluded that the boy, who had been sworn, did not know the nature of the oath nor the consequences of failing to tell the truth under oath. He further held that the sanction involved in the word "consequences" is one of a religious nature.

[74] Dickson J., then on the Manitoba Queen's Bench and sitting ad hoc as a member of the panel, found that there was no error in allowing the boy to be sworn. He concluded that the boy understood the nature and consequences of taking an oath and that he understood he was under a moral obligation to tell the truth. Schultz J.A. concurred with Dickson J. on this issue.

[75] The judgment of Dickson J. in *Bannerman*, supra, was an evolutionary decision. It shifted the focus away from the somewhat theological consideration of the consequences of breach of an oath -- will one incur damnation? -- to a more modern consideration of the question. In *Bannerman*, supra, Dickson J. noted the following at p. 137:

The author of *Best on Evidence*, Canadian Edition, (1911), says, at p. 146: "It is well pointed out, in Note XI to Mr. Justice Stephen's *Digest of the Law of Evidence*, that 'the practice of insisting on a child's belief in punishment in a future state for lying, as a condition of the admissibility of its evidence, leads to scenes little calculated to increase respect either for religion or for the administration of justice.'" After *Bannerman*, supra, that observation or criticism of Sir James

Stephen came to be less valid. Probably, the comment by Goldie J.A., in *R. v. G. (C.W.)* (1994), 88 C.C.C. (3d) 240 at 246 that the court must assess, in making a decision in this area, whether the oath or promise gets at the conscience of a witness, sums up the modern approach.

[76] Of course, the issue in the present case is a different one from that considered in *Bannerman*, supra, because no one here suggested this young complainant could be sworn. The issue, in the case at bar, is whether she should have been permitted, by the trial judge, to give evidence upon her making a promise to tell the truth. There is recent jurisprudence on the issue including *R. v. G. (C.W.)*, supra, and *R. v. Ferguson* (1997), 112 C.C.C. (3d) 342 (B.C.C.A.), judgments of this Court, and *R. v. Rockey*, [1996] 3 S.C.R. 829, the leading case of the Supreme Court of Canada. The evolution that commenced with the *Bannerman*, supra, informs these more recent authorities.

[77] The judgment of Finch J.A., speaking for this Court in *Ferguson*, supra, is a helpful and comprehensive discussion of the subject. As Finch J.A. points out, there may not be much difference between the purpose and intent of the present section 16 and the former section 16. He cites, with approval, the language of the Ontario Court of Appeal in *R. v. Khan* (42 C.C.C. (3d) 197 (Ont. C.A.) at 206), a case decided under the former section 16 at 362:

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so. [emphasis in original]

[78] As he notes, under both the former and present legislative regimes, the child witness must appreciate the duty of telling the truth in court and promise to do so. I would also note these comments of McLachlin J. (as she then was) concerning what is required to permit a child to give evidence in *Rockey*, supra, at 494:

... I agree with Doherty J.A. in dissent that it is not necessary that the witness be able to define the word "promise" in some technical sense; what is required is that the witness understand the obligation to tell the truth in giving his or her evidence. [79] In my opinion, that passage captures the essence of the relevant inquiry. It parallels what Dickson J. said in *Bannerman*, supra, about the witness assuming a moral obligation. Of course, the comprehension and elucidation of this concept, by a child, would be expected to be different than that of an adult. The inquiry, directed to a young child will partake more of the simple and the concrete than would a discussion with an adult.

[80] It is, on the authorities, quite permissible to instruct a child witness on the subject. This was done by the complainant's mother in this case when it became apparent, during the initial questioning of E.T. by the trial judge, that the young child was deficient in her understanding of what a promise meant or implied. As Dickson J. observed in *Bannerman*, supra, those calling a child have a duty to inform and instruct the child. Often a parent is best situated to give the requisite instruction because of the constant interaction between

the parent and the child. Still, in the face of instruction, there will be cases where the child will not be able to absorb the necessary information or manifest an appreciation of the duty to speak the truth. In those cases, the judge may conclude that the child does not have a sufficient appreciation of what is required by this moral obligation to be permitted to give evidence. That was the conclusion reached on a consideration of the evidence by this court in *Ferguson*, supra. Finch J.A. found that the evidence did not support the conclusion that the young witness comprehended her obligation when she promised to tell the truth.

[81] In the case at bar, the judge, after an inquiry performed on two days of the trial, concluded that the complainant, E.T., should be permitted to give evidence after promising to tell the truth. The judge's inquiry was separated by an interval during which the mother instructed the complainant about the consequences of a promise.

[82] In *R. v. Marquard* (1993), 85 C.C.C. (3d) 193, McLachlin J., (as she then was) stated at 220:

The examination conducted in this case was sufficient to permit the trial judge to conclude that Debbie-Ann was capable of perceiving events, remembering events and recounting events to the court. This in turn permitted the trial judge to receive her evidence, upon Debbie-Ann's promise to tell the truth. What Debbie-Ann actually perceived and recollected of the events in question was a matter for the jury to determine after listening to her evidence in chief and in cross-examination. I would add this. It has repeatedly been held that a large measure of deference is to be accorded to the trial judge's assessment of a child's capacity to testify. Meticulous second-guessing on appeal is to be eschewed. As Dickson J. (as he then was) put it in the oft-cited case of *R. v. Bannerman* (1966), 48 C.R. 110 at p. 135, 55 W.W.R. 257 (Man. C.A.); affirmed [1966] S.C.R. v, 50 C.R. 76n, 57 W.W.R. 736n, a trial judge's discretion in determining that a child is competent to testify "unless manifestly abused, should not be interfered with". [83] In the transcript of the inquiry conducted by the trial judge, E.T. said a promise is "what you say and then you have to do it" and breaking a promise would be "a bad thing". Later, E.T. said, in answer to a question from the prosecutor, that, if she promised to tell the judge the truth, she would tell the judge the truth. In answer to a further question that, during the inquiry, she also said she was going to tell the judge about her cousin because he did something bad to her. In answer to a question from the judge, she said she would tell the judge the truth and not tell the judge lies. At times, in response to questions, she answered, "I don't know what you mean". These were often responses to "why" type of questions. Her ultimate understanding of certain conceptual matters was undoubtedly imperfect, but it appears to me that, unlike the situation in *Ferguson*, supra, the evidence demonstrates that this young child recognized an obligation to tell the truth to the court and to avoid telling lies. That seems to me sufficient to satisfy the essential precondition for the giving of evidence. She did manifest an appreciation of the obligation to be truthful as a result of her promise to be truthful. I am not inclined to overrule the decision of the trial judge, who heard and saw E.T., to permit the child to give unsworn testimony in the proceedings. The child was young and her capacity to testify unsworn was not a question of easy resolution. But in the circumstances of this case, I am of the view it has not been demonstrated that this Court should overrule the decision of the trial judge who had the greater benefit of observing the child. In my

view, to do so here, would be to engage in the type of inappropriate second guessing that was noted in *Marquard*, supra. Thus, I do not accede to the argument advanced by the appellant on this issue.

[84] I turn next to the question of whether the findings of the learned judge were unreasonable or not supported by the evidence. The Supreme Court of Canada has recently restated the test to be applied in this area in *R. v. Biniaris* (2000), 143 C.C.C. (3d) 1 at para. 36:

The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebe* as follows:

[C]urial review is invited whenever a jury goes beyond a reasonable standard ...the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered". [*Yebe*, supra, at p. 185 (quoting *R. v. Corbett*, [1975] 2 S.C.R. 275 at 282, 14 C.C.C. (2d) 385, 42 D.L.R. (3d) 142, per Pigeon J.).] That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyze and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test. The *Yebe* test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury. The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal.

[85] In this case, the learned trial judge considered the unsworn evidence of E.T. as well as evidence from her mother and father about the events at the family Thanksgiving dinner. She preferred, for clearly expressed reasons, this evidence to certain evidence given by the appellant and his parents. The judge also had before her the evidence of the videotaped interview between E.T. and the investigator. The judge noted that, even if she had not found the child competent to testify, she would have reached the conclusion that the appellant was guilty as charged.

[86] The task of an appellate court has been thus formulated in *R. v. Biniaris*, supra at paras. 39-40:

...after the jury has been adequately charged as to the applicable law, and warned, if necessary, about drawing possibly unwarranted conclusions, it remains that in some cases, the totality of the evidence and the peculiar factual circumstances of a given case will lead an experienced jurist to conclude that the fact-finding exercise applied at trial was flawed in light of the

unreasonable result that it produced. When an appellate court arrives at that conclusion, it does not act as a "thirteenth juror", nor is it "usurping the function of the jury". In concluding that no properly instructed jury acting judicially could have convicted, the reviewing court inevitably is concluding that these particular jurors who convicted must not have been acting judicially. In that context, acting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction. [87] In her evidence, and in the videotaped interview, E.T. was able to give a clear account of acts of molestation by the appellant that occurred at the grandparents' home and the appellants' parents' home. The judge concluded this after a careful consideration of all the evidence.

[88] It is very often the situation, in this type of case, that the only available evidence, before the court, comes from the young child complainant. In the case at bar, there was additional evidence that I view as confirmatory of E.T.'s evidence. That evidence was given by the complainant's mother and father. It further included the observations made by her mother when she entered the room of the appellant, the observed condition of the clothing of E.T. on this occasion, and the father's evidence about the demeanour of the appellant when he came out of his room. In my judgment, there was a cogent body of evidence upon which the trial judge was entitled to conclude that the Crown had proved the case beyond a reasonable doubt. After careful perusal of the evidence and the reasons of the trial judge, I am not of the view that it can successfully be argued that the findings of guilt are unreasonable or cannot be supported by the evidence. I would dismiss the appeal.

"THE HONOURABLE MR. JUSTICE HALL"

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