

CANADA / JUDGMENT

R. v. N.S.N.C.

2020 BCSC 404

COURT

Supreme Court of British Columbia

DECIDED

13 March 2020

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2020 BCSC 404 R. v. N.S.N.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. N.S.N.C.,

2020 BCSC 404

Date: 20200313

Docket: 81347-3

Registry: New Westminster

Regina

v.

N.S.N.C.

Restriction on publication: Pursuant to s. 486.4 of the Criminal Code, the Court has ordered that any information that could identify the victim or a witness, referred to in this judgment by the initials N.S.N.C, XY, RC, and MC, shall not be published in any document or broadcast or transmitted in any way.

Corrected Judgment: These reasons have been amended throughout to anonymize the defendant to this proceeding on March 19, 2020.

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

Counsel for the Crown:

J. Henry

Counsel for the Accused:

M.N. Stern

M. Beckett

Place and Dates of Trial:

New Westminster, B.C.

January 27-30 & February 6, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 13, 2020

Introduction

- [1] To protect the privacy of the complainant and his family, when these reasons are transcribed they will describe the accused as Mr. C and the complainant as XY.
- [2] Mr. C is charged with two counts of sexual assault and sexual touching of XY between January 7, 1993 and November 23, 1993. The Crown's primary claim is that there were two sexual assaults. It maintains that the sexual assaults took place in the spring of 1993. At that time, Mr. C was 18 years old and XY was 5 years old. Mr. C is XY's uncle; he is the younger brother of XY's father. They were members of the same household.
- [3] The Crown's principal witness is XY. His evidence is that no one else was present when he was assaulted. XY's mother gave evidence bearing on the surrounding circumstances, the timing, and some exchanges with Mr. C after the fact, but she cannot testify as to what occurred between XY and Mr. C. The Crown's case therefore rests principally on XY's evidence.
- [4] Mr. C denies the charges. He says that he was seldom alone with XY in 1993 and nothing untoward occurred when he was. Alternatively, if there was improper conduct, he says that it is not established that it occurred in the time period covered by the indictment. Sexual assault or sexual touching that occurred earlier would have occurred prior to Mr. C's 18th birthday and could not be the subject of a criminal conviction in this Court.

Background

- [5] In 1992 and 1993, XY lived with his parents in a large house in Surrey, British Columbia. This is where the assaults are alleged to have occurred. The house belonged to XY's paternal grandfather, who also lived there. Other residents included XY's paternal grandmother, his great grandfather, and Mr. C.
- [6] XY's father is the eldest of three children, all boys, in his family. Mr. C was the youngest son. The middle son ("RC"), a second paternal uncle of XY, also resided in the house at times.

- [7] In early 1993, XY was his parents' only child. His mother became pregnant with a second child and gave birth to a daughter, XY's younger sister, in November 1993.
- [8] The family had immigrated to Canada from the Punjab region in India. They spoke Punjabi at home. Sikh religious observance was an important part of the family life.
- [9] XY's grandfather worked outside the home. XY's father had a business installing gas fireplaces. There is a conflict in the evidence as to whether some of the father's business was operated from the home, but it is clear that he was fully occupied with the business and had no role in caring for XY during the day. XY's great grandfather no longer worked outside the home; he was in his late eighties and had become frail.
- [10] XY's mother and grandmother did not work outside the home. They were XY's primary caregivers. XY was attending a local preschool, but had not yet started kindergarten and was at home more often than not.
- [11] In the first half of 1993, Mr. C was in grade 12, although he was not doing well and did not graduate that year. He testifies that he was working part-time every day after school. Mr. C is a large man, 6'4" tall. He was already that tall or close to it when he turned 18 in January 1993.
- [12] The main entrance to the house was on the ground floor. It opened onto a foyer with stairs to the second floor. Mr. C had his bedroom in a suite of rooms to the right of the main entrance. The suite included two bedrooms, a bathroom, and a living room. The entrance to the suite was a doorway off the foyer. When RC was living in the house, he occupied a second bedroom in the suite. The first assault is alleged to have taken place in this suite, close to the doorway.
- [13] Most of the rooms were on the second floor. One got there by climbing the stairs from the entrance foyer on the ground floor. The second floor included a living room, dining room, kitchen, family room, and several bedrooms where the other members of the household slept. A doorway to the family room opened off a hallway at the top of the stairs. The family room contained a gas fireplace and a television. The second assault is alleged to have taken place in this room, on the floor, close to the gas fireplace and the door.
- [14] XY had a bedroom of his own close to his parent's bedroom on the second floor.
- [15] XY and his parents travelled to India at the end of 1992 and remained there for several months visiting their extended families. They arrived in India on December 25, 1992 and returned in early March 1993. XY celebrated his fifth birthday while they were in India. He says that the assaults occurred following his return from India to the home.

Elements of the offences

- [16] The counts in the indictment are:

- a) That Mr. C sexually assaulted XY, contrary to s. 271(1) of the Criminal Code, R.S.C. 1985, c. C-46 [the "Code"]; and
- b) That Mr. C "did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object" XY's body, XY being a person under the age of 16 years, contrary to s. 151 of the Code.

[17] We are concerned with the Code as it stood in 1993. At that time s. 271(1) provided:

271.(1) Every one who commits a sexual assault is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding ten years;

[18] By s. 150.1(1) and (2), the presence of consent is not a defence in respect of a complainant under the age of 12 years.

[19] A sexual assault is an assault committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated; *R v. Chase*, [1987] 2 S.C.R. 293 at 302. Assault is defined in s. 265 of the Code. It includes the intentional application of force to another person, directly or indirectly, without that person's consent.

[20] Section 151 provided:

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

[21] Because XY was only five years old in 1993, consent is not a relevant consideration under either charge. The issue is whether Mr. C assaulted XY in circumstances of a sexual nature or touched him for a sexual purpose.

[22] There is no legal requirement that XY's evidence must be corroborated to found a conviction on either charge; Code, s. 274.

Burden of proof

[23] As in any criminal case, the Crown bears the onus of proving beyond a reasonable doubt that the charges are well founded.

[24] In this case, Mr. C gave evidence and I must take care not to lose sight of the Crown's burden of proof at any stage of my assessment of the evidence. In particular, I must not resolve the case by weighing XY's evidence against Mr. C's evidence and deciding which account is more credible. In *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [W.(D.)], Justice Cory., speaking for the majority, stated at 757-758:

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

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

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

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

If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[25] It is sometimes suggested that a fourth step should be added to the W.(D.) formula: "if you are unable to decide whom to believe, you must acquit"; *R. v. C.W.H.* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.) at 155.

[26] The W.(D.) formula has been restated in various ways. The critical point is always that one cannot determine whether an accused is guilty of a criminal offence simply by weighing inculpatory testimony against exculpatory testimony and deciding who to believe. In *R. v. C.L.Y.*, 2008 SCC 2 at para 8, Justice Abella., speaking for a majority, stated that:

what W. (D.) offered was a helpful map, not the only route. Its purpose was to ensure that triers of fact - judges or juries - understand that the verdict should not be based on a choice between the accused's and Crown's evidence, but on whether, based on the whole of the evidence, they are left with a reasonable doubt as to the accused's guilt.

[27] Appellate courts have repeatedly emphasized that what is important is not the order in which a trial judge makes findings of credibility; it is that proof of the accusation beyond a reasonable doubt is the central and paramount consideration; *R. v. Vuradin*, 2013 SCC 38 at para. 21; *R v. Tyers*, 2015 BCCA 507 at paras. 15-16. In *R v. Ryon*, 2019 ABCA 36 at paras. 44-47, the Court emphasized that, regardless of the order in which one proceeds, exculpatory evidence given by the accused must be considered in the context of the evidence as a whole.

XY's evidence

[28] In determining whether I believe Mr. C's denial of the charges or whether his denial raises a reasonable doubt as to his guilt (addressing the first and second parts of the W.(D.) analysis), I begin with XY's account of what happened to him almost 27 years ago, when he was five years old. I will address the third part of the W.(D.) analysis afterwards.

- [29] XY testifies that Mr. C was a member of the household and he remembers spending time with Mr. C before the trip to India. Prior to the trip, he says that Mr. C spent time with him, playing Nintendo, video games, karate and games with plastic toy figures. Some of these activities took place upstairs in the family room, and some of them took place downstairs in the basement suite. XY says that he often spent time alone with Mr. C, who picked him up from school.
- [30] XY remembers celebrating his fifth birthday in India in February 1993. On his return, he played with Mr. C as he had before.
- [31] XY says that the first alleged assault took place in the basement suite. He was alone there with Mr. C. XY remembers the furniture and the colour of the carpet in the room. He remembers where he was in the suite. He does not recall how it began, but he remembers that Mr. C was behind him and moved him to the ground, crouching over. Mr. C pulled down XY's pants and underwear at the same time. XY was on his knees, bent over, with his arms crossed in front of him, very close to his body. Mr. C's hands were on the carpet, clenched into fists, by XY's shoulders. XY recalls that Mr. C was leaning against him, breathing into his right ear, and he felt pressure inside his anus. It was painful. He recalls that Mr. C was rocking back and forth, anally penetrating him with his penis.
- [32] XY recalls that he ended up on his back, though he does not remember how he got to that position. This episode did not last very long. Mr. C was on top of him, rubbing the tip of his penis against the tip of XY's penis. XY recalls that Mr. C was wearing gold-framed glasses and a gold chain necklace that was dangling down while Mr. C was on top of him. He remembers Mr. C's haircut. He does not recall whether Mr. C's penis was erect, but he remembers feeling pressure against his own penis.
- [33] XY recalls that he ended up on his knees again with Mr. C behind him in the same position as before. He does not recall how they got back into that position. Again Mr. C penetrated XY's anus with Mr. C's penis. Mr. C swayed back and forth and XY tried to stay still.
- [34] After that, XY recalls that he was in the washroom with Mr. C. He was bleeding from the anus and got blood on his hands from running them around the area. Mr. C turned the sink on and told XY in Punjabi to remove his shirt. This is the only thing XY recalls being said during the entire incident. Mr. C cleaned the blood off XY. XY does not recall what was used to mop up the blood. XY remembers the tiles and the fixtures in the washroom. He does not remember how the time in the washroom came to an end.
- [35] XY testifies that the second alleged assault took place upstairs in the family room. He believes it took place a few weeks later. The room was carpeted. It had a television in the south-west corner. Along the south wall was a gas fireplace with polished brass flashing. Between the fireplace and the television was a pocket door. The door was open. XY's recollection of the layout corresponds to what can be seen in a contemporary photograph produced by the defence.

- [36] Before the incident began, XY recalls that he was sitting on the carpet near the fireplace. He and Mr. C were alone in the room. Mr. C was seated on a coffee table close to the television with the remote in hand, flipping through channels. There was a hockey game or highlights from a hockey game on. XY recalls that the Jets and the Canucks were playing, and that there was discussion of the Kings. The Jets played the Canucks in the first round of the Stanley Cup playoffs in the spring of 1993, and the Canucks played the Kings in the second round.
- [37] XY recalls that Mr. C changed channels. He landed on a Simpsons cartoon. Then he landed on a channel of people dancing. A man wearing khaki pants was dancing sexually with a woman, rubbing his crotch against hers with their clothes on. Mr. C pointed to that and asked XY if he wanted to do what they did the other day. XY said no.
- [38] XY recalls that Mr. C then offered him gum. XY said yes to the gum. Mr. C ran downstairs and returned with gum. XY recalls that he could see Mr. C "hopping" up the stairs two at a time. XY took the gum and does not remember what he did with it.
- [39] After that, XY remembers Mr. C on top of him again. He does not recall how Mr. C came to be on top of him. XY was lying on his back in front of the fireplace, with his feet to the east and his head to the west. Mr. C was on top of him, his face maybe a foot away, hands out to the sides on the carpet. XY's pants and underwear were off. So were Mr. C's. Mr. C was pressing his penis against XY's penis and swaying back and forth in a rocking motion. Mr. C's penis was erect.
- [40] At this point, XY recalls that he looked to the right and could see both bodies in the polished brass of the fireplace. XY could see the penises rubbing. Mr. C looked towards the fireplace and they made eye contact in the reflection. Mr. C said "uh oh". He didn't say anything further and the rubbing continued. XY thinks this lasted several minutes.
- [41] XY recalls that Mr. C was wearing the same gold-rimmed glasses and gold chain necklace as before.
- [42] XY recalls that this was followed by an episode with Mr. C behind him, both of them crouching. XY was facing the television. He does not recall the transition to this position. Mr. C was hovering over him, chest and stomach against XY's back, and XY could hear his breathing. Mr. C anally penetrated XY with his penis. It was painful. XY looked at the reflection in the brass fireplace and could see Mr. C's penis pressed against his anal area. This lasted several minutes. XY does not recall how it came to an end.
- [43] After this, XY spoke with his mother and there were no further incidents.
- [44] While there are many things XY does not recall in connection with the incidents, very little of what he does recall, as set out above, was directly challenged in cross-examination. The defence argues that XY's evidence is not credible or reliable on various grounds that I will address.

- [45] I turn to a preliminary assessment of XY's evidence. A full assessment must take into account Mr. C's denial of the assaults and the evidence of other witnesses.
- [46] Notable features of XY's recollection include flashes of vivid detail: Mr. C's glasses, neck chain and haircut; a china cabinet without dishes in it; seeing reflections in the brass flashing on the fireplace; and Mr. C's hands making fists on the carpet; among others. Another feature is the generally episodic quality of XY's account of events, which jumps from scene to scene without transitions and often without much context. For example, XY does not remember the time of day, what clothes he and Mr. C were wearing, how they got from one position to another, whether Mr. C used lubrication, whether the bleeding from the first incident continued after he was cleaned up in the washroom, whether he got blood on any of his clothes, and whether there was anyone else in the house when the incidents occurred.
- [47] It must be kept in mind that XY testifies as an adult describing events of long ago when he was a child. Both counsel referred me to *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at 133, where Justice McLachlin, before she became Chief Justice, noted "the peculiar perspectives of children". She stated, at 134:

In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

- [48] XY testifies that he felt grossed out and scared by the incidents. I do not think it is unusual that XY, as a five-year-old experiencing traumatic and upsetting events, would vividly recall certain details without being clear as to how events transitioned from one episode to the next. It stands to reason that peripheral details and matters that a five-year-old would not necessarily understand or keep track of, such as the possible use of lubrication, time of day, and presence of others in the house, would not be remembered.
- [49] In giving evidence, XY presented as a witness who was trying to be helpful to the court and to counsel. He distinguished between what he remembered and what he did not. He was matter of fact.
- [50] For the most part, XY gave his evidence dispassionately and without apparent animus towards Mr. C. There were moments when his feelings came out. Early on in his evidence in chief, he described Mr. C as a bully. As years went by, a family rift developed between XY's immediate family and the extended family. It became clear that XY is bitter that, as he sees it, other family members have protected Mr. C.

- [51] There are certain features of XY's evidence that are doubtful or probably incorrect. He specifies that, when Mr. C was crouching over him, Mr. C's stomach was pressed against his lower back and Mr. C's chest was pressed against his upper back. Mr. C was far taller than XY and their bodies cannot have lined up like this. However, XY was facing away from Mr. C and what he is describing is what he thought or felt at the time was happening. In this light, XY's testimony provides a plausible account of his subjective experience.
- [52] Again, XY provided estimates of how long or how many times Mr. C swayed back and forth inside him. I have not repeated these estimates in my account of his evidence, because I do not think that they have probative value. I would not expect a five-year-old to keep track of such things. Nor do I think that the fact that XY offered them detracts at all from the credibility or reliability of his evidence.
- [53] The defence asks me to be sceptical of the account offered by XY because it contains many details of the sexual acts that were not provided to police in a statement made on July 20, 2017. Only portions of the statement were put to XY in cross-examination. When it was put to him that he had not provided the police officer with certain details, he responded that the officer did not ask those questions, and he was not asked for details of the actual sexual acts until he met with Crown counsel before the preliminary hearing. From the portions of the statement that were put to XY, I have no reason to doubt that this is correct.
- [54] The defence asks me to view XY's evidence about the "uh oh" exchange as a fabrication because he did not mention it in any of three statements made to the police. Under cross-examination, he testified that this was something he remembered but did not think to mention when he was giving the statements. He acknowledged that he was asked about things that were said; he testified that he thought of "uh oh" as more of a sound than words spoken. I do not agree with defence counsel that this is too fine a point. I do not view XY's evidence of the "uh oh" exchange as a fabrication.
- [55] The defence argues that XY's evidence that Mr. C ran downstairs to get the gum and returned hopping up the stairs two at a time cannot be correct, because XY acknowledged in cross-examination that he could not have seen more than the top two stairs from where he was in the family room. In my view, XY's evidence on this point hangs together. He was in a position to hear running down the stairs. He was in a position to see Mr. C taking the final two stairs two at a time when he returned.
- [56] The defence points to an acknowledgment of self-doubt in XY's first statement to police and asks me to conclude that his present assertion of a firm recollection is unreliable. In his statement, XY repeatedly asserted that he knew what had happened to him. He said that he had a good memory of the incidents. He said that, if Mr. C admitted only to sexually touching him but not to the rest of it, he did not want to know about it "like that will make me suicidal because then I'm gonna doubt my memories and then I'm gonna start thinking what the fuck happened". He said that he would rather not be told Mr. C's account of events. Then he said again that he knew what happened.

- [57] I do not think that these portions of XY's statement can fairly be read as expressing a lack of confidence in his recollection. In it, XY is very clear as to what he recalls. He expresses some doubt as to whether his clear recollection is reliable, and a strong desire not to grapple with that question. In my view, none of this calls into question XY's credibility. He simply believed, in giving the statement, that others would be in a better position than he to evaluate the ultimate reliability of his memories, taking all available evidence into account. This state of mind may have owed something to the fact that XY was in law school at the time, and he was not incorrect.
- [58] The defence argues that, in parts of his evidence, XY's answers reveal him as an advocate. Counsel points in particular to evidence given by XY concerning the timing issue and his evidence concerning a meeting XY arranged with his father shortly after XY first went to the police in 2017.
- [59] I will address the timing issue later in these reasons.
- [60] Concerning XY's meeting with his father, XY testifies that he had two reasons to meet with his father in 2017: to reconnect with him, and to gather evidence that might corroborate his police complaint. XY recorded the meeting. XY acknowledged both reasons in his evidence in chief. I am sceptical of the first reason - a desire to reconnect - and I think that the second reason - a desire to obtain corroborative evidence from a family member from whom XY was estranged - was the real reason. XY's stated desire to reconnect is a defensive excuse, formulated in the context of what defence counsel described as an acrimonious and vitriolic familial ecosystem. My non-acceptance of XY's evidence on this particular point does not cause me to doubt his account of what happened with Mr. C when he was 5 years old. This point is entirely collateral to the substance of this case.
- [61] Taking all this and other points raised by the defence on cross-examination and in argument into account, it appears to me that XY is sincerely trying to tell the truth in giving his evidence concerning the sexual assaults. On the face of his testimony, he is a credible witness. I will address the reliability of his account of events later in these reasons, in the context of the evidence as a whole.

Mr. C's evidence

- [62] Mr. C confirms the living arrangements I have already described. He says that his older brother, RC, shared the two-bedroom basement suite with him, but RC was away from March 1992 until March 1993. He testifies that he played with XY in the manner XY describes, but does not recall babysitting XY. According to Mr. C, he had no time to babysit because he was always at school or working.

- [63] As I have already noted, Mr. C denies that the sexual incidents described by XY took place. In his favour in the assessment of his credibility are his willingness to make certain admissions and his demeanor on the witness stand. He was not a difficult or combative witness.
- [64] Unfortunately, Mr. C gave certain evidence that bears poorly on his credibility.
- [65] The most striking example of this concerns a family meeting that took place at the home shortly before Mr. C's wedding in 1999. The meeting took place in XY's former bedroom, XY and his parents having moved out in 1994. XY's mother and Mr. C both testified concerning this meeting. They agree as to the timing, location, and who was present. The participants were Mr. C, XY's parents, Mr. C's parents (XY's paternal grandparents), and RC.
- [66] The wedding was approaching. It was a family event of some significance. XY's mother testifies that she and XY's father came to the meeting to discuss and deal with XY's accusation that Mr. C had molested him, years ago. She says that, at the meeting, Mr. C told his family members that he did not recall the incident, but that he was sorry.
- [67] XY's mother's account of an apology by Mr. C is not probative of the charges against him. My concern is with Mr. C's account of the meeting.
- [68] In his evidence in chief, Mr. C gave a detailed description of the people in the room. Everyone was on the floor, and Mr. C set out where each was sitting. He recalled that RC came into the room late, just after the meeting began. Then, he said, XY's mother began the meeting by saying that XY had had a dream that Mr. C had molested him. Mr. C responded, "excuse me", and she repeated the same thing about a dream. Mr. C's mother asked what had happened, and his father repeated that XY had a dream. According to Mr. C, XY's mother then asked him directly, "did you do it?" He said no. The question was put to him again separately by his father and his mother. Each time he denied it. He said to everyone, "I'm sorry if you think it was me, but it was not me".
- [69] In cross-examination, it was put to Mr. C that the pointed questions he was asked by others at the meeting were not just questions about a dream. He acknowledged that an accusation was on the table. He said that, as XY's mother spoke, she started to make it seem like it really happened. He confirmed that his mother and father asked him if he had done anything - this time he said that his father asked him first and his mother second - and he denied that he had. This time, he said that he did not recall whether XY's mother asked him if he had done it. He said that he told those at the meeting that "I'm sorry you think it was me".
- [70] Then Mr. C denied that he understood that anyone else thought that he had molested XY. After the meeting, he said, he did not think any more of it, because it was just a report of a dream. He denied that he had any lingering concerns arising from XY's mother's accusations against him, because it was only that she thought her son had a dream.

- [71] Mr. C clearly remembers the meeting. He says that he remembers details such as where everyone sat because it was a serious conversation. It is plain from his account of the pointed questions put to him at the meeting that what was under discussion was not a dream but an accusation. Mr. C avoided mentioning the accusation in his evidence in chief. He was driven under cross-examination to acknowledge the accusation, but then he took refuge again in the idea that all that was being discussed was a dream. I am satisfied that Mr. C knows that it was more than that. His evidence concerning this meeting and his reaction to it is internally inconsistent. It is not trustworthy.
- [72] Other aspects of Mr. C's evidence also cause concern. He made firm, confident statements in his evidence in chief that he withdrew under cross-examination.
- [73] There is a dispute in the evidence as to whether Mr. C was still going to school in the first half of 1993. He produced documents that establish that he was enrolled in grade 12 classes, although he was not passing them. In chief, he asserted that he obtained his high school graduation certificate in the summer of 1993. Under cross-examination, he said that he took classes on and off and believes that he graduated within a few years. It was not in the summer of 1993.
- [74] Mr. C testified in chief that he took XY and his friends to a movie in his Ford 150 truck in 2004. Under cross-examination, he walked back from this evidence, stating that he did not remember taking them to the movie, though he believed that he met with them in the parking lot at the cinema and took them home.
- [75] In his evidence in chief, Mr. C testified that he believes he was not babysitting XY because he was "always" at school or working. Under cross-examination, he testified that he worked part-time after school, Saturdays, some Sundays, and school holidays until June 1993, and full-time after that.
- [76] Mr. C further testified that his mother (XY's grandmother) never left the house between the hours of 6 a.m. and 6 p.m. on weekdays. If Mr. C was as busy with work and school as he maintains, he is not in a position to say that his mother never left the house during the day.
- [77] Mr. C's recollection of many details of his daily life in 1993 - 27 years ago - is understandably sketchy. He cannot remember most of his high school classes and the names of most of his teachers. He is unsure whether his brother (XY's father) was running the fireplace installation business from the home or an outside office. When pressed, Mr. C acknowledged that he had time to play with XY in the evenings, after he got home from work at 7 or 8 p.m. It seems to him that he would have been working during the spring break of that year, but really he cannot recall. He acknowledges that he was skipping classes at school. While he does not recall babysitting XY in this period, he acknowledges that there could have been times this occurred.

- [78] Taking Mr. C's evidence as a whole, I find that he was not a careful witness. Some of his evidence in chief was exaggerated. His evidence concerning the family meeting in 1993 was deliberately untruthful. In this light, I cannot rely on Mr. C's denial of the alleged sexual assaults as establishing that they did not occur.
- [79] There remains for consideration whether Mr. C's evidence or any evidence leaves me with a reasonable doubt as to whether the sexual assaults occurred and within the period covered by the indictment.

Evidence of other witnesses

- [80] Apart from XY, his mother was the only Crown witness of substance. Defence counsel subjected her to a thoroughly professional cross-examination that effectively raised doubts about portions of her evidence. Nevertheless, I am not persuaded that her evidence is generally unreliable.
- [81] The mother's evidence addresses two contested evidentiary points of substance. The first is the extent to which Mr. C was left alone in the home with XY in early 1993. The second bears on whether the alleged assaults might have occurred earlier than 1993, when Mr. C was not yet 18 years old. I will address her evidence in considering these points.
- [82] Apart from Mr. C, the defence called three witnesses. Two were medical professionals who gave evidence of statements made by XY that bear on the timing issue. The third was MC, who is Mr. C's separated spouse. MC first met Mr. C's family shortly before the wedding in 1999. She lived at the home after that and gave some evidence concerning the household routine. That evidence is of limited value because it post-dates the alleged assaults by six years.
- [83] MC also gave evidence contradicting XY's mother on the subject of an alleged meeting attended by Mr. C and XY's mother in 2006 or 2007. The Crown concedes that the mother's evidence of what was allegedly said at the meeting is not probative of the charges against Mr. C. This conflict in the evidence is not germane to my assessment of the mother's evidence in relation to the points discussed below, and I need not address it further.

Is the Crown's case established beyond a reasonable doubt?

- [84] I turn to the central questions in this case. There are two of them:
- a) On all the evidence, including Mr. C's evidence, is it established beyond a reasonable doubt that Mr. C sexually assaulted or sexually interfered with XY?
 - b) If so, on all the evidence, including Mr. C's evidence, is it established that the assaults occurred after XY returned from India in 1993?

The assault/interference issue

- [85] XY's account of Mr. C's actions is clear, cogent, and plausible. The conduct described by XY features rubbing unclothed genitals and anal penetration. If proven, such conduct would constitute assaults committed against a child in circumstances of a sexual nature such that XY's sexual integrity was violated. It would also constitute sexual interference with the child's body. There could be no doubt that Mr. C's conduct, as described by XY, was intentional and carried out for a sexual purpose.
- [86] Is the case established beyond a reasonable doubt? A reasonable doubt is a doubt based on reason and common sense, not sympathy or prejudice. It is logically connected to the evidence or the absence of evidence; *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36.
- [87] Three aspects of the evidence require close consideration, both individually and collectively.
- [88] The first is the necessary question of the reliability of an account, provided 27 years after the fact, of events experienced by XY when he was a child of 5 years old. It is clear that XY bears some animus towards Mr. C, and that he has reflected at length on his understanding and experience of Mr. C's conduct for at least 16 years. Human memory is not infallible. It may be influenced by the statements of others. It may be subject to reconstruction, and the individual may come to "remember" a reconstructed event that did not occur.
- [89] There is nothing in the evidence to suggest that XY has been influenced by others in his account of what occurred to him. There is no reason to think that he has reconstructed his account of the assaults. As I have noted, XY's account includes flashes of vivid detail that speak to the presence of real as opposed to reconstructed memory. I do not find in XY's evidence indications that his animus towards Mr. C drives or significantly influences his account of what Mr. C did.
- [90] The second matter calling for close consideration is whether the presence of others living in the home renders XY's account of what occurred implausible such that I must be left with a reasonable doubt.
- [91] XY does not recall whether he and Mr. C were alone in the house when the assaults occurred. I will assume that the doors to the basement suite and the family room were open. It is implausible that the assaults would have occurred if there was a possibility that a family member might walk by at any time.
- [92] The defence argues that XY's great grandfather was living in the house and rarely left, but was active enough that he might wander into rooms such as the family room. XY's mother, XY and Mr. C gave conflicting evidence as to whether this was likely in 1993.
- [93] While XY's mother was not working outside the home, she testified that she was sometimes out at medical appointments and for other reasons. She was in the early stages of what she describes as a difficult pregnancy at the time. I accept her evidence that she left the house without XY from time to time, leaving other members of the household to babysit him.

- [94] The witnesses agree that XY's grandmother did not have a driver's licence and only left the home alone to walk to the local Sikh temple. The grandmother went to the temple to help prepare food for special services. According to Mr. C and MC, this did not occur during the day on weekdays. As I have already noted, on Mr. C's evidence, it is unclear how he could know this, and MC only came into the household six years later.
- [95] The evidence of Mr. C and MC that the grandmother did not leave the house during the day on weekdays is contradicted by XY's mother. She says that the grandmother would go to the local Sikh temple to prepare lunches. She also says there were occasions when the family, other than Mr. C and XY, drove to Squamish to see relatives.
- [96] Taking into account the time that has passed and the natural frailties of memory, I doubt that any of the witnesses' testimony on this question is completely reliable.
- [97] Mr. C recalls that he interested himself in XY, buying him toys and playing with him. He was a natural candidate to serve as a babysitter as and when the need arose. The other adult members of the household had various family, social and religious interests outside the home. It stands to reason that sometimes Mr. C was called upon to babysit. Giving due weight to the defence evidence, it was probably not often that Mr. C was alone in the house and not at risk of being disturbed, but it is something that could and did occur from time to time.
- [98] In short, windows of opportunity in which the assaults could take place probably did not arise often, but they did arise. Lack of opportunity does not of itself raise a reasonable doubt that the assaults occurred.
- [99] The third matter calling for close consideration is Mr. C's denial that he assaulted XY and his evidence generally. I have found that I cannot rely on his testimony as establishing that the assaults did not occur, but do they raise a reasonable doubt as to what occurred?
- [100] The difficulty is that Mr. C does not offer an affirmative account of what occurred with XY, except that he played with XY sometimes. On his account, quite understandably, he does not remember very much. Setting aside the question of opportunity which I have just addressed, Mr. C's testimony does not offer grounds for doubt that engage with XY's detailed, sincere and cogent account of what occurred.
- [101] Taking these three matters collectively and considering the evidence as a whole, I accept XY's evidence and am left without a reasonable doubt as to what occurred. I am satisfied beyond a reasonable doubt that Mr. C sexually assaulted and sexually interfered with XY on two occasions as described by XY.

The timing issue

- [102] XY believes that the assaults occurred after his return to India. It is worth noting immediately that XY's evidence on this question is largely and necessarily a matter of reconstruction. As a rule, memories of events of long ago are not organized or retrievable

in sequence. They do not come with date stamps attached. An attempt to remember when something occurred involves a search for what Crown counsel termed "landmarks" - associated events or circumstances - of determinate date. XY bases his belief as to the timing of the assaults on several remembered landmarks.

- [103] A search for landmarks undertaken long after the fact is a process of rationalisation. I must make my own assessment of the rationale and pay close attention to the possibility that XY's reasoning has been influenced by his animus towards Mr. C.
- [104] First, XY says that his fifth birthday, celebrated in India, was fresh in his mind when the assaults occurred. This was his second trip to India. The first took place when he was a baby and he does not recall it. There was a third trip in 1996 when he was eight; on that trip he recalls his sister, who was then three. This is the only trip XY recalls before his sister was born. He recalls that he hated India, was glad to come home, and was given little animal toys that he brought back with him.
- [105] Second, XY says that, in the vicinity of the assaults, he recalls discussions that he was going to have a baby sister. Those discussions would have to have taken place in 1993.
- [106] Third, XY recalls that the first assault took place in the springtime.
- [107] Fourth, XY distinctly recalls that the hockey game or highlights on the television just before the second assault involved the Jets and the Canucks, and there was mention of the Kings. XY knew that his father was a particular fan of Wayne Gretzky, who was leading the Kings. He understood that it was the playoffs. That would place the event during the first round of the Stanley Cup playoffs in the spring of 1993.
- [108] XY's mother confirms the dates of the family trip to India with reference to family photographs. She testifies that they returned in the first or second week of March 1993. She recalls that XY complained that he had been molested by Mr. C around Vaisakhi, which is celebrated annually in mid-April.
- [109] The defence challenges XY's recollection of the timing of the incidents - that they took place following his fifth birthday and the family's return from India in early 1993 - with reference to statements he made to a clinical counsellor and a psychiatrist eleven and twelve years later in 2004 and 2005. At that time he said that the incidents took place when he was three or four years old. XY acknowledges having probably made those statements but says that he had not put his mind to the timing at that point. In the clear light of day, he testifies, with the benefit of contemplation and reflection, he is now confident that the incidents took place in 1993 when he was five.
- [110] The psychiatrist, Dr. Randawa, testifies that he would not have focused on the timing in his interview with XY. While he noted the age at which the assaults occurred, recording different ages at different points in his notes, so far as he was concerned, it was immaterial. The clinical counsellor, Dr. Whitehead, has since completed a doctorate and is now a practising psychologist. While he has no memory of meeting XY, he would have viewed the

age at which the assaults occurred as a helpful detail to be noted as part of the general conversation.

- [111] It is clear that XY spoke with Drs. Randawa and Whitehead before he had searched his memory for landmarks with a view to settling the timing. His statements to them that he was three or four years old were an unconsidered impression. The fact that he made those statements does not, of itself, call into question his present understanding of the timing.
- [112] Defence counsel asks me to doubt that XY, at 31 years old, is in a position to remember that the India trip was fresh in his mind while he was being assaulted in 1993. He points to a shift in XY's description of the hockey on television: in his police statement, he referred to a hockey game, but in his evidence he was careful to say that it might only have been game highlights. Defence counsel suggests that the shift may have been attributable to a realisation that a game would have been played in the early evening when there would have been other people in the house. Defence counsel asks me to conclude that XY has massaged his reconstruction to arrive at a certain conclusion, or that there is at least a risk that he has, raising a reasonable doubt as to the timing.
- [113] XY and XY's mother gave evidence about the India trip with reference to family photographs, some of them dated. There are photographs of XY's fifth birthday party, including the cake and the animal toys he described independently in his evidence. Even today, XY has a vivid memory of the trip. I do not agree with the defence that XY is not in a position to say that the trip was fresh in his mind when he was assaulted.
- [114] I attribute XY's current precision in describing his memory of the hockey preceding the second assault as either a game or game highlights as the appropriate caution of a careful witness, not evidence that XY has massaged his reconstruction.
- [115] Taking all of the evidence into account, I am satisfied beyond a reasonable doubt that XY's present account of the timing is correct. I find that the assaults occurred in the spring of 1993 when Mr. C was 18 years old.

Disposition

- [116] Mr. C, please stand. For the reasons I have given, I find you guilty of count 2 in the indictment, that you sexually assaulted XY in Surrey, British Columbia, after January 7, 1993 and before November 23, 1993, contrary to s. 271(1) of the Criminal Code.
- [117] I also find you guilty of count 1 in the indictment, that you sexually interfered with XY at the same place and times, contrary to s. 151 of the Criminal Code.
- [118] *R v. Kienapple*, [1975] 1 S.C.R. 729 requires that one of these convictions be stayed. Based on the Crown's advice that it considers the conviction for sexual assault as the more serious matter, I conditionally stay the conviction for sexual interference.

"Gomery J."

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