

CANADA / JUDGMENT

R. v. P.A.

2024 BCSC 282

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 282 R. v. P.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. P.A.,

2024 BCSC 282

Date: 20240213

Docket: X084802-2

Registry: New Westminster

Rex

v.

P.A.

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Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

Counsel for the Crown:

C. Reimer

Counsel for the Accused:

M. Beckett

Place and Dates of Trial:

New Westminster, B.C.

November 20-22, 27, 30, 2023

December 1, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 13, 2024

I. INTRODUCTION

- [1] P.A. is charged on a two-count indictment with sexual touching of a minor on count 1, and with sexual assault on count 2, both on August 16 to 17, 2021.
- [2] The complainant was 12 years old at the time, and staying over at the accused's home. The Crown alleges that the offences occurred during the night, after the complainant had moved to the accused's bed to sleep as a result of her room having overly hot temperatures.
- [3] The accused testified and denies that the incident occurred as described by the complainant. He denies any sexual touching and denies the allegations of sexual assault.
- [4] The main issues at trial are (1) the credibility and reliability of the evidence of the complainant and the accused, and (2) whether the Crown has, on the whole of the evidence, proven its case on either or both counts beyond a reasonable doubt.

II. OVERVIEW OF EVIDENCE

- [5] Much of the evidence is not in issue. N and P.A. are related because the daughter of P.A., K, is the step-mother of N. P.A. is also referred to in the evidence as "P" or "grandpa".
- [6] On Sunday, August 15, 2021, the day prior to the events giving rise to the charges, N, her step-mother, and the baby had visited the accused's townhouse in Surrey and stayed the night. On Monday, August 16, 2021, the mother and baby returned to their residence. N spent the day visiting with her best friend, L, who lived in the next-door townhouse, and stayed over another night at the accused's house. L and N watched a movie at the accused's house that evening, then L went home. L had had a sleepover at the accused's house with N the previous night.
- [7] As background to a more detailed discussion of the evidence to follow, an overview of the circumstances includes the following facts.
- [8] After watching the movie, N had gone to bed in the spare bedroom, but it was too hot. She moved to the accused's room to sleep because it had air conditioning.

- [9] On the morning of August 17, 2021, something caused N to become extremely distressed. She was inside the accused's bedroom when P.A. awoke. She screamed and fled to another room in the house. P.A. followed and, through the closed door, asked her what had happened and if it was a nightmare. N then ran from that room, down the stairs, and out of the townhouse. P.A. followed and tried to calm N.
- [10] N ran next door to the neighbours' house. When G opened the door, she saw N and P.A. The evidence regarding what was said at the time differs. G then called the police, who attended. G is the mother of L.
- [11] The accused's townhouse has his and another bedroom and an office upstairs on the second floor. His bedroom is the only room with air conditioning. He lives alone in the townhouse.
- [12] N is now 15 years old and was 12 at the time of the events in August 2021. P.A. is now 57 years old.
- [13] The witnesses called by the Crown were N, G, and L. P.A. testified in his defence. The parties filed two agreed statements of facts pursuant to s. 655 of the Criminal Code. The evidence of a forensic nursing examination and DNA evidence were included in an agreed statements of facts.

III. SUBMISSIONS OF THE PARTIES

- [14] The Crown submits that N's testimony at trial provided a specific, detailed, and plausible articulation of what happened in the night and in the morning, and her testimony is corroborated by other evidence in this trial on certain points. They say that as can be reasonably expected with evidence of a 12-year-old complainant, recalling events and ongoing statements over the years up until her testimony before this Court at age 15, there were intrinsic inconsistencies in her evidence. Some of those inconsistencies she explained, and some were of no consequence.
- [15] It is the defence position that the Crown has not discharged its burden of proving the accused's guilt beyond a reasonable doubt. The defence submits that, after analyzing and weighing all of the evidence and applying the relevant legal principles, this Court should either believe the accused's evidence and acquit him, or at least be left in reasonable doubt as to his guilt and acquit him.

IV. legal principles

- [16] Counsel for the Crown and the accused provided a summary of the applicable principles of the law. There is no issue on these principles, which I summarize below.

A. Essential Elements of the Offence of Sexual Interference Under s. 151 of the Criminal Code

- (i) Actus Reus

[17] The actus reus of the offence of sexual interference under s. 151 of the Criminal Code requires proof beyond a reasonable doubt that (i) the accused used their body or an object (ii) to touch the complainant's body and (iii) the complainant was under 16 years of age.

(ii) Mens Rea

[18] Sexual interference is a specific intent offence, requiring intent to touch for a sexual purpose. Touching "for a sexual purpose" includes that which was meant to sexually gratify the accused or violate the complainant's sexual integrity: *R. v. Morrissey*, 2011 ABCA 150 at para. 21. The ultimate question for the court is whether the touching was "sexual in nature": *R. v. G.B.*, 2009 BCCA 88 at paras. 24, 28. The court's determination of that question "will be disclosed by the proven circumstances": *G.B.* at para. 28.

B. Essential Elements of the Offence of Sexual Assault Under s. 271 of the Criminal Code

[19] To establish the accused's guilt for the offence of sexual assault under s. 271 of the Criminal Code, the Crown must prove beyond a reasonable doubt that the accused:

- (a) committed the actus reus of unwanted sexual touching; and
- (b) had the necessary mens rea of intention to touch while knowing, or being reckless or wilfully blind to, the lack of consent.

See *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 23, 169 D.L.R. (4th) 193.

[20] The definition of assault is enumerated in s. 265(1) of the Criminal Code. Section 265(2) of the Criminal Code establishes that the definition of assault applies to all forms of assault, including sexual assault. In this case, the relevant definition is s. 265(1)(a), as the complainant alleges that the accused intentionally applied force to the complainant, directly or indirectly, without the complainant's consent.

(i) Actus Reus

[21] The actus reus of sexual assault requires proof beyond a reasonable doubt of (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent: *Ewanchuk* at para. 25.

[22] Consent is not possible in this case, but the following overview is included for completeness. For the offence of sexual assault, "consent" is defined under s. 273.1(1) of the Criminal Code as "the voluntary agreement of the complainant to engage in the sexual activity in question." As Chief Justice McLachlin and Justice Cromwell explain in *R. v. Hutchinson*, 2014 SCC 19 at para. 17, "[c]onsent cannot be implied, must coincide with the sexual activity, and may be withdrawn at any time". In Canada, the age of consent for sexual activity is 16 years old. In this case, the complainant was aged 12 or 13 years old at the time of the alleged incident, which precludes any "consent" at law: see Criminal Code, s. 150.1(1).

- [23] The first and second elements are objective, while the third element "is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred": Ewanchuk at paras. 25-26.
- [24] The complainant's testimony is the only source of direct evidence of their state of mind, and their credibility must be assessed in light of all of the evidence: Ewanchuk at para. 29. The accused may claim that the complainant's words or actions, before and during the incident, raise a reasonable doubt as to whether the complainant did not want the sexual touching to take place: Ewanchuk at para. 29.

(ii) Mens Rea

- [25] Sexual assault is a general intent offence, under which the Crown must prove beyond a reasonable doubt that the accused intended to touch the complainant and was knowing of, reckless of, or wilfully blind to the complainant's lack of consent: Ewanchuk at paras. 23, 41-42. Thus, touching of a sexual nature is only an offence in the absence of consent.
- [26] An accused who is alive to the risk that the complainant has not consented, but who nonetheless persists with touching of a sexual nature, is reckless: *R. v. Hinds*, 2016 ONSC 95 at para. 18. An accused who recognizes the need to inquire about whether the complainant is consenting, but does not make the inquiry, is wilfully blind: *Hinds* at para. 18.
- [27] It is trite law that the principle underlying the criminal law's requirement of proof beyond a reasonable doubt of mens rea is meant to avoid convicting morally innocent persons: Ewanchuk at para. 42; *R. v. Creighton*, [1993] 3 S.C.R. 3, 105 D.L.R. (4th) 632.

C. W.(D.) Analysis

- [28] Whenever an accused testifies in a criminal trial, the trier of fact must embark upon the analysis set out at in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 757-58, 63 C.C.C. (3d) 397 and built on in *R. v. H.(C.W.)* (1991), 68 C.C.C. (3d) 146 at 155, 3 B.C.A.C. 205 (B.C.C.A.). That test is summarized in *R. v. Ay* (1994), 93 C.C.C. (3d) 456 at 476-77, 59 B.C.A.C. 161 (B.C.C.A.):
- (a) If they believe the accused they must acquit.
 - (b) If they do not know whether to believe the accused or the complainant, they must acquit.
 - (c) If they do not reject the evidence of the accused they will have a reasonable doubt and must acquit.
 - (d) If they disbelieve the accused, that is if they reject his evidence as untrue, they have to be convinced beyond a reasonable doubt of the guilt of the accused on the whole of the evidence before they could convict.

D. A Trial is Not a Credibility Contest

- [29] In applying the W.(D.) test, the trier of fact "must not base its verdict on a choice between the Crown's evidence and the accused's evidence": *R. v. D.J.M.*, 2021 BCSC 1024 at para. 36. This means that the determination of guilt or innocence must not amount to a mere credibility contest: *R. v. J.H.S.*, 2008 SCC 30 at paras. 9, 13. Instead, the verdict must be based on an assessment of all the evidence and whether such assessment leaves the trier of fact with a reasonable doubt as to the accused's guilt: *D.J.M.* at paras. 36-37.
- [30] Therefore, the ultimate question for the trier of fact is whether, on all of the evidence, they are left with a reasonable doubt as to the accused's guilt. A lack of credibility in respect of the accused does not equate to proof of their guilt beyond a reasonable doubt: *D.J.M.* at para. 42. The trier of fact must not make a "direct progression" from a finding that they believe the complainant to the conviction of the accused: *R. v. Turmel*, 2004 BCCA 555 at paras. 11-13. Nor can the trier of fact simply reject the accused's evidence because they believe the complainant: *R. v. Guan*, 2002 BCCA 542 at para. 24.
- [31] Accordingly, the trier of fact must not allow their fact-finding to devolve into a credibility contest wherein, if the complainant wins the contest, the accused is convicted, and vice versa in respect of an acquittal. To do so would be a misapplication of the burden of proof, which is guilt beyond a reasonable doubt and which lies with the Crown: *R. v. Nyznik*, 2017 ONSC 4392 at paras. 12, 14.
- [32] Properly applied, the criminal burden of proof requires the trier of fact to acquit if the accused's evidence, when assessed in light of all the evidence, raises a reasonable doubt as to their guilt: *Nyznik* at paras. 12, 14. The trier of fact may not fully believe the accused's version of events, and may even find the complainant's version to be more plausible or credible, but nonetheless remain uncertain as to what actually happened: *Nyznik* at paras. 12, 14. In that situation, there is a reasonable doubt, the benefit of which must flow to the accused: *Nyznik* at paras. 12, 14.

E. Inferences

- [33] The trier of fact is entitled to draw inferences. An "inference is a deduction of fact which is logically and reasonably drawn from other facts established in the case", and it is not speculation: *R. v. Rochemont*, 2017 BCSC 930 at para. 104. The line between permissible inferences and impermissible speculation may be difficult to draw, particularly when there is circumstantial evidence: *Rochemont* at para. 104.

- [34] If a reasonable inference other than guilt may be drawn from the facts, then the Crown's evidence does not meet the burden of proof beyond a reasonable doubt: *Rochemont* at para. 105. Gaps in the evidence may properly ground an inference other than guilt, but "must be reasonable based on the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense": *Rochemont* at para. 105; see also *R. v. Villaroman*, 2016 SCC 33 at para. 30.
- [35] Thus, if "proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence", then "an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits": *Villaroman* at para. 30; see also *R. v. Griffin*, 2009 SCC 28 at para. 27.

F. Credibility and Reliability

- [36] In *R. v. Parent*, 2000 BCPC 11 at paras. 4-5, the Honourable Judge A.E. Rounthwaite helpfully distilled the caselaw, which continues to provide a non-exhaustive list of factors that courts have considered in the credibility and reliability analysis:
- (a) The witness's ability to observe the events, record them in memory, recall, and describe them accurately.
 - (b) The external consistency of the evidence. Is the testimony consistent with other, independent evidence which is accepted?
 - (c) The internal consistency of the evidence. Does the witness's evidence change during direct examination and cross examination?
 - (d) The existence of prior inconsistent statements or previous occasions in which the witness has been untruthful.
 - (e) The "sense" of the evidence. When weighed with common sense, does it seem impossible or unlikely? Or does it "make sense"?
 - (f) Motives to lie or mislead the court, namely bias, prejudice, or advantage. To consider the obvious possible motive of every accused person to avoid conviction would place an accused at an unfair disadvantage and should not be considered when assessing an accused's testimony.
 - (g) The attitude and demeanour of the witness. Are they evasive or forthcoming, belligerent, co-operative, defensive, or neutral? In assessing demeanour, a judge should consider all possible explanations for the witness's attitude, and be sensitive to individual and cultural factors, which may affect demeanour. Because of the danger of misinterpreting demeanour, it is unwise to rely on this factor alone.

G. Assessing Children's Evidence

- [37] The court must have regard to the principles articulated by the Supreme Court of Canada in *R. v. B.(G.)*, [1990] 2 S.C.R. 30 at 54-55, 56 C.C.C. (3d) 200 and *R. v. W.(R.)*, [1992] 2 S.C.R. 122 at 132-34, 74 C.C.C. (3d) 134 in relation to the evidence of children, which include:
- (a) Courts should take a "common sense" approach when dealing with children's evidence.
 - (b) A flaw, such as a contradiction in a child's evidence, should not be given the same effect as a similar flaw in an adult's testimony.
 - (c) A child may not be able to recall all the details of an event, such as the time and place, while still accurately recalling what happened to them and who did it.
- [38] This does not mean the standard of proof is lower when dealing with children, or that their credibility should not be carefully assessed: *B.(G.)* at 55. Rather, it means that the standard of a "reasonable adult" may not be appropriate when assessing the evidence of a child: *B.(G.)* at 55.
- [39] In this case, the Court must consider the complainant's age at the time of the alleged incidents, and remain alive to the different stages of her development when considering her police statements at age 12 and her testimony in Court at age 15.

H. The Timing of Disclosure in Sexual Assaults

- [40] There is evidence in this case regarding how the complainant's allegations made their way to police and before the Court.
- [41] In *R. v. D.D.*, 2000 SCC 43, the complainant alleged the accused sexually assaulted her when she was five or six years old. The complainant did not disclose the assault to anyone for two and a half years, until she disclosed to a friend at school. She was thereafter interviewed by a Children's Aid Society worker in the presence of a police officer. The complainant said she could not remember any sexual touching, but later reported the incidents to police. The Crown sought to call expert evidence about the nature and timing of the child complainant's disclosure, but the Supreme Court held the expert evidence was not necessary and therefore inadmissible.
- [42] In reaching that conclusion, the Supreme Court notes that a complainant's delayed disclosure, "standing alone", will never give rise to an adverse inference regarding the complainant's credibility, and "the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case": *D.D.* at para. 65.
- [43] There is also evidence in this case of the complainant incrementally revealing details of the alleged sexual assault. In *R. v. D.P.*, 2017 ONCA 263 at paras. 30-31, leave to appeal to SCC ref'd, 37658 (23 November 2017), the Ontario Court of Appeal held that the principles from *D.D.* are potentially applicable to "piecemeal" disclosure of sexual assault, "depending of course on the circumstances revealed by the evidence in any particular case".

- [44] In a more recent decision, *R. v. W.O.*, 2020 ONCA 392, aff'd 2021 SCC 8, the Ontario Court of Appeal considered the application of D.D. and D.P. in a case where the young complainant had provided inconsistent evidence on some issues, and had delayed disclosing an additional incident until she was cross-examined at trial, despite having previously made two statements to police. The Court held that the principles in D.D. and D.P. were applicable to assessing the inconsistencies in the complainant's evidence, as well as her piecemeal disclosure: W.O. at paras. 23-24, 46.

I. Inappropriate Reasoning--The Rules Against Common-Sense Assumptions and Stereotypical Inferences

- [45] In *R. v. JC*, 2021 ONCA 131, writing for the majority, Justice Paciocco discusses two rules relating to impermissible reasoning regarding the "plausibility of human behaviour": see para. 57.
- [46] The first rule is against "common-sense" assumptions. Under this first rule, "judges must avoid speculative reasoning that invokes 'common-sense' assumptions that are not grounded in the evidence or appropriately supported by judicial notice": JC at para. 58.
- [47] The second rule is against stereotypical inferences. Under this second rule, "factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour": JC at para. 63. It is an error of law to rely on stereotypes or "prejudicial generalizations" about how a sexual assault complainant is expected to act, to either bolster or undermine their credibility: JC at paras. 63, 65. It is likewise wrong to draw inferences from stereotypes or "prejudicial generalizations" about the way an accused person is expected to act: JC at paras. 63, 65.

J. Prior Consistent Statements

- [48] Justice Wood addresses the admissibility of prior consistent statements in Ay at 471:
- the fact that a prior complaint was made, when it was made, and why it was or was not made in a timely fashion, are all matters relevant and admissible to establish the conduct of the complainant in a criminal case, from which conduct the trier of fact is entitled to draw inferences relative to the credibility of that complainant's evidence. However, the content of any prior statement cannot be used to demonstrate its consistency with, and therefore the probable truthfulness of, the complainant's evidence at trial, and thus such content is inadmissible unless relevant for some other purpose such as providing necessary context for other probative evidence.
- [49] More recently, in *R. v. Greif*, 2021 BCCA 187, leave to appeal to SCC ref'd, 39689 (4 November 2021), our Court of Appeal revisited the admissibility of prior consistent statements in the context of a sexual assault case. Writing for the Court, Justice MacKenzie notes in *Greif* at paras. 68-69 that such statements are admissible for the purpose of assessing the timing and circumstances of the complainant's disclosure; the complainant's post-event demeanor; the

context of how the allegation came to police attention; as well as for circumstantial evidence relevant to assessing the complainant's reliability and credibility. Justice MacKenzie acknowledges the importance of avoiding reliance on myths and stereotypes about how a "true victim" of sexual assault would react, but underscores that evidence about how the complaint arose is nonetheless relevant and admissible to support permissible inferences: Greif at paras. 62-64.

- [50] The Court of Appeal also addresses prior consistent statements in *R. v. Singh*, 2021 BCCA 172. The Court cautions against using prior consistent statements for the prohibited inference that repetition enhances truthfulness: Singh at paras. 33, 44. The Court also outlines permissible uses of such evidence, particularly in assessing the reliability and credibility of a complainant's in-court testimony: Singh at paras. 32-34. Finally, the Court notes the unique probative value of exchanges containing prior consistent statements between the complainant and the accused, and their role in assessment of the complainant and the accused's credibility and reliability: Singh at paras. 35-37.

K. Demeanor Evidence

- [51] In this case, the Court has several instances of demeanor evidence available: the complainant's demeanor at the time of her comment outside her neighbour's door, at the time of her disclosure to the accused's neighbours, at the time of her two police statements, and at the time of her in-court testimony.
- [52] Our Court of Appeal instructs in *R. v. Sandhu*, 2012 BCCA 500 at para. 31 that "reasons relating to credibility cannot be based on demeanour alone". Demeanor evidence is but one piece of the broader credibility analysis.

L. Inadvertent Tainting

- [53] Justice Bramwell in *R. v. Richer*, 2023 ONSC 3158 usefully discusses the meaning and import of inadvertent tainting:
- [249] Inadvertent tainting, also referred to as innocent collusion, occurs when a witness' testimony is influenced by hearing evidence from other witnesses. Through conversation with others, a witness may start to remember the situation in question differently or certain details differently or the witness may interpret differently what he or she heard or saw or felt, as a result of hearing the interpretations of others. The inadvertent or innocent nature of this form of witness contamination refers to the fact that it can happen without the witness ever intending to seek out information with a view to changing or aligning their own account. It can happen subconsciously, without the witness even being aware that his or her later account or interpretation of events has been subtly changed by hearing the views and accounts of others.

- [250] Inadvertent tainting should be distinguished from collusion which is the term used to describe the situation in which witnesses get together and decide together what they are going to say to the police and/or in court to appear to be telling a consistent and reliable story.
- [251] It is important to note that just because one witness has heard what someone else will say or believes happened, or has discussed another person's recollections or interpretations, it does not necessarily mean that either witness is not telling the truth or that their evidence was tainted.
- [252] Outright collusion between witnesses is a credibility issue. If a court finds that witnesses have actively tried to "get their stories straight," the ability of the court to find that those witnesses are honest and credible and are intending to tell the truth is compromised. Inadvertent tainting is a reliability issue. A witness whose evidence has been tainted, without him or her realizing it, through inadvertent tainting, may well be a credible witness who appears to be honest, forthright and telling the truth. The witness may well believe he or she is telling the truth. But the fact that his or her account has changed, even subtly, but in a relevant way, because of discussions with others, means that it may be less reliable.

See also *R. v. Ricchio*, 2022 ONCA 772 at para. 21; *R. v. E.M.M.*, 2021 ONCA 436 at para. 19; *R. v. C.G.*, 2021 ONCA 809 at paras. 28-32.

- [54] Ultimately, unlike in respect of collusion, which corrupts all participants' evidence, inadvertent tainting requires the trier of fact to closely examine and determine what impact that innocent information sharing may have had on the evidence of each witness who is a party to the exchange: *C.G.* at para. 32.

M. Scrutiny of the Evidence

- [55] The trier of fact may not subject the defence's evidence to more rigorous scrutiny than the Crown's evidence--to do so is an error of law: *R. v. Roth*, 2020 BCCA 240 at para. 47.

V. evidence of the CROWN

- [56] The witnesses called by the Crown were N, L, and G. N and L each testified by way of CCTV from a separate room with a support person present. I will first address the evidence of G and L.

A. G's Evidence

- [57] G was forthcoming and straightforward. There were no internal inconsistencies. When she was challenged on her certainty regarding a few points of her evidence, she accepted the limitations of her memory where there was a possibility that she was mistaken. G was, as is understandable, protective of N and somewhat her advocate.

- [58] P.A. was her next-door neighbor in an attached townhouse, sharing a wall. She knew him quite well--they spent time together, and they were neighbourly.
- [59] She also knew N quite well, since N was her daughter L's best friend. N would sleep over at G's house, and she took the two girls on outings such as camping, Harrison Hot Springs, and shopping.
- [60] On August 16, 2021, she recalled that L was at P.A.'s watching a movie after they had been out for dinner with P.A. G took P.A. a bottle of wine and observed that he also had a glass of wine at that time, but she was candid that it is possible she could have been mistaken about that. L came home about 10:00 p.m.
- [61] The next morning, when G woke up around 7:00 a.m., she heard commotion coming from P.A.'s residence through the shared wall. She heard really loud noises: banging, shouting, and sounds she believed were consistent with someone thundering down the stairs.
- [62] She then heard screaming outside her door. The doorbell was ringing and someone was kicking at the door. It sounded like somebody desperately wanted to come in. She put on a robe and went down the stairs and by the time she opened her door, N and P.A. were across the landing and down the steps from her front door where the door bell ringing and kicking would have occurred.
- [63] G agreed that it looked like P.A. was restraining N, who was trying to release herself. N's face was puffy and tear stained like she had been crying, and she appeared somewhat hysterical to G.
- [64] G exclaimed, "what the fuck?" P.A. raised his hands into the air and stated, "I did nothing". N then said, in a haunting and confused, angry voice, "you know what you did". G had never seen her like that before.
- [65] P.A. looked confused, and she was confused.
- [66] G further testified that P.A. said something to suggest N's reaction had to do with all the horror movies they were watching.
- [67] G witnessed some of N's interaction with L, and talked with N some more as well. She was not as hysterical as she had been outside but was still sobbing, out of breath, and worked up.
- [68] N provided some information about what had happened, but G did not hear N say anything about sexual touching or other criminal behavior. However, G thought that something inappropriate had happened and she called 911. Police attended quickly, then G and L took N to Surrey Memorial Hospital for a forensic nursing examination. N did not have any further conversations with G about what had happened on August 16 or 17, 2021.

B. L's Evidence

- [69] L was also forthcoming and straightforward. There were no inconsistencies or concerns raised regarding her evidence. She readily admitted the limitations of her memory and was agreeable with all reasonable suggestions made by defence, apart from her being cautious to note when she could not remember something, like whether she had had a sleepover with N the night prior to the alleged event.
- [70] L, who is now 14 years old, told the court N was her best friend in 2021 and had been for a few years at that point. They spent a lot of time together on weekends, summer breaks, and winter breaks from school, when N would stay with her grandpa next door to L.
- [71] On August 16, 2021, L spent the evening at P.A.'s place with N. The three of them watched a movie together, "The Joker", which was a comedy-thriller. She did not find it scary, nor did N appear to be scared by the movie.
- [72] The next morning, L woke up to N screaming and crying hard next to her bed.
- [73] N told L she went to sleep in P.A.'s room. She woke up and P.A. was naked. She had a t-shirt on but no bottoms. She found her clothes and ran to the washroom to put them back on. She thought P.A. had had sex with her.
- [74] L did not recall N telling her anything else had happened. However, she was having trouble understanding N's words at first because N was talking while crying and L was not 100% focused at the time. She was overwhelmed and zoning out at times during the interaction. She testified that N did not tell her anything else. However, it was not every word or the exact words that N had said.
- [75] After the preliminary hearing in January 2023, N told her more about what happened on August 17, 2021, but they did not discuss court or police statements or their evidence.

C. DNA Evidence

- [76] The DNA examination was carried out on N's underwear and on two external vaginal/genital swabs taken by the nurse examiner. Four samples were examined: two from the interior crotch and one from the exterior crotch of N's underwear, and one from an external swab of her vagina. The DNA from the external area of the crotch was collected using a "taping" method that concentrates DNA from a larger surface area, here an area of 12cm x 17cm.
- [77] There was male DNA detected in the vaginal swabs and interior crotch but it was unidentified. There is no inference to be drawn that that male DNA is P.A.'s DNA.
- [78] It is agreed that P.A.'s DNA could not be associated with the samples obtained from the interior crotch of the underwear or the external vaginal swab.

- [79] P.A.'s DNA was found on the exterior of the underwear's crotch. The examination does not provide any information as to how or when the DNA was deposited. The parties agree that there are other ways that it could have been deposited, such as indirectly by contact with a surface or object in the townhouse which contained P.A.'s DNA.
- [80] Crown submits that the Court should remain cognizant that N described digital penetration inside of her vagina and the swab taken was from the outside of her vagina many hours after the event occurred, after she had changed, and after she had used the washroom. There is no evidence regarding what DNA an expert would expect to locate in these circumstances.
- [81] In the result, the DNA report does not provide corroborative evidence that the alleged offences occurred or did not occur.

D. Forensic Nursing Exam

- [82] The forensic nursing evidence is included in the first agreed statement of facts. A head-to-to examination was conducted on the complainant using an "alternative light source" to help visualise evidence. A careful visual inspection was conducted of the complainant's genitals and vagina. The exam was within normal limits, and no abnormalities or atypical findings were made. The findings of the examination neither confirm nor rule out the possibility of sexual violence or abuse.
- [83] The nurse examiner was told the details of the alleged incident by N's step-mother. She said that N went to sleep in her grandpa's room, as it was cooler, and when she woke up in the morning, the blankets were at the bottom of the bed, and her grandpa had no clothes on and her shorts were off.
- [84] The results of this examination were inconclusive, and are not corroborative of either version of events. They do not assist the Court in weighing the credibility or reliability of any of the witnesses.

E. Text Messages

- [85] P.A. texted G at 7:29: "See if you can see what she is freaked out about. Scared the crap out me in dead sleep." "Fkn nightmares and scary movies". At 9:09 a.m. he again texts her: "OMG. [K] just told me what she said. I feel sick! I wouldn't do something to her in a million years! "
- [86] N read the messages in the neighbours' car on the way to the hospital, and accurately recounted their contents.

F. Photo, Exhibit 8

- [87] The photograph of P.A.'s bedroom taken on the morning of August 17, 2021 accurately describes the room that N had seen a number of times previously, and the placement of the blankets that morning. It provides some corroboration of her evidence that she was sleeping in that room when she awoke.

G. N's Evidence

[88] N provided two police statements, both to Corporal Barbour of the Surrey RCMP at Sophie's Place. I will summarise both statements, which were in evidence pursuant to s. 715.1 of the Criminal Code, as well as her evidence at the preliminary inquiry.

(i) First Police Statement, August 18, 2021

[89] N is 12 when she gives her first statement to Corporal Barbour. It is the day after she has run to the neighbours' house. N tells Corporal Barbour she had gone to stay at her grandpa's house around Saturday (which would have been August 14, 2021). She said it was the night of August 16, that it was hot in her room, and so she went to go to sleep in her grandpa's room--something she has done lots of times before. Earlier that night, they watched the movie "The Joker", and then L went home around 9:30 p.m. or just after. She watched Netflix and Youtube with her bunny, Fluffy. Her grandpa said she had to go to bed, so she put her bunny to bed and then turned off the TV probably around 11:30 p.m. She went upstairs and got ready for bed and then discovered her room was hot.

[90] She went into her grandpa's room probably around midnight, and he was laying in the bed awake--they spoke to each other a little before they both went to sleep in his bed in his bedroom. Corporal Barbour asks N if her grandpa takes any medications and she says he will sometimes have a nibble of a marihuana bar or smoke pot to help him fall asleep. N then says that she took melatonin that night in a liquid form. She only takes this liquid melatonin at her grandpa's house because that is what is there, as opposed to at home where they have tablets instead. When she takes melatonin she does not usually wake up at night because it makes her a heavy sleeper.

[91] Her grandpa was wearing shorts, underwear, and a shirt to bed, and gave specific details about his shorts. She described two blankets that she used that night, and she also described the room. N said she was sleeping on the far end of the bed next to the air conditioning. When she woke, both of the two blankets she had used were off of her at the end of the bed, and her grandpa was not under his covers anymore.

[92] N told Corporal Barbour that when she woke, both her underwear and her shorts had been removed, and her grandpa was fully naked. She said she saw a lot of her grandpa that she did not want to see, including his penis, and it was the first time she had seen his penis. She stood up and looked around and thought about what to do. She said she was confused, shocked, and scared.

[93] She then noticed her grandpa wake up and she screamed and ran from the room to the hot room.

[94] She said her grandpa was asking her, "what's wrong?" and "did you have a nightmare?" and he was kind of laughing. She ran to the hot room, which did not have a lock, and her grandpa came and popped her clothes into the room. She could not see him when he did that because he only opened the door a crack. He was saying that they would talk about

what happened in her nightmare, even though she did not remember having a dream that night. She put on her clothes and waited for her grandpa to go away from the door and then she ran out of the room and down the stairs. Her grandpa was in his bedroom at that point.

- [95] She ran to G's house next door. Before G answered the door, her grandpa approached and was asking her to go back inside and stop screaming. He was telling N that people were sleeping, and that she had just had a nightmare. Then he grabbed her, trying to pick up her to take her inside, and she was kicking. Then G answered the door and her grandpa was not holding her anymore, so N ran inside.
- [96] N does not mention the exchange that G testified about, where she said that P.A. said, "I didn't do anything" and N responded, "you know what you did." She was hysterical and crying and screaming at this point. She admits that she does not recall everything she said and everything that P.A. said in that moment.
- [97] G told N to go wake up L. N heard her grandpa talking to G, acting confused, and saying N just had a nightmare.
- [98] N said she went to wake up L and told L everything that had happened. Corporal Barbour asked N what she told G, and N responded, "I said everything that I just told you."
- [99] N said that the police came to the house. She felt really gross and wanted to shower, but the police told her not to shower. N went with L and G to the hospital with a police car following them.
- [100] N said she also texted her mom around that time and told her basically everything she had just told Corporal Barbour. She said she texted it instead of saying it on the phone because she was still really uncomfortable. N said she had had nightmares before, but that was not like this. She said she had had nightmares before, after watching a super scary movie or something like that, but they had only watched "The Joker" the night before, and it was not even scary.
- [101] Corporal Barbour asks N three questions at different points in the statement, in an attempt to elicit more information from N about the night. She asks, "do you remember anything like happening or anything during the night, before you woke up?"; "is there anything else that you can think of that would be important for me to know?"; and "is there anything else that you can think of that you need to talk to me about?" N says no to each of these questions. Corporal Barbour then tells N that she can come back and talk to Corporal Barbour anytime, if there is anything else she remembers or if there is anything else she has not told Corporal Barbour.
- [102] N's demeanor throughout this statement is mostly calm, although there are signs of discomfort and times where it sounds like she might start crying. She appears uncomfortable and quieter when she tells Corporal Barbour that she saw P.A.'s penis.

(ii) Second Police Statement, September 23, 2021

- [103] Corporal Barbour asks N to tell her more about what happened the night of the incident. N repeats the same details she had provided in her first statement. She goes over the sequence of events she described in her first statement. She appears calm and her demeanor overall appears quite similar to her previous statement early on in the conversation, until she provides the following new information.
- [104] N says that she woke up in the night "during it". She said she did not know what to do, so she tried moving over, but P.A. pulled her back and it was really scary. She says she was awake for about an hour before eventually falling back asleep. Then she woke up to P.A. holding her foot on his penis and P.A.'s hand on her vagina in the morning.
- [105] There is a shift in N's demeanor. She is crying and struggling to get the words out. N is again able to calmly answer, with the same information as her previous statement, until Corporal Barbour asks her specifically what woke her up in the middle of the night.
- [106] N appears unable to answer the question out loud and asks to write it down instead. N is then able to get out the phrase, "his fingers were inside me." She is crying and difficult to understand at this point.
- [107] N says that when P.A.'s fingers are inside her she is still wearing what she wore to bed: her shirt, shorts, and underwear. Corporal Barbour tries to elicit information about the positioning of her clothing. N says, "I think it was like this" and demonstrates a motion that appears may be a hand sliding under the clothing. Corporal Barbour does not clarify further.
- [108] N says she was laying on her back. She says she does not know the position her grandpa was in on the bed during the incident in the night because she did not want to look. She says when she moved or pulled away, it was to turn towards the air conditioner. Then P.A. pulled her back onto her back and he continued what she said before.
- [109] N did not know whether P.A. was aware that she was awake at that time. She did not know what time it was when this incident happened in the night, but guessed it was probably around two-ish. She did not know when her shorts and underwear came off, but it was sometime after this and before she woke up in the morning. She believes she must have been asleep when her bottoms were removed.
- [110] N is asked more details about her positioning in the morning and she demonstrates her right leg bent to the side towards P.A. in the bed. She explains and demonstrates that P.A. was on his side and he was holding her right foot against his penis. He had the other hand on her vagina. This too appears very difficult for her to talk about.
- [111] N was asked about what she told L on the morning of August 17, 2021. She could not really remember what she told L, but she knew she did not provide near as many details as she had now given Corporal Barbour. She said that she had not told her mother about everything that had happened, but only that she had woken up naked at her grandpa's house. Corporal Barbour confirmed again whether she had recently told her mother more

and N said no. She said she did tell a little bit more to her auntie, and said she gave her information about the foot and the hand. She said again she only told her mom the sleeping part.

[112] There was also a third statement, on February 14, 2022, where the officer asked N to return to ask her about the differences between the two earlier statements. N responded that she had been scared--it was a very brief statement.

(iii) N's Testimony at the Preliminary Hearing, January 30-31, 2023

[113] N testified at the preliminary hearing about a year and a half after the event that occurred when she was 12 years old. She was now 14 years old.

[114] N drew a diagram and then adjusted it in cross examination. N was asked to draw how she and her grandfather were positioned on the bed when she woke up and he was holding her foot and her vagina. She draws a positioning on the bed which is the first diagram. She was asked whether her grandfather was holding her foot and her vagina as she just illustrated, and she says yes. The diagram that she drew on the spot, using stick figures, does not depict her testimony. When it is put to her that the diagram does not show the touching she described, she agrees and then tries to adjust the diagram to depict that testimony.

(iv) N's Testimony at This Trial, November 20-21, 2023

[115] N's testimony at this trial occurred almost two and a half years after the event. She is now 15 years old. It is understandable that, at this time, the events are no longer fresh in her mind.

[116] The Crown submits that the Court should accept the evidence that N provided in her video police statements as the best evidence of what occurred. Section 715.1 of the Criminal Code allows the court to view a child's evidence at the time when it was most fresh in the child's mind.

VII. Evidence of the accused

[117] P.A. testified that N was staying with him at the time. His relationship with N was very good. She spent quite a lot of time at his place, including nights, and sometimes she would sleep in bed with him. One reason for her sleeping in his bed was that the other room was too hot and his room was the only room with air conditioning. He was aware that N had a history of nightmares, and had heard from her family that it was not rare for her to have extremely bad nightmares. He had seen her crying and screaming and appear confused after nightmares. This morning was similar but she was more upset.

- [118] In cross examination, he said that he had only personally observed two or three nightmares. One time, when she was acting scared and crying, and asked to sleep in his bed, and he assumed she must have had a nightmare. One of the times, she told him she had had a nightmare, and she had come into his room because of the nightmare. He described a third incident, where he woke up in the morning and N was wrapped up in her blanket on the corner of his bed and she said she had had a nightmare.
- [119] He had no recollection of N ever waking up from a nightmare and maintaining a belief that what happened was real. He had never seen her run to a neighbour's house. He had never seen her accuse him of doing something because of a nightmare.
- [120] P.A. testified that, on the evening of August 16, 2021, he watched the movie "The Joker" with N and L. He said N was scared by multiple parts of the movie and a couple of times she hid her face in the covers. Both she and L jumped and screamed several times during the movie.
- [121] L went home after the movie, and then he told N to go to bed. He had told N that L could not sleep over another night. He describes an uncharacteristic exchange between him and N where she refuses to go to bed. He gives up and goes to bed himself, leaving her awake downstairs. He was wearing shorts and a T-shirt.
- [122] P.A. takes some THC and Gravol, as is usual for him, and goes to sleep. That is the last thing he remembers before waking up from a dead sleep to N screaming in his bedroom the next morning. She ran from the room so quickly, at a point where he is just waking, that he did not know whether she was clothed or naked in that moment. He was wearing the same clothes at this point. He accepted that it would have been concerning if either she or he was in a state of undress together that morning. He had no knowledge of her having been in his bed.
- [123] N runs from his room to the bathroom, where she prevented him from entering by locking the door. He agrees that she flees the house and is screaming and crying outside. He is trying to quiet her so she does not wake up the neighbourhood, and get her to come back inside the house. He tries to corral her, then releases her and she goes next door.
- [124] He denies restraining N at the time that G opens the door. He denies removing his hands at that moment, lifting them in the air, and saying, "I did not do anything". He denies N stating, "you know what you did". He told N to go inside and see L. She then runs into G's house. He tells G he thinks her behavior is a reaction to another nightmare. They discuss a possible night terror because of horror movies.
- [125] P.A. then went home. He heard later that morning from K that N thought something had happened.

VIII. analysis

- [126] In assessing the evidence of N, who was 12 at the time of the events and is 15 now, I am guided and instructed by the law as set out above, including regarding the evidence of a child witness, and regarding the evidence of a complainant in a case involving sexual offences.
- [127] Before turning to the analysis generally, I cite two specific instances of the application of the law regarding sexual offences. Here, the complainant had two differing reactions to the alleged sexual abuse: one in the night, where she remained with her abuser and pretended to be asleep; and a second in the morning, where she fled and immediately sought help. The Court must use caution when relying on the reaction of a sexual assault complainant as a means of assessing the credibility of their evidence, as this is the territory of myths and stereotypes regarding how victims of sexual assault should behave. There is no inviolable rule as to how a sexual assault victim will react to abuse. That includes that the Court cannot rely on an expectation that a sexual assault victim will react in the same way to different acts of sexual abuse, or in the same way they respond to other fears.
- [128] With regard to the nature of the disclosure made to the police in two differing statements, the accused argued that the complainant did not simply hold back information, but was untruthful with police in holding back that information. However, when a child is interviewed by police about an offence and does not share all of the allegations at that time, there would inherently be an aspect of dishonesty involved. The law pertaining to delayed disclosure and piecemeal disclosure are applicable, and waiting to her second statement to disclose the nature of the sexual touching that had occurred does not, on its own, determine credibility: D.D. at para. 65.
- [129] I commence with the evidence of the Crown, and with the evidence of N. Her testimony was given pursuant to s. 715.1, with the two videotaped statements played first. She was then examined by counsel.
- [130] The essence of the two statements is that, in the first statement, N describes falling asleep on the accused's bed, and waking up in the morning with her shorts off, him naked and on top of the covers. When she sees him awaken, she becomes scared, then screams and runs from the room. Defence counsel submits that even if proven, these allegations do not amount to an offence.
- [131] The second statement includes these allegations in addition to allegations that, at around 2:00a.m., the accused had his finger inside her vagina for about an hour, she fell back asleep, and when she woke he had her foot on his penis and his hand on her vagina.
- [132] I found N to be a sincere young person who appeared to take the court process seriously. She considered the questions, both in the videos when she was 12 and in court, and responded carefully. In order to assess her credibility and reliability, I will address the inconsistencies relied on by the defence and also addressed by the Crown. In so doing, I

state that the standard for assessing all evidence in a criminal trial is founded on the presumption of innocence and the necessity for proof beyond a reasonable doubt. That necessity is the lens through which evidence is discussed and characterised.

- [133] The first inconsistency relied on by the defence is that the complainant did not tell Corporal Barbour, L, or G everything that happened because she did not feel comfortable sharing everything at the time. She said she was not really sure why she was not comfortable sharing everything at the time, adding that she was nervous and upset, and probably worrying about the outcome. Under cross examination, she testified that by "outcome" she meant she was worried about how it would affect her, that she was scared people would pity her if she told them what had been done to her.
- [134] As stated above, on its own, telling the full narrative to Corporal Barbour in two stages is not determinative of credibility, but is rather piecemeal disclosure. There was little opportunity to tell G, given that P.A. was also outside with them at the first conversation with G, and then G let N and L talk privately in L's room.
- [135] However, I agree that the inconsistency in telling L only the substance of the first statement, together with that she thought P.A. may have had sex with her is a material inconsistency. L was her best friend. That he may have had sex with her is more serious than his finger in her vagina, as she admitted in cross examination. However, I do not place any weight on her testimony at trial that she forgot that she told L at that time that she thought P.A. may have had sex with her. It is the disclosure to L at the time of the possible sex but not the fingering that is the material inconsistency.
- [136] There is also an inconsistency in her describing to L where she ran to when she fled P.A. room. She told L that she ran to the washroom, but told Corporal Barbour that she ran to the hot room, or other bedroom. I find this inconsistency to also be material because this telling to L is a short time after the event, and while it does not go to the alleged assault itself, it is a part of the narrative of her describing the events which have just occurred.
- [137] Another inconsistency is regarding what the complainant was wearing during the fingering. In her second statement, she told the officer that when she woke up to the fingering she was wearing the same shorts and shirt that she had worn to bed. She was not awake when her shorts and underwear were removed. At the preliminary inquiry, however, she testified that at the time of the fingering her shorts and underwear were not on her body.
- [138] Similarly, in her second statement, she told the officer that she did not see the accused during the fingering because she did not want to look. At the preliminary inquiry, she testified that he was laying beside her on his side. She could see him by the light coming in the window from the stars and the moon. I find these to be significant material inconsistencies because they both describe the time of the offence alleged, a time that she is unlikely to be mistaken.

- [139] There is also an inconsistency in the evidence from the preliminary inquiry and the diagram of stick people lying in bed. Regarding the positioning of the accused and complainant when she awoke in the morning, as described in the second statement, she first drew the diagram without showing the hand and foot on her vagina and on his penis. On further questioning, she adjusted the diagram.
- [140] It is submitted by the defence that there has been some tainting because of what her aunt and her mother told her between the first and second statement. In the preliminary inquiry, it was put to the complainant that her mother had asked her if the accused had put his fingers inside her, and she cried harder and harder until she finally said yes to her mother. She testified that her mother told her she had to go back to provide a second statement and she would not have gone back if her mother had not insisted.
- [141] This submission is tied to the submission regarding demeanour. The defence submits that the change in the complainant's demeanour during the second statement, the intense crying and inability to talk, is a result of her telling a story that her mother suggested to her and that she knows is not true, rather than being upset at actual events that occurred.
- [142] In summary, the three main areas raised by the defence regarding the complainant's evidence are: piecemeal disclosure; inconsistencies between her statements and testimony; and her behavior or reactions to the alleged assault. It is the totality, circumstances, and nature of the inconsistencies collectively that I find raise a reasonable doubt. While piecemeal disclosure without more does not, on its own, raise an issue of credibility, here there is more. The inconsistencies are material and do raise a reasonable doubt.
- [143] Taking into account the whole of the evidence, I find the evidence of the complainant is not sufficiently reliable to establish proof beyond a reasonable doubt.
- [144] In addition, the evidence of the accused raises a reasonable doubt. P.A. has denied that he touched N at all, and specifically that he touched her as alleged. His evidence is that he was sound asleep from when he went to bed, with N still downstairs watching television, until he was awoken from a deep sleep by her screaming. That she had had a nightmare has a ring of truth, given her history. He was forthright in saying that this one seemed more severe than her previous nightmares he had seen. He immediately asks her if it was a nightmare, and expresses that concern to G.
- [145] The accused's evidence is consistent with that of L and G regarding arriving at their home and N's demeanour at that time. The exception of G's evidence that he said then that he did not do anything, while he denied saying it, can be understood in the context of the heightened emotion of N's intense upset and the adults' concern about her. N too does not remember that which G said both she and P.A. said.
- [146] P.A. has provided a reasonable account of his learning of the allegations against him from his telephone conversation with his daughter after N had texted her.

[147] The DNA evidence and the forensic nursing examination are inconsistent with the accused's evidence.

[148] On the evidence, I can and do find that N went to sleep in the accused's bed. She woke up there; something had deeply upset her. I cannot be sure what upset her, or that the allegations have been proven. Although I have suspicions, on the entirety of the evidence, I cannot reject the accused's denials which also raise a reasonable doubt.

[149] The Crown has therefore not proven the offences to the high standard required on a criminal trial.

[150] P.A., I therefore find you not guilty on both counts.

"The Honourable Madam Justice Watchuk"

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