

CANADA / JUDGMENT

R. v. R.O.

2022 BCCA 270

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 270 R. v. R.O.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. R.O.,

2022 BCCA 270

Date: 20220803

Docket: CA47485

Between:

Regina

Respondent

And

R.O.

Appellant

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Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

On appeal from: An order of the Provincial Court of British Columbia, dated

November 6, 2019 (conviction) (R. v. R.O., Kamloops Docket 105370-1).

Counsel for the Appellant:

K.A. Kirkpatrick

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

May 4, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 3, 2022

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

Summary:

The appellant appeals from his conviction for indecent assault, contrary to s. 156 of the Criminal Code, for assaults of the minor complainant on numerous occasions between January 1, 1974 and December 31, 1977. He argues that the judge erred in failing to reconcile inconsistent evidence. Held: Appeal dismissed. It is appropriate to consider the judge's colloquy with counsel during the course of submissions, which makes clear that the judge was alive to the evidence with respect to whether the appellant was present in the location in which the assaults were alleged to have happened. That the judge took a different view of the evidence than argued by the appellant does not mean that he misapprehended or failed to give effect to the evidence.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] On November 6, 2019, the appellant was convicted of indecently assaulting M.L. on numerous occasions between January 1, 1974 and December 31, 1977, when M.L. was between 7 and 10 years old. The assaults were found to have occurred at the home of the complainant's aunt in Lillooet, British Columbia. The appellant contends the trial judge did not adequately address the evidence of his opportunity to commit the offence, in particular the evidence of a witness that he had never seen the complainant at the house where the assaults were found to have occurred.

Background and Context

[2] On March 1, 2018 the appellant was charged the following offences:

- a) the indecent assault of a male person M.L., from the 1st day of January 1974 to the 31st day of December 1977, contrary to s. 156 of the Criminal Code, R.S.C. 1970, c. C-34; and
- b) the indecent assault of another male person J.L., from the 12th day of January 1972 to the 31st day of December 1972 contrary to s. 156 of the Criminal Code.

[3] His trial in the Provincial Court commenced on March 13, 2019. Crown adduced the evidence of the two complainants.

[4] M.L. testified that he was born in 1967, raised in Lillooet, and lived there until he was about 18 or 19. Between 1974 and 1977, he lived in a house with his mother. Initially, his grandmother lived in a cabin on the same property and he spent a lot of time with her while his mother was working or drinking. When his aunt moved to a home near a hotel in town, some time during this period, his grandmother moved in with her, and M.L. then spent a lot of time at that house. In these reasons, when I refer to the "aunt's house", this is the house to which I refer.

[5] M.L. testified that, although the appellant was living at the home of M.L.'s great-grandmother, he was always around the aunt's home. He seemed to often be there at bath time, and he frequently came into the bathroom when M.L. was bathing and sexually abused him there. M.L. testified:

A It was -- my grandmother, like I said, she was very, very punctual in a lot of things and she made sure that, you know, there was always -- pretty much always had time to bath before you go to bed. Whether or not it was a sponge bath or bath bath, but most of the time, because it was after dinner, she would relax. So we'd have baths, but the bathroom door would be left open because she wouldn't close the door with -- with kids being in the tub. She'd always hear and of course, as kids, we're splashing, playing.

Um, uh, getting to -- it was around that, you know, I can't remember exactly how long after, in that time period, you know, like, always end up seeing -- seeing [the appellant] around dinnertime, he's always around. He knew [my aunt], I believe he knew [my aunt] quite well and so he was around the hotel also. I don't know whether or not he worked there or not or helped out, I

can't recall to that -- that aspect of it. But he was -- always seemed to be around, dinnertime. Even though as far as I knew, he was living out on the property with -- with [M.L.'s great-grandmother] Always seemed to be in town. ...

Um, but I always saw -- always saw him there. It just . . . dinnertime, always see him around and at just -- and when it come time to those bath times, he was always around

[6] He testified that the abuse occurred there:

A [the appellant] started coming into the bathroom when I was in the bathroom a lot. A lot of things never really happened right away. Um, but as time went on, um, yeah, it would -- as time went on things just got a little --

At the time, I thought it was just weird, you know. Seeing, in my mind, a grown man standing there holding his -- holding his parts in his hand and showing a young kid, um. It's just -- it was just really weird. But at -- like, at first nothing ever really happened and then, you know, I'm out of the tub and he'd come in and use the bathroom and you know, he'd -- he would just kind of -- he'd just kind of watch us. Watch us in the bathroom, and play with himself and you know, there were -- and it went from that point to, you know, him wanting us to touch it.

[7] He said the appellant first forced him to touch his penis and later progressed to oral and anal penetration. He thought the abuse started when he was about seven (in 1974) and continued until he no longer regularly went to his grandmother's house after school, when he joined after school activities at about age 10 or 11 (in 1977-78).

[8] He described the frequency of abuse as follows:

Q Okay. So in that timeframe that you've provided us of your age range, are you able to say how often these incidents of rubbing, touching, that you've described -- at the hands of [the appellant], how -- how often they occurred?

A I've always put -- my memory and what I recollect, I -- it was like a couple of days a week, two maybe three if that. Sometimes less, sometimes, you know, it's -- on average, it was at least a couple of times a week when I was there. You know, it's about the best estimate I could put on it. I know it's a couple of times a week -

Q Okay.

A -- that he would end -- end up going by and like I said, my grandmother was so punctual on things. You know, like there was dinner at 5:00, bath, bed. You know. By the time, bed, 7:00, 7:30, we were in bed. You know, so we'd eat dinner at 5:00, jumped in and you had a bath. And from that point on it was -- it was clockwork for it.

[9] The following exchanges occurred in M.L.'s cross-examination:

Q [N]ow, the events that you were talking about in your direct evidence involving [the appellant], you say those events happened at your [aunt]'s house?

A It would have been at my [aunt]'s house, yes.

Q And that would be also your grandma's house at the time?

A Yeah, she'd -- she'd moved in with her, yeah.

Q And that's located right next to the [hotel] here in Lillooet?

A Yes.

...

Q Now, you'd mentioned that [the appellant] seemed to show up for dinner frequently?

A I don't know if it was actually for dinner but he would always -- I'd always see -- it seemed like I always seen him -- seem around the dinner time because things were on such a schedule that I don't --

Q And so is it your memory that he ate dinner with the family there?

A I can't recall. The -- I'm sure he's probably had some -- had food there because he had stayed there occasionally. But when we ate dinner, the kids and I, we all sat at the table So there we never really sat down as -- as a family . Like, my -- a lot of times my grandmother would wait to eat. Us kids sat and ate. And then bath shortly thereafter.

...

Q. Do you know or do you remember ever knowing why he was coming over? Did he ever say why he was coming over?

A Mm, no, I just remember him being around. Like, from what I -- what I know, he was -- he was friends with [my aunt] and he'd be around. She was at the bar a lot. And with our, um -- she was one of my aunts, he was one of my aunt's friends. So he was -- he was around a fair amount from what I recall, yes.

...

Q. And when it comes to [the appellant] being over at your [aunt]'s house, you would disagree that [the appellant] was almost never, ever at your [aunt]'s house?

A He was there a lot. He was there a lot more than I thought was normal but I'm -- at that time I was a kid. But yeah, he was -- he was definitely there a lot. But in --

Q If he says the opposite, you would disagree with that?

A Of course.

[10] M.L. did not testify about nor was he asked about the presence of his older brother J.L. at their aunt's house.

- [11] He testified that the appellant told him not to tell anyone what he had done, that if he did so no one would believe him and he would be punished. As a result, he did not disclose the abuse until he was encouraged by his partner to give a statement to the RCMP in the spring of 2017.
- [12] J.L. was born in 1962. He would therefore have been between 12 and 15 years old when the abuse described by M.L. was said to have occurred. He testified to his own abuse by the appellant and was cross-examined on the allegations made by M.L.
- [13] Of his own abuse, he said that he spent weekends at his great-grandmother's house, and that the appellant, a "fixture" on the ranch, took advantage of him when there was no one around from the age of five until he was about nine or ten years old (therefore from 1967 to about 1972). The appellant would have J.L. touch his penis, have him perform fellatio, and would attempt to perform anal sex on J.L.
- [14] Of the opportunity for the appellant to abuse M.L. he testified, in cross-examination as follows

Q And did you ever visit the house near the [hotel]?

A Yes.

Q And on any occasion that you visited there did you see [the appellant] there?

A No.

Q You never saw [the appellant] there?

A Myself, I've never seen him at that house.

Q How often did you visit that house?

A In 1977 I moved away to go to Kamloops to go ... -- to go finish schooling. I don't ever remem -- recall [the appellant] being at that house and I would go to my aunt's a fair bit.

Q Well, how would you define "a fair bit", weekly?

A Oh, more than weekly.

Q And did you have an opportunity to go to the house near the [hotel] where your [aunt] was living at around dinnertime?

A I would go at all hours of the day.

Q And you don't recall ever seeing [the appellant] there?

A To be honest, no, I don't ever recall seeing him there.

Q Now, it's over 40 years since the events that you have described --

A Correct.

Q -- in the late 60s, in the early 70s and my question for you is it could be that you have mixed up [the appellant] for another person?

A Absolutely not.

[15] The appellant testified on his own behalf. It was his evidence that he had not touched either complainant in a sexual manner and that he never been inside the house occupied by the aunt near the hotel. He was asked:

Q [Y]ou know where this house is that was described in the evidence, then, next to the [hotel]?

A Yes...

Q And it's still there today?

A Yes, it is.

Q And again, your evidence on -- on having been to that house is what? Have you been to the house or not?

A I've been up to the back door, that's it.

[16] In the course of his submissions, defence counsel contended the testimony of J.L. corroborated the evidence of the appellant and contradicted that of the complainant M.L. He argued:

[T]he court has to address the inconsistency between what [J.L.] said and what [M.L.] said about [the appellant] going to the house next to the [hotel]. And the defence submits this is a major inconsistency, because [M.L.] was clear that it happened at [the aunt's] house next to the [hotel].

[17] After citing the evidence of J.L. quoted above, he continued:

... [J.L.] testified as to some other incidents where he saw [the appellant] after [J.L.] claims to have been sexually assaulted] and the gist of his testimony was that it was to some extent traumatizing. So the defence submission is that when [J.L.] says that [the appellant] wasn't there, this court can accept that [the appellant] wasn't there. Which means that [M.L.] was wrong in his account.

[18] The following exchange with the trial judge ensued:

CNSL D. McNAMEE: [M.L.]'s account was that it happened repeatedly at the same location. It's the defence submission this is something that couldn't be forgotten or mixed up.

THE COURT: Well, other than [the appellant]'s assertion that he'd never been inside the [house next to the hotel], there's no other evidence about -- about that point other than what [M.L.] had to say about it.

CNSL D. McNAMEE: I would submit that [J.L.]'s evidence is on point.

THE COURT: Well, [J.L.] says that he would go there all hours of the day and he had been - dinnertime as mentioned. And he said he didn't recall ever seeing [the appellant] there and agreed that it was over 40 years since those events. He didn't have a recollection of it after 40 years. [Emphasis added.]

[19] When defence counsel pointed out that J.L. expressly said that he did not see the appellant at his aunt's home on any occasion, the trial judge noted:

THE COURT: Yeah, but he goes on to say at line 23, when he's asked a second time:

Q And you don't recall ever seeing [the appellant] there?

A To be honest, no, I don't ever recall seeing him there.

And the next question:

Q Now, it's over 40 years since the events that you have described --

A Correct.

[20] Defence counsel then said:

[H]is evidence seems to be repeatedly that he never saw him there and even if Your Honour can only take from this that he doesn't ever recall seeing him there, [the appellant] is in a position of essentially -- he shouldn't be in a position of trying to disprove a negative, trying to prove that he was never there.

[T]he submission involving [the testimony of J.L.] is ... first that he says that he never saw him there. But if -- if Your Honour says that he -- his evidence that you only can take from it that he doesn't recall seeing him there

But even if the only evidence that can be taken is that [J.L.] is saying that he just doesn't recall it, the defence submission is that that is very significant. If the court accepts [J.L.]'s account, the fact that [J.L.] doesn't recall seeing [the appellant] there is significant evidence, that [J.L.] would have been expected to recall [the appellant] there. ... [Emphasis added.]

[21] The Crown's position was that there was no particular reason for J.L. to remember whether the appellant was ever at his aunt's house in the period from 1974 to 1977. J.L.'s evidence was that after 1972, the appellant was no longer abusing him or in a position to do so. There was no reason for J.L. to have a clear, distinct recollection of the occasions on which he saw the appellant or "to remember random events or random incidents where he bumps into him occasionally on the street in Lillooet or in a house that is a house that his family goes to". Further, the Crown submitted, M.L. described occasions when abuse occurred as follows:

... Dinnertime is clockwork and it's always between 5:30ish to 7:30, that's when dinner, bath time, bedtime happens. And in those timeframes, that's when Grandma is at the TV with her glass of wine, sometimes taking a snooze, waiting for the kids to get ready for bed. That was her downtime.

That is when he's alleged to be -- that's when the accused is alleged to be in the home. It's very specific.

...

... Grandma is there. That's the only -- those are the only people that are there. So of course [J.L.] isn't going to remember when [the appellant] is there because he's not around when [M.L.] is alleging that these incidents are happening to him. So there is no frame of reference for [J.L.] to have an incident for [the appellant] to be in the same vicinity as [M.L.]. Nor for [J.L.] to be there.

Judgment at Trial

- [22] The judge dismissed the charge set out in Count 2 because there was a reasonable doubt "whether the offence started and ended before the start date in Count 2 of the indictment", January 12, 1972, the appellant's 18th birthday.
- [23] The appellant was found guilty of Count 1. The whole of the rationale for conviction is in the following paragraphs of the judgment:
- [54] I have to say that in the nearly four decades that I have been involved in the practice of law or as a judge in the courts of law, I have rarely heard a more telling complaint than that rendered by [M.L.]. His evidence struck entirely the right note as a recollection of a grown man trying to recall and successfully, in my view, doing so, the events which had been so significant in his life. It was a remarkable piece of evidence and I was very impressed by it.
- [55] [The appellant], as I say, must be recognized to have had a difficult task. I found his evidence less reliable and less credible. He was uncertain and unclear in a number of areas where he would have been expected to. They have been outlined by the Crown in her argument. I would point out his uncertainty as to what was going on with his licenses, not that a lot turns on it beyond the fact that it damaged his reliability and also, in my view, his credibility.
- [56] In my view, on the assessment of the evidence, I find the Crown case persuasive with respect to Count 1. I am not left with any reasonable doubt, either on the evidence of [the appellant] or on the evidence as a whole, and in the result I find you guilty on Count 1 with respect to [M.L.].
- [24] The judge did not mention J.L.'s evidence with respect to the appellant's presence or non-presence in the aunt's house in his reasons for judgment. He did not expressly, in his reasons, address defence counsel's submission that there was an inconsistency between what J.L. said and what M.L. said about the appellant going to the house next to the hotel.

Discussion and Analysis

- [25] The appellant says the trial judge had a duty to reconcile inconsistent evidence and erred in law in failing to do so. The trial judge did not address the issue of the inconsistency between the complainants, and between the complainants and the appellant. The inconsistencies were significant--going to the core issue at trial--and not peripheral. Although this appeal is

not framed as one founded upon insufficiency of reasons, the appellant says the reasons do not address a critical inconsistency and that can only be because the judge misapprehended the effect of the evidence of J.L. In this regard, he cites the observation of Doherty J.A. in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 538 (C.A.) to the effect that:

A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence.

- [26] Citing *R. v. C.G.*, 2021 ONCA 809, the appellant says that while a trial judge is not required to address each and every piece of evidence, a judge is required to address crucial evidence that bears directly on the credibility and reliability of a witness. A failure to do so undermines the trial judge's assessment of credibility: *R. v. M.D.*, 2021 BCCA 339 at para. 58, citing *R. v. Dewar*, 2001 BCCA 561 at para. 23 and *Whitehouse v. Reimer* (1980), 116 D.L.R. (3d) 594 at 595 (Alta. C.A.).
- [27] The appellant correctly notes that in *M.D.*, this Court recently reaffirmed the importance of basing credibility determinations on a correct apprehension of the evidence.
- [28] In my opinion, however, it is clear from the record that the trial judge was aware of the evidence of J.L. and the significance attributed to it by the appellant, but he did not consider J.L.'s evidence to be clearly inconsistent with the evidence of M.L. That is clear from the colloquy with counsel, as noted above at paras. 18-19, in the course of submissions with respect to the effect of the testimony of J.L. that immediately preceded the oral judgment on November 6, 2019.
- [29] In my view, it is appropriate in this case to consider that colloquy in weighing the submission that the failure to expressly address what is said to be a clear inconsistency in the evidence reflects a misapprehension.
- [30] The approach taken to appeals founded upon an allegation of insufficient reasons is instructive. In such cases, the trial judge's reasons must be assessed in their full context. As Karakatsanis J. writing for the majority in *R. v. G.F.*, 2021 SCC 20 observed:
- [69] This Court has repeatedly and consistently emphasized the importance of a functional and contextual reading of a trial judge's reasons when those reasons are alleged to be insufficient: *Sheppard*, at paras. 28-33 and 53; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 19; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 101; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 25; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at paras. 10, 15 and 19; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 15; *R. v. Chung*, 2020 SCC 8, at paras. 13 and 33. Appellate courts must not finely parse the trial judge's reasons in a search for error: *Chung*, at paras. 13 and 33. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what

the trial judge decided and why they decided that way in a manner that permits effective appellate review. As McLachlin C.J. put it in *R.E.M.*, "The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded": para. 17. And as Charron J. stated in *Dinardo*, "the inquiry into the sufficiency of the reasons should be directed at whether the reasons respond to the case's live issues": para. 31. [Emphasis added.]

- [31] The same may be said where omission of reference to evidence is said to reflect a misapprehension. The reasons must be read in context of the evidence and submissions. In *R. v. Coreman*, 2021 ABCA 107, relied upon by the appellant as an authoritative description of the trial judge's role in cases involving historic sexual assault, the court held:
- [28] The key question in determining whether the trial judge's reasons are sufficient in this case is whether the reasons, in the context of the evidence, the submissions of counsel and the history of the trial show why the trial judge disbelieved the appellant and was not left with a reasonable doubt that he had sexually assaulted the complainants. [Emphasis added.]
- [32] As a general rule, as Simmons J.A. noted in *R. v. Smith* (2001), 161 C.C.C. (3d) 1 at para. 45 (Ont. C.A.), "[I]t is generally neither appropriate nor possible to draw inferences concerning a trial judge's reasons for a ruling based on colloquy with counsel." As he noted, that is because "judges routinely probe submissions to test the viability of various avenues of decision".
- [33] However, some reference to the exchanges between judges and counsel in the course of submissions may be considered in weighing arguments on appeal. For example, in *Williams v. Unrau Williams*, 2004 BCCA 577 at para. 42, Finch C.J.B.C. rejected the appellant's argument that the trial judge had overlooked a party's submission because he had not referred to it in his reasons by referring to the fact that the judge "took pains during final submissions to clarify and understand the positions of the parties and made careful note of them" and his awareness of the issue was "apparent from the colloquy in which he engaged them during their respective submissions".
- [34] In *R. v. Hehn*, 2008 BCCA 170, this Court noted at para. 35, that the focus of an appeal cannot be on a colloquy during submissions between the court and counsel, "for the reason that judges often put forward a proposition to test counsel's theory of the case, or to suggest an alternative theory" but added a caveat:
- [35] ... At most, such comments by a trial judge may assist in understanding a trial judge's reasons as they did in *Dubois*
- [35] In *R. v. Dubois*, [1980] 2 S.C.R. 21, rev'g (1979), 49 C.C.C. (2d) 501 (Alta. C.A.), the colloquy illuminated the judge's misapprehension. The Supreme Court of Canada quashed an acquittal and ordered a new trial by adopting the dissenting reasons of McGillivray C.J.A. who had written at 509:

... I am respectfully of the view that the learned trial Judge's observations in the course of argument, taken with his reasons for judgment, establish clearly that he failed to distinguish between a rational conclusion, based on evidence, and a conclusion based on conjecture and unsupported by evidence; and that this is an error in law, and that he misdirected himself.

[36] In *Ganges Kangro Properties Ltd. v. Shepard*, 2015 BCCA 522, in circumstances that bear some resemblance to those before us, Kirkpatrick J.A. rejected the argument that the colloquy between the judge and counsel should not be considered in addressing the adequacy of reasons in a case turning upon credibility of a witness. She held:

[48] The second question is whether this Court can consider the judge's colloquy with counsel to assist in understanding his reasons for rejecting Mr. Wilson's evidence. There is authority for the proposition that an appellate court may examine the record as a whole to determine whether the trial judge gave sufficient reasons: *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621 at paras. 12-13; see also *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 101. Examining the record in this context is distinct from the proposition advanced in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 355, 356 (B.C.C.A.), and affirmed in *Chancery Estate Holdings Corp. v. Jetha*, 2013 BCCA 145 at para. 51, that colloquies with counsel do not form part of the reasons for judgment. On this basis, I would find that it is open to this Court to consider the judge's colloquy in assessing whether he gave sufficient reasons for rejecting Mr. Wilson's evidence.

[37] She concluded that the colloquy effectively answered the complaint that a significant inconsistency (arising from expert evidence set out in what is referred to as the "Wilson Report") had not been addressed by the judge in the reasons:

[58] In my opinion, when one examines the Wilson Report itself and the concerns expressed by the judge in his colloquy with counsel, it is clear that Mr. Wilson's evidence was not so critical to the issues before the court that the judge's failure to articulate more detailed reasons for rejecting this evidence amounts to a reversible error. The Wilson Report did not address the circumstances that prevailed at the relevant time, and there was cogent evidence from lay witnesses that explained the cause of the December Flooding (a topic I will address later in these reasons). It was open to the judge to reject this expert evidence as "unhelpful".

[38] It is apparent in the passages I have excerpted from the transcript in this case that the trial judge was aware of the evidence relied upon by the appellant and the appellant's argument that there was inconsistent evidence with respect to his presence in the complainants' aunt's house.

- [39] Whether the reasons for judgment in the case fail to give proper effect to the evidence of J.L. hinges upon whether J.L.'s evidence that he did not recall seeing the appellant at the aunt's house was "significant exculpatory evidence, the presence of which makes a finding of guilt beyond a reasonable doubt unthinkable, or at least highly unlikely, absent a thorough explanation of why it does not": C.G. at para. 57. The trial judge made clear in the course of submissions that he did not consider the evidence of J.L. to be so exculpatory.
- [40] The Crown says, as it argued at trial, that J.L.'s evidence was not inherently inconsistent with M.L.'s evidence. It says J.L. did not testify to the length or the purpose of his visits to his aunt's house, and that the only evidence about what happened when M.L. was in the home came from M.L. himself, who was never asked whether his brother J.L. was often or ever there at the same times as he was.
- [41] It was open to the trial judge to take that view of the evidence of J.L. with respect to the alleged inconsistency. M.L. was very young when the offences occurred; his evidence about the appellant's presence at his aunt's house was vague and non-specific. His significant memories concerned what occurred in the bathroom when he was alone with the appellant. Neither J.L. nor M.L. were asked about the other's presence at their aunt's house, or if they were ever there at the same time. And, of course, the events in question occurred long ago.
- [42] I agree with the Crown's submission that the fact that the judge took a different view of J.L.'s evidence than that urged upon him by the appellant's counsel does not reflect a misapprehension or failure to give effect to the evidence.
- [43] Finally, I note that in her oral submissions on appeal, counsel for the appellant drew our attention to confusion or lack of clarity in the reasons with respect to the distinction between M.L.'s grandmother's cabin on his mother's property and the aunt's house. In my view, it is clear from the reasons that the judge understood M.L.'s evidence to be that he was abused at the house shared by his grandmother and his aunt "near the [hotel]", where [the appellant] dropped by "at least a couple of times a week". The errors in the description of the house in the reasons, in my view, are immaterial.

[44] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Fenlon"

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