

CANADA / JUDGMENT

R. v. S.M.P.

2025 BCSC 912

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Supreme Court of British Columbia

DECIDED

9 May 2025

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2025 BCSC 912 R. v. S.M.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. S.M.P.,

2025 BCSC 912

Date: 20250509

Docket: 45063

Registry: Duncan

Rex

v.

S.M.P.

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Before: The Honourable Justice E. McDonald

Oral Reasons for Judgment

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Place and Date of Trial:

Duncan, B.C.

April 7-16, 2025

Place and Date of Judgment:

Duncan, B.C.

May 9, 2025

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[1] These reasons for judgment were delivered orally. They have since been edited for distribution and publication.

Introduction

- [2] The accused, S.M.P., is charged with one count of sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code] and one count of sexual interference contrary to s. 151 of the Code. The Crown alleges that the accused committed these offences against the complainant, S.S., at a time when the complainant was under 16 years of age. The complainant was 13 years old when she made her video statement to police and she was 15 years old when testifying at the trial.
- [3] The offences are alleged to have taken place when the complainant was staying at her grandmother's home, where the accused and the complainant's grandmother lived. The accused had a grandfather-like relationship with the complainant. The accused had been in a relationship with the complainant's grandmother for many years and he has known the complainant since she was an infant.
- [4] In the complainant's video statement to the police made on March 8, 2023, she described that when she was 12 years old, the accused committed the sexual offences against her while she was staying overnight at her grandmother's home. The alleged offences began with the accused touching the complainant's bum and whispering sexual things to her and escalated to include vaginal and anal intercourse. Following a voir dire, the complainant's video statement was admitted as evidence in the trial pursuant to s. 715.1 of the Code.
- [5] Both the complainant and her mother, S.W., testified at the trial. In addition, a police officer, Constable Green, testified about taking a statement from S.W. and arresting the accused. During the voir dire concerning the admissibility of the video statement, the Crown called Corporal Arrowsmith. Corporal Arrowsmith testified about taking the complainant's police statement on March 8, 2023. By consent, Cpl. Arrowsmith's evidence provided at the voir dire was admitted into evidence at the trial.
- [6] As is his right, the accused did not testify. The accused is presumed innocent and the defence has no obligation to prove anything since the burden of proof always rests with the Crown.
- [7] I will begin these reasons with a summary of the relevant evidence in chronological order and I will comment on the issues arising in the evidence during my review. Even though the accused did not testify, credibility remains a vital issue and so I instruct myself on the application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [W.(D.)] which applies to other exculpatory evidence that emerges during trial proceedings. I will then examine the legal principles that apply and finally, I will apply the relevant law to my analysis of the evidence.

Summary of the Evidence

Evidence of Corporal Arrowsmith

- [8] Corporal Bryanna Arrowsmith testified that on March 8, 2023, she met with the complainant and her mother, S.W., at the RCMP Detachment. Corporal Arrowsmith, who is trained and experienced in taking statements from children, took the complainant's video statement. During the video statement, Cpl. Arrowsmith labelled the body parts of drawings of gingerbread people, one male and one female, using the names that the complainant provided for various body parts such as genitalia.
- [9] The complainant referred to the vagina of the female gingerbread person as the "privates" and the penis of the male gingerbread person as the "pee-pee". Corporal Arrowsmith labelled the drawings as the complainant described the parts during her video statement.
- [10] During the video statement, the complainant pointed to things on the drawings to indicate the body parts she was referring to. Corporal Arrowsmith gave evidence about the body parts that the complainant had pointed to during the video statement. I found Cpl. Arrowsmith to be a credible and reliable witness.

Evidence of the Complainant

- [11] As mentioned, the complainant was 13 years old when she gave her video statement to the police. I determined that the complainant's video-recorded statement to the police was admissible pursuant to s. 715.1 of the Code and therefore, her video statement constitutes part of her trial evidence.
- [12] The complainant grew up living with a family that included her mother, S.W., and her siblings. She has older siblings and one younger sibling.
- [13] The complainant lives with her mother and siblings on the reserve lands of her First Nation. The complainant and her family live on the opposite side of the reserve lands from where her grandmother and the accused lived. The complainant described the accused as her grandpa and said that she called him "papa".
- [14] The complainant's mother would drive her over to her grandmother's home and sometimes the complainant would stay there during the day or overnight while her mother was busy with other things. The complainant testified that she stayed overnight at her grandmother's home on a weekly basis and sometimes more often than that.
- [15] The complainant testified about the layout of her grandmother's home. The home included a living room, kitchen, bathroom and one bedroom. The complainant testified that her grandmother slept in a reclining chair in the living room because the grandmother had a back injury. The accused slept on a bed in the one-bedroom of the home. The complainant said that when she stayed overnight, she was supposed to sleep on a bed in the living room that was located near her grandmother's chair.

- [16] The accused's bedroom was located directly off the living room. While there was no door to his bedroom, there was a blanket covering the doorway between the bedroom and living room.
- [17] The complainant said that her grandmother's usual routine was to go to sleep by 8:00 p.m. in her recliner chair. She observed that her grandmother was somewhere between a heavy and light sleeper because sometimes sounds would wake her up and other times they would not. The complainant said that the accused's usual routine was to get up before her grandmother woke up and go into the kitchen to make coffee.
- [18] The complainant said that the incidents with the accused started with him slapping her bum and whispering sexual things to her. He would do these things when out of hearing range, or in another area of the home, from where the complainant's grandmother was.
- [19] The complainant described that the incidents escalated. In her video statement, the complainant said that after her grandmother went to sleep at night, the accused would bring her into his bedroom and put his "pee-pee" into her privates and bum. She recalled that these incidents happened a lot, but she did not know the exact number of times or the dates when they happened.
- [20] The complainant said that the incidents happened after she had turned 12 years old. The complainant recalled that these incidents were painful and especially for the last incident, it was the severe pain that she felt during and after the incident that helped her to remember it.
- [21] The complainant testified that the accused appeared concerned about the grandmother noticing what he was doing during the incidents. In her video statement, the complainant recalled the accused being concerned about her making noise. For example, she recounted an incident during which she described feeling severe pain from the accused aggressively vaginally and anally penetrating her. That incident stopped when the accused hurriedly got up to make coffee before her grandmother woke up in the morning.
- [22] When the accused got up, he told the complainant to get dressed, leave the bedroom and go to her usual bed in the living room. The complainant got up and remembered feeling such pain from the sexual abuse that it caused her to stumble while she walked from the accused's bedroom to her bed in the living room. At that point, the accused said, "shhhhh" to her, so that she did not wake up her grandmother.
- [23] The complainant said that later when she was 13 or 14 years old, she learned what sex was but at the time the incidents were happening, she did not know what the accused was doing to her. The complainant said her ability to figure out what had happened to her was caused by her maturing and getting older.

- [24] The complainant eventually told her mother about the incidents. She said she felt sad while telling her mother and during her video statement to the police. The complainant said that after she gave her video statement, her relationship with her grandmother changed. Their relationship became more distant and she did not go to her grandmother's home anymore. I will address the credibility and reliability of the complainant's evidence later in these reasons.

Evidence of Constable Green

- [25] Constable Calvin Green testified that he was the preliminary responder to the call that came in on February 28, 2023 concerning the incidents. On February 28, 2023, Cst. Green took the initial call from the complainant's mother and he also carried out a secondary interview of the complainant's mother concerning the incidents.
- [26] Constable Green knew the complainant's mother prior to taking the initial call on February 28, 2023. He knew the complainant's mother from her work as a first responder for her community. Constable Green agreed that he did not seek to interview the complainant's grandmother about the allegations because the complainant's mother told him that the grandmother did not want to provide a statement and she was unsupportive.
- [27] Constable Green also agreed that when he attended the grandmother's home to arrest the accused, he did not speak with the grandmother or go inside the home to check for condoms. He explained that, given the passage of time since the complainant said the offences occurred, he did not believe it would be helpful to look for condoms at that time. I found Cst. Green's evidence to be credible and reliable.

Evidence of the Complainant's Mother

- [28] S.W. is the complainant's mother. She testified that she lives in a home with her children on the opposite side of the reserve lands from the home where the accused lived with her mother.
- [29] S.W. testified that her mother and the accused had lived together, including at the home where the offences are alleged to have occurred, for approximately 20 years. S.W. said that she accepted the accused as her father and grandfather to her children. S.W. said that the accused had known the complainant since she was a baby.
- [30] S.W. said that her parents' home was located about 5-10 minutes away from her own home by car and it was within walking distance as well.

- [31] S.W. had been employed as a cook and seafood harvester. That work sometimes required S.W. to work in town, or at remote sites, away from the community. To get to town or work, S.W. had to travel by boat and car and it was not always easy to get back and forth. Because of this, S.W. sometimes spent nights or parts of the week away from home. When S.W.'s older children could not provide child care for the complainant and her young sibling, S.W. would ask her mother and the accused to care for them.
- [32] S.W. said that the complainant and her younger sibling often spent time during the day and overnight at their grandparents' home. Sometimes S.W. took the complainant over during the day or for overnights at the grandparents' home alone without any of her siblings also being there. S.W. said that she usually dropped children off at the grandparents' home because she had to go to work or do personal things, like go to town to do the shopping.
- [33] In cross-examination, S.W. was asked about her knowledge of what time her mother went to bed at night. She said her mother took medication at night that made her drowsy. Her mother slept on a recliner chair in the living room and the accused slept in a bedroom off of the living room with a blanket over the doorway. S.W. knew this from her time staying over at her mother's home for a month when her mother was sick and having seizures. S.W. recalled that her mother usually got up during the night to go to the washroom. Her mother would turn on a light or flashlight to get to the washroom while using her walker.
- [34] S.W. knew Cst. Green for many years prior to reporting the incidents that the complainant had disclosed to her. They knew each other because of S.W.'s role volunteering as a first-responder for her community. Since there are no police facilities located near to the remote community where they live, S.W. and others provide volunteer first-responder services including by liaising with the police at Cst. Green's detachment and fire services.
- [35] S.W. testified that the complainant disclosed the incidents to her after midnight on the day that she ended up reporting the incidents to the police, which was February 28, 2023. S.W. described that when she arrived at her home, the complainant was the only one awake because it was very late. The complainant told S.W. that she wanted to talk about something. S.W. said the complainant appeared tearful and sad while she made the disclosure.
- [36] S.W. said that she waited until the morning to call the police to report the incidents. On February 28, 2023, S.W. called the police to report the incidents.
- [37] S.W. said arrangements had to be made for her and the complainant to travel to the detachment to give their statements to the police. She was frustrated that after her initial report to the police, the accused was not immediately arrested and taken out of the community. S.W. explained that she took steps to get the accused barred from returning to the reserve lands.

- [38] S.W. said that her mother cried after learning of the allegations against the accused, but she also made it clear to S.W. that she wanted no involvement in the proceedings. S.W. also told Cst. Green that her mother did not want to be involved in any way. I found S.W. to be a credible and reliable witness.

General Legal Principles

- [39] S.M.P. is presumed innocent unless and until the Crown proves the elements of the offences beyond a reasonable doubt. The burden of proof always rests with the Crown and S.M.P. is not required to prove anything.
- [40] In *R. v. Sieber*, 2023 BCSC 1590 [Sieber], at paras. 8-9, Justice Hughes summarizes the principles in the authorities that elucidate the standard of proof beyond a reasonable doubt:
- [8] A reasonable doubt is one that is based on reason and common sense, not an imaginary or frivolous doubt, and is logically derived from the evidence or absence of evidence: *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 39, 1997 CanLII 319; *R. v. C.R.F.*, 2023 BCSC 1247 at para. 60. While the Crown does not have to prove guilt to an absolute certainty, probable guilt is not enough: *E.A.G.* at para. 184. Proof beyond a reasonable doubt is "much closer to absolute certainty than to proof on a balance of probabilities": *R. v. Starr*, 2000 SCC 40 at para. 242.
- [9] The standard of reasonable doubt applies to the totality of evidence before the court: *R. v. Vallee*, 2022 BCCA 11 at para. 236, leave to appeal to SCC ref'd, 40087 (28 July 2022). The trier of fact is not to assess the evidence in a piecemeal fashion, and not every individual piece of evidence requires proof beyond a reasonable doubt. It is only the elements of an offence that are subject to a criminal standard of proof: *R. v. A.F.*, 2021 BCSC 2662 at para. 14, citing *R. v. Morin*, [1998] 2 S.C.R. 345, 1988 CanLII 8; *R. v. J.M.H.*, 2011 SCC 45 at para. 31.
- [41] The accused is charged with sexual assault, contrary to s. 271, as well as sexual interference, contrary to s. 151 of the Code. The elements of these offences were recently summarized by Justice Brongers in *R. v. Hooper*, 2023 BCSC 1871 [Hooper]:
- [65] The elements of the offence of sexual assault are well established, even though this crime is only indirectly defined by s. 271 of the Criminal Code: *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330. They were conveniently summarized in *R. v. Knight*, 2023 BCSC 624 [Knight], as follows:
- [17] The *actus reus* of the offence involves proof that the accused touched the complainant without consent and that the contact was of a sexual nature. The sexual nature of the assault is determined objectively: *Ewanchuk* at para. 25.
- [18] The *mens rea* requires proof that the accused intended to touch the complainant and that the accused knew or was wilfully blind or reckless to the victim's lack of consent.
- [19] The Crown must prove the *actus reus* and the *mens rea* beyond a reasonable doubt.

- [66] When a complainant was less than 16 years of age at the time of the offence, however, reference must also be made to s. 150.1(1) of the Criminal Code. Subject to some limited exceptions that do not apply in this case, it effectively provides that it is legally impossible for such complainants to consent to sexual touching. This has the effect of removing consent as a defence in cases involving complainants younger than 16.
- [68] The offence of sexual interference is prescribed by s. 151 of the Criminal Code. The elements of this offence were also noted in Knight at paragraphs 57 and 58.
- [69] With respect to the actus reus, the Crown must prove beyond a reasonable doubt that the accused used their body to touch the body of the complainant while the complainant was under the age of 16.
- [70] With respect to the mens rea, the Crown must prove beyond a reasonable doubt that the accused: (a) intended to touch the complainant for a sexual purpose; and (b) knew that the complainant was under the age of 16 years, or was recklessly indifferent regarding the complainant's age by failing to take all reasonable steps to ascertain the complainant's age.
- [42] The legal principles that apply to assessing the credibility and reliability of witnesses, including the instruction provided in W.(D.), [were also summarized in Hooper at paras. 59-62:
- [59] In R. v. W. (D.), [1991] 1 S.C.R. 742, 1991 CanLII 93, the Supreme Court of Canada grappled with the relationship between the assessment of credibility and the Crown's burden to prove the accused's guilt beyond a reasonable doubt. The Court set out a jury instruction formula that, once again, is also to be followed by judges who hear criminal trials without a jury. It is as follows:
- 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.
- [60] This instruction also applies in cases where the accused does not testify. A clear discussion of this concept can be found in R. v. K.B., 2015 ONSC 3410, a decision of the Ontario Superior Court. It states at paragraphs 30 and 31:
- [30] Without an accused testifying, evidence favourable to the defence may be grounded in evidence called by the defence or through the testimony of prosecution witnesses. Such evidence may engage the trier of fact in important credibility determinations respecting contradictory evidence. At paras. 37 and 39 of R. v. Smits, 2012 ONCA 524, the court stated:

There is now no doubt that in light of this court's decision in *R. v. D.(B.)*, 2011 ONCA 51 (CanLII), at para. 114, that, even if an accused does not testify or call any evidence, where there are credibility findings on a vital issue to be made between conflicting evidence arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear that it is not necessary for the trier of fact to believe the evidence favourable to the defence on that trial issue. Rather, it is sufficient if, viewed in the context of all the evidence, the conflicting evidence leaves the trier of fact in a state of reasonable doubt as to the accused's guilt. In that event, the trier of fact must acquit.

...

- [31] Accordingly, the W.(D.) instruction, or its functional equivalent has application "to other exculpatory evidence that emerges during trial proceedings: *R. v. B.D.*, 2011 ONCA 51 at paras. 113-114" and a trier of fact need not accept the evidence favourable to the defence in order to acquit if it is found capable of raising a reasonable doubt: *R. v. Cyr*, 2012 ONCA 919, at paras. 50, 58; *R. v. Burnie*, 2013 ONCA 112, at paras. 47-48; *R. v. King*, 2013 ONCA 417, at paras. 13-14; *R. v. Dayes*, 2013 ONCA 614, at paras. 51, 55-59; *J.M.M.*, at para. 74; *R. v. Grant*, 2013 MBCA 95, at paras. 31-32, affd 2015 SCC 9; *R. v. B.D.* 2011 ONCA 51, at paras. 105, 113-114.
- [61] Indeed, it is only where credibility is not a central or significant issue that the W.(D.) analysis does not apply: *R. v. Daley*, 2007 SCC 53 at paragraph 106.
- [62] The principles to be applied when considering the credibility and reliability of a witness who provides testimony are also well established. Credibility is the notion of a witness's truthfulness and honesty, while reliability is the notion of a witness' ability to accurately observe, recall, and recount events. Guidance on how to assess these notions can be found in the often-quoted case of *Bradshaw v. Stenner*, 2010 BCSC 1398 at paragraph 186, affirmed 2012 BCCA 298, leave to appeal refused [2012] S.C.C.A. No. 392:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)*, 1919 CanLII (SCC).. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)), Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in

existence at the time (Farnya at para. 356).

- [43] In Seiber, Hughes J. stated as follows respecting a complainant's age and how it might bear on the assessment of credibility:
- [23] The complainant's age at the time the offences are alleged to have occurred, when she gave her statement to the police, and when she testified are also relevant factors in assessing her evidence. M.M. was 15 years old at the time the offences are alleged to have occurred and 18 years old at trial. In assessing M.M.'s credibility, I must keep in mind that children may not necessarily perceive and recall events in the same way that an adult would: E.A.G. at para. 200; R. v. M.P.H., 2022 BCCA 216 at paras. 48-50... .
- [44] In R. v. Kruk, 2024 SCC 7, Justice Martin discussed the presumption of innocence, the standard of proof beyond a reasonable doubt and, at para. 81, the particular importance of the difficult task of assessing witness credibility and reliability in cases involving sexual assault:
- [81] Assessments of credibility and reliability can be the most important judicial determinations in a criminal trial. They are certainly among the most difficult. This is especially so in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-specific and multifactorial: they do not operate along fixed lines and are "more of an 'art than a science'" (S. (R.D.), at para. 128; R. v. Gagnon, 2006 SCC 17, [2006] 1 S.C.R. 621).[4] With respect to credibility in particular, while coherent reasons are crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (Gagnon, at para. 20; see also R. v. R.E.M., 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 28; R. v. G.F., 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81). The task is further complicated by the trial judge's ability to accept some, all, or none of a witness's testimony.
- [45] R. v. F.(C.C.), 1997 CanLII 306 [F.(C.C.)], [1997] 3 S.C.R. 1183 at para. 45, provides that if a video statement is admitted under s. 715.1 of the Code, it "becomes the evidence of the events described as if the child were giving the statements on the videotape in open court" and the adopted video statement along with the viva voce evidence at trial "comprise the whole of the evidence in chief of the complainant". Any questions concerning the video statement, such as the overall reliability of the evidence, are matters for the trial judge to consider in deciding how much weight should be given to it: F.(C.C.), at para. 46.
- [46] As I consider whether the Crown has established the elements of the offences beyond a reasonable doubt, I am guided by these principles in my analysis of the evidence.

Position of the Parties

- [47] The Crown submits that the evidence tendered in this trial proves the elements of the offences beyond a reasonable doubt that the accused sexually assaulted and sexually interfered with the complainant. The Crown concedes that during her viva voce testimony at trial, the complainant struggled to recount and communicate the timing and certain details of the alleged offences. However, the Crown submits that given her age and personal characteristics, and bearing in mind the principles in the authorities applicable to assessing a child's evidence, these issues do not significantly detract from her credibility and reliability.
- [48] The defence submits that the Crown has not proven the offences beyond a reasonable doubt including because the complainant lacked a present recollection of the offences that she described in the s. 715.1 video. The defence also submits that the s. 715.1 video statement lacks ultimate reliability including because there is no corroboration.
- [49] The issue of whether, to satisfy the Crown's burden of proof, corroboration is required will be addressed as the first issue in these reasons.

Analysis

- [50] In the complainant's video statement, she described numerous incidents of the accused committing sexual offences against her. However, before I conduct an analysis of the incidents, I will address the defence submission that corroboration is required.

Is Corroboration Required?

- [51] The Supreme Court of Canada has addressed the matter of testing the reliability of a child's video statement in circumstances where a child has little or no independent present memory of the incidents. The court noted factors present in s. 715.1 are intended to provide the requisite reliability of a video-recorded statement: F.(C.C.), at para. 44.
- [52] In F.(C.C.), Justice Cory notes that in the context of threshold admissibility, while referring to R. v. Meddoui (1990), 1990 CanLII 2592 (ABCA), 61 C.C.C. (3d) 345, that where the child has no independent memory of the events, the need for the video-recorded evidence is obvious: Ibid. Where such a circumstance exists, Cory J. noted that: "the trier of fact should be given a special warning (similar to the one given in *Vetrovec v. The Queen*, 1982 CanLII 20 (SCC), [1982] 1 S.C.R. 811 [*Vetrovec*]) of the dangers of convicting based on the videotape alone. In my view, this sage advice should be followed.": Ibid.
- [53] *Vetrovec* concerned whether there was a special rule of evidence for accomplices. At para. 42, Justice Dickson discussed the proper practice to follow at trial:
42. I would only like to add one or two observations concerning the proper practice to be followed in the trial court where as a matter of common sense something in the nature of confirmatory evidence should be found before the finder of fact relies upon the evidence of

a witness whose testimony occupies a central position in the purported demonstration of guilt and yet may be suspect by reason of the witness being an accomplice or complainant or of disreputable character. Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word "corroboration", or indeed in any other comparable expression such as "confirmation" and "support". The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the evidence of the particular case of the type of evidence, documentary or testimonial, which might be drawn upon by the juror in confirmation of the witness' testimony or some important part thereof.

44. I return to the facts of the present case. In light of my earlier comments, it would have been sufficient for the trial judge simply to have instructed the jury that they should view the testimony of Langvand with great caution, and that it would be wise to look for other supporting evidence before convicting the appellants. The question that must be kept in mind is: does this supporting evidence strengthen our belief that Langvand is telling the truth?

[Emphasis added.]

- [54] The defence submits that in the present case, because the complainant allegedly lacked an independent memory of the incidents, a special warning similar to *Vetrovec* should be applied because it would be unsafe to convict on the basis of the s. 715.1 statement alone and there must also be corroboration. I note that courts in other provinces have rejected the proposition that corroboration is a prerequisite for relying on the complainant's s. 715.1 statement where the complainant lacks a present recollection of the events described in the video statement: *R. v. R.G.B.*, 2012 MBCA 5 at para. 45, *R. v. A.M.B.*, 2024 NSCA 49 at para. 56 and *R. v. C.H.*, 2024 ONCJ 229 at paras. 213-219.
- [55] Assuming that I accept that the complainant lacks independent memory of the incidents that she described in her video statement, then I agree that I must warn myself against the risk of adopting the complainant's video statement to convict the accused, "without more", i.e. without looking for other supporting evidence and considering that other supporting evidence, or its absence, as I weigh the evidence as a whole: *R. v. Williams*, 2020 BCSC 1983 at paras. 12-14. However, while a trier of fact must be cautious about convicting on the basis of a video statement alone where a complainant has no present memory of the incidents, corroboration may not be treated as a legal requirement in relation to the counts charged in this case because doing so would contravene s. 274 of the Code.

- [56] The complainant's s. 715.1 video statement should not be regarded as an out-of-court statement because, once admitted, it forms part of the complainant's in-chief evidence at the trial: *R. v. Aksidan*, 2006 BCCA 258 at para. 36. In my view, despite the need for caution, it is not fatal to the prosecution if the complainant has no present memory of the incidents, because her s. 715.1 video statement constitutes part of her trial evidence.
- [57] Before I analyse the evidence and whether it meets the standard required to prove the offences, I will address whether I agree that the complainant lacked an independent memory during her viva voce testimony at trial of the incidents that she described in her video statement.

Did the Complainant Have an Independent Present Memory of the Incidents?

- [58] The defence submits that the complainant clearly lacked an independent present memory of the alleged incidents of sexual abuse that she described in her video statement. In the defence's view, the complainant's only present memory was of an incident she said was the "last", where she woke up in the living room with a weird taste in her mouth.
- [59] Near the end of the cross-examination, the complainant was asked a series of questions about why, in her video statement she had referred to more than one incident as being the "last" one. For example, she said the incident when she was pinned down by the wrists and penetrated by the accused was the "last" time. However, she also described the incident when she awoke in the living room with a weird taste in her mouth that made her suspicious that the accused had put his penis in her mouth as the "last" time. At that point, defence counsel put to the complainant that there were lots of times that she could not remember and she agreed. She was then asked if she agreed that the most pain she experienced was during the incident she called the "last" time and she said "yes".
- [60] When it was put to the complainant that on that particular day of trial, she could not remember a number of things, the complainant agreed. The complainant was then asked if there was any incident she could remember clearly and she replied with something to the effect of "the weird taste in my mouth the last time I believe". It was then put to her that this was the only thing she really had a memory of and she said, "correct".
- [61] While the defence focuses on the complainant's answers near the end of the cross-examination about her use of the phrase "last time" when describing the incidents and her answer that waking up to the suspicious taste in her mouth being the only incident she really had a memory of, I do not find that these are the only relevant answers the complainant gave about her present memory of the incidents.
- [62] For example, while being cross-examined about telling Cpl. Arrowsmith that she was "raped" and whether she knew the meaning of that word, the complainant was asked to confirm if she was now saying that she did not know if she actually was raped. The complainant responded to that suggestion by saying, "no". She clarified that she was just saying she did not know where she got the word rape. The complainant denied that her mother told her she

was raped or gave her that word. Instead, the complainant said that she came to that conclusion herself without remembering how she got that knowledge.

- [63] The complainant was also cross-examined at length about the times when she alleges the incidents happened. For example, it was put to her that in her video statement she said the incidents happened a year ago when she was 12 years old. The complainant answered that she cannot remember the dates back then. When it was put to her that the incidents could have happened more than one, two or three years before that, the complainant said, "yes". However, the complainant later stated that it could be "any year one or two years ago". While her evidence about the timing of the incidents was challenged, her evidence about the details of the incidents were not.
- [64] During the cross-examination about the number of times the complainant saw the accused pull out the box of condoms from his bedroom drawer, she stated that there were many times he pulled the box out. When defence counsel asked her about the second time she saw the accused pull out the box of condoms, she stated that she went to her grandmother's home on a weekly basis. She continued that it was probably the next time she was there, after her grandmother went to bed at 8:00 p.m. because that is when the accused would do that to her and sometimes he used condoms. Again, while she referred to her video statement, she also said that this was based on her knowledge.
- [65] The complainant was asked in cross-examination if she saw the accused's "thingy thing", which she agreed also meant his penis or "pee pee". She answered, "yes". When asked what it looked like, she appeared embarrassed and remarked that it was a "ridiculous" question. The complainant was asked again if she saw the accused's penis, she said "yes", but said that she could not describe it.
- [66] At that point, defence counsel asked her again if she saw it and she replied after a long pause, "not that I can recall". The complainant's embarrassment and discomfort over being asked questions about the appearance of the accused's penis was evident and at that point, she asked for break.
- [67] When the cross-examination continued the next day, I noticed that the complainant was even more withdrawn and reluctant to answer questions. The complainant was asked how she knew that it was exactly 8:20 a.m. when the accused let her go from his bed and she said it was because of the light outside. However, she later said she was unsure why she said in her video statement that it was exactly 8:20 a.m.
- [68] When it was pointed out to the complainant during the cross-examination that in her video statement she also mentioned the accused letting her go at an earlier time, and when it was further suggested that she had no memory, but was just trying to make sense of her video statement, the complainant said she was not sure. It was not clarified whether being unsure related to her memory of the incident or just to the time that the accused let her go.

[69] In my view, after considering the whole of the evidence, I conclude that the complainant did possess an independent present memory of the incidents and this is not a situation where she lacked any present memory of the incidents that she described in her video statement.

[70] I will now turn to a consideration of the credibility and reliability of the complainant.

Assessment of Complainant's Credibility and Reliability

[71] The main witness for the Crown is the complainant. When I consider the whole of the complainant's evidence, I agree that she had difficulty recalling details about the dates, times and frequency of the alleged incidents.

[72] The authorities are clear that while the credibility of each witness must be assessed, the standard that applies to the evidence of an adult is not always appropriate when assessing the credibility of a child: *R. v. W.(R.)*, 1992 CanLII 56 (S.C.C.) at pp. 132-34 [W.(R.)]. Flaws in a child's testimony, such as being unable to recount precise details or to say exactly when and where an event happened, does not necessarily mean the child has misconceived what happened to them: *R. v. B.(G.)*, 1990 CanLII 7308 (S.C.C.) at p. 55.

[73] I am mindful that the complainant was 13 years old when she gave her video statement and 15 years old at trial. However, I also recognize that the credibility and reliability of her evidence must, like the evidence of any witness, be carefully assessed and the standard of proof is not lowered because she is a child, albeit an older child. In *R. v. E.A.G.*, 2020 BCSC 1691 at para. 202, citing *R. v. W.(R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122 at 134, the court stated that a "solid foundation" is required for a verdict of guilt, whether the complainant is an adult or a child.

[74] I observed the complainant to be unsophisticated and vulnerable. She was easily confused and she sometimes struggled to express herself clearly. The complainant's answers tended to be short and to use unsophisticated vocabulary. I also noticed that during cross-examination on matters that embarrassed her, such as the details of the body parts or sexual acts involved, she retreated into long silences after the question was posed. The complainant also sometimes used gestures along with words, for example, as she described the motions made by the accused during the sexual offences.

[75] Overall, I find that the complainant is a credible and reliable witness. While she is unsophisticated and she was embarrassed and reluctant to talk about the details, especially during her viva voce testimony, I find that the complainant did her best to answer the questions that were put to her despite the process clearly weighing on her. She did not hide her embarrassment or confusion about being asked to say again what had happened to her.

[76] I will now turn to my analysis of the evidence respecting the alleged incidents. I group the incidents into two main categories of conduct: (1) sex talk and bum touching, and (2) vaginal and anal intercourse.

1. The Allegations of Sex Talk and Bum Touching

- [77] In the video statement, the complainant stated that the incidents began when the accused started "whispering sexual things" to her and touching her bum. The sexual words that the accused said included things like, "nice bum", as well as talk about sex and condoms.
- [78] In the first few incidents that the complainant described in her video statement, she said the accused would whisper sexual things and slap or touch her bum when they were in an area of the home where the grandmother could not hear what was being said. While she described the accused touching her bum, the complainant demonstrated by making a slapping motion with her hand.
- [79] In one of these types of incidents, the complainant said that the accused touched her on the upper back leg, sliding his hand upwards to touch her back underneath her shirt. In cross-examination, the complainant said that this touching occurred on her lower back "too close" to her behind, which seemed to be why she mentioned it, along with the other incidents where the accused had touched her on the bum.
- [80] In cross-examination, the complainant was asked about the specific words that the accused used during these sex-talk incidents. The complainant stated that all she could remember was him saying, "I wish I had condoms and stuff like that". Except for the one incident where the complainant said the accused touched her in an area that was too close to her bum, she was not cross-examined about her allegations that the accused had touched her bum.

2. The Allegations of Vaginal and Anal Intercourse

- [81] In the video statement, the complainant described that at night, when her grandmother was asleep, the complainant told her to come to his bedroom. On the first of the incidents involving penetration, she said she watched the accused take a box out of his drawer. She asked him what it was. The accused told her that the box was candy. The complainant said that she asked him again what it was because she was confused by reading the word "condom" on the box. The complainant once again told her that the box was candy.
- [82] In the video statement, Cpl. Arrowsmith asked the complainant what the accused did with the condom. The complainant said, by pointing to body parts on the gingerbread drawings, that the accused then put his penis in her vagina. The complainant said that the incidents where the accused put his penis in her vagina happened many times, probably more than ten times, although she could not name all of the times that it happened. The complainant also said that the very last time the accused did this to her, it hurt her a lot and she still remembered it.
- [83] Corporal Arrowsmith asked the complainant if there was any talking during the incidents. The complainant responded by saying that it was "bad" because it was really sexual. She stated that she was scared and she did not really want to explain it but she would because it was important.

- [84] The complainant said that the accused would whisper in her ear during the incidents so her grandmother would not hear and he held her down on the bed, holding her by her wrists. In the video statement, the complainant demonstrated showing how the complainant "pinned" her down to the bed by holding onto her wrists. She held her arm up near her head and pointed at her wrist. She explained that she regretted "letting him" because she did not understand what was happening.
- [85] The complainant stated that during the incident, the accused said to her, "should I go harder". When she did not respond to the accused, he went harder and the complainant said it hurt her a lot. The accused also said to her, "should I go faster", and she did not say anything to him so he started to go faster. The complainant described the accused going like this aggressively "over and over" and she felt a lot of pain which she said she could still remember.
- [86] The complainant said the incident began with the accused putting his "pee pee" in her bum and then flipping her over to put it in her privates. The incident stopped when the accused got up, put on his shorts and went to the kitchen to make coffee before her grandmother awoke in the morning.
- [87] She remembered the accused telling her to go to her bed in the living room and feeling she could barely walk from the intense pain. When she stumbled and almost woke up her grandmother, the accused was in the kitchen and he told her to be quiet by saying, "shhhhh".
- [88] The complainant described the clothes she was wearing before the accused removed her clothing and she said that the accused was wearing shorts before she saw him without clothing. She said that they were both without clothing during the incident.
- [89] When asked by Cpl. Arrowsmith about which time it was the accused had held the complainant on the bed by her wrists while he sexually offended against her, the complainant said it was the last time and all she could remember is that he let her go at 7:00 a.m. because he would get up to make her grandmother coffee before she woke up at exactly 8:20 am.
- [90] The complainant was cross-examined at length about her memories and observations of the condoms that she described seeing the accused take out of the drawer in his bedroom. The questioning on this topic demonstrated both that the complainant was easily confused and that eventually, she tended to agree with the suggestions that were put to her.
- [91] Both in her evidence in chief and during her cross-examination, the complainant appeared to struggle with questions that required her to keep multiple time references in mind and to engage with comparisons. For example, putting events to the complainant that allegedly happened during the incident, along with what she said in her video statement and during the trial, appeared to cause confusion or difficulty processing because these types of questions were often followed by lengthy pauses before she would ask counsel to repeat the question.

[92] For example, during the complainant's cross-examination, she was asked about seeing the condoms:

Q. You said you saw condoms in your grandma's home?

A. Yes.

Q. Describe them, what did they look like?

A. You mean the box or the condom?

[93] Without clarifying for her which item was actually being referred to, the cross-examination continued with questions about what the complainant saw and how the condoms were used. During this part of the cross-examination, the complainant testified that:

- She saw the accused hide the condoms in his drawer underneath clothing;
- She saw the accused pull the box of condoms out of his drawer many times, but she could not count the number of times; and
- She was certain, and not mistaken, about having seen the condoms.

[94] When the complainant was asked about what the accused did with the condoms, she mentioned embarrassment and then referred to her video statement, saying, "he used it to do the assault". When defence counsel suggested that this was only according to the complainant's video statement, the complainant answered by saying, "and my knowledge".

[95] The complainant was then asked if she had a memory of what the accused did with the condoms. The complainant responded that the accused would put it on and "do what he did". Defence counsel then asked the complainant to be specific about what the accused put the condom on and the complainant said something along the lines of, "do I have to go on explaining this?".

[96] Defence counsel then reminded the complainant that she did have to explain where the accused put the condom and she responded with something along the lines of, "all I remember is seeing the condoms and what he does with it". After answering that she remembered seeing the condom and what he does with it, defence counsel then put it to her that she had no memory of how the accused used the condom. Her eventual response to that suggestion was, "no, not from my memory".

[97] However, the complainant was not challenged on whether she actually saw the accused place a condom on his penis and then use his penis to commit the alleged sexual offences against her. The complainant was not challenged on the central allegations that she described involving the accused repeatedly vaginally or anally penetrating her using his penis.

- [98] The complainant was asked a series of cross-examination questions about the number of times she saw the condoms, where the condoms were kept, what the condoms looked like and what the accused did with them.
- [99] Again, it was clear that the complainant was embarrassed and reluctant, especially during her viva voce evidence at trial, to talk about the details of the incidents. Towards the end of the cross-examination, I noticed that the complainant appeared increasingly withdrawn and propositions put to her tended to be followed by lengthy periods of silence before she would eventually respond with "yes", or say that she did not remember.
- [100] In re-direct, the complainant was asked whether she had any memory today of other sexual incidents other than waking up with the strange taste in her mouth. The complainant responded that she remembered a bit, but not a lot.

Sexual Interference

- [101] Following an amendment of the indictment during trial, specifically, to the dates of the alleged offences, count 2 of the indictment is as follows:

Count 2

S.M.P., from the 1st day of January, 2020, to the 31st day of December, 2022, inclusive, at or near [X], in the Province of British Columbia, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of S.S., a person under the age of sixteen years, contrary to section 151 of the Criminal Code.

- [102] To prove the offence of sexual interference contrary to s. 151, the Crown must prove each of these elements beyond a reasonable doubt:
- a) The identity of the accused;
 - b) That the person touched was under 16 years of age;
 - c) That the accused touched the person; and
 - d) That the touching was for a sexual purpose.
- [103] There is no issue as to the identity of the accused or the complainant's age at the time of the alleged offences, as the complainant and her mother testified that she was 15 years old at the time she testified at trial.
- [104] With respect to the requirements to prove beyond a reasonable doubt that the accused touched the complainant for a sexual purpose, I accept the complainant's evidence that the accused would touch her bum while whispering sexual things to her and that this touching escalated to include incidents of the accused inserting his penis into the complainant's anus and vagina.

- [105] The complainant's video evidence concerning the incidents of touching by the accused contained many compelling details about the nature of the touching and the touching to her vagina and anus were obviously of a sexual nature. She recalled words spoken to her by the accused both before and after the incidents. She recalled seeing the condom box and questioning and trusting the accused's answer that the box contained candy. She associated the accused's removal of the condom box with the incidents of penetrative intercourse inflicted on her by the accused. She remembered the pain she experienced during and after the offences.
- [106] The complainant remembered the details of the speed and intensity of the accused's motions in carrying out the offending behaviour against her. She also recalled the accused telling her to be quiet and not to wake up her grandmother as she stumbled from his bedroom to her own bed.
- [107] While the complainant said she remembered less during her viva voce testimony at trial than in her video statement, she stated during her cross-examination that she still remembered a bit of what happened during the incidents and she still remembered the pain that she had felt. The complainant stated in her cross-examination that the accused used the condoms to do the assaults on her and she remembered this both from seeing her video statement and from her "knowledge". The complainant stated that all she remembered was seeing the condoms and "what he does with them".
- [108] That the complainant's recollection of the details of the offences during her viva voce testimony at trial was not as good as her recollection in the video recording is not surprising. In my view, that goes to the ultimate weight to be accorded to the evidence. The authorities are clear that the purposes of the s. 715.1 video include preserving what may be the best and most accurate early account of the alleged events and reducing further injury to the child by participating in the criminal proceeding: *R. v. T.R.J.*, 2014 BCSC 1611. at paras. 43-44.
- [109] In my view, the complainant's reluctance during her viva voce testimony to provide details and her propensity to sit in silence after being asked a question was not evasiveness, but rather the result of her embarrassment and fearfulness. I found the complainant's reluctance and embarrassment to be genuine reactions to experiences that she described, both at trial and during her video statement, as making her feel sad and scared.
- [110] I appreciate that cross-examining an obviously vulnerable and unsophisticated 15 year old witness is a very difficult task. In the cross-examination, I have already observed that the complainant had a tendency, especially after she expressed embarrassment, to retreat from earlier answers and to simply agree with defence counsel's suggestion even if it negated her earlier answer.
- [111] I am entitled to believe all, some or none of the evidence of a witness and I am also entitled, if reasonable, to prefer the evidence elicited in the video statement from that evidence elicited in cross-examination or another part of the witness' viva voce testimony. In the

present case, I note that the complainant was not specifically cross-examined about the main details of the allegations that the accused repeatedly vaginally penetrated her anus and vagina using his penis, or that he had engaged in the motions and said the things she alleged during or after the offences.

- [112] In cross-examination, despite her embarrassment and vulnerability, the complainant stated that she had knowledge and some memory of the incidents she was asked about.
- [113] I believe the complainant's evidence that the accused whispered words of a sexual nature to the complainant and he touched her bum. I also believe the complainant's evidence that the accused inserted his penis to penetrate her vaginally and anally. In my view, the complainant's evidence about these aspects of the accused's conduct was not directly challenged. I am unable to determine exactly how many times this offending conduct occurred, but I am satisfied that it happened on more than one occasion. I am not satisfied that the accused ever placed his penis in the complainant's mouth.
- [114] Although I have accepted the complainant's evidence concerning these incidents, I must continue the analysis by asking myself whether, on the whole of the evidence, the Crown has proven beyond a reasonable doubt the necessary elements of the offence of sexual interference.
- [115] I find that the whole of the evidence establishes beyond a reasonable doubt that on numerous occasions at the grandmother's home, during the timeframe stated in the indictment when the complainant was under the age of 16 years old, the accused touched the complainant including by slapping her bum and inserting his penis into her vagina and anus and that the touching was clearly for a sexual purpose.
- [116] I find that the Crown has established all of the elements of the offence of sexual interference contrary to s. 151 of the Code.

Sexual Assault

- [117] With respect to the allegation of sexual assault contrary to s. 271 of the Code, following an amendment of the indictment during trial, count 1 of the indictment is as follows:

Count 1

S.M.P. from the 1st day of January, 2020, to the 31st day of December, 2022, inclusive, at or near [X], in the Province of British Columbia, did sexually assault S.S., contrary to s. 271 of the Criminal Code.

- [118] To prove the offence of sexual assault contrary to s. 271, the Crown must prove each of these elements beyond a reasonable doubt:

- a) The identity of the accused;
- b) That the accused applied force or touched the complainant directly or indirectly;

- c) That the accused intended to apply force or touch the complainant directly;
- d) That the complainant did not consent; and
- e) That the contact was of a sexual nature.

[119] As discussed previously, although I accept the complainant's evidence of the incidents that she said occurred, I must continue the analysis by asking myself whether, on the whole of the evidence, the Crown has proven beyond a reasonable doubt the necessary elements of the offence of sexual assault.

[120] There is no issue as to the identity of the accused or the complainant's age at the time of the alleged offences as the complainant and her mother testified that she was 15 years old at the time she testified at trial. As such, there is no issue that, given the complainant's age, she is capable of providing consent.

[121] On the whole of the evidence, as I previously discussed, I find that I am satisfied beyond a reasonable doubt that, during the timeframe stated in the indictment, the accused intentionally directly touched the complainant and the contact was for a sexual purpose when he touched the complainant on the bum and used his penis to vaginally and anally penetrate the complainant on numerous occasions.

[122] I find that the Crown has established all of the elements of the offence of sexual assault contrary to s. 271 of the Code.

Decision

[123] As discussed above, I am satisfied that the crown has met the burden of establishing beyond a reasonable doubt that the accused committed the offences charged in the indictment.

[124] S.M.P., will you please stand.

[125] On count 1 of the indictment, I find you guilty.

[126] On count 2 of the indictment, I find you guilty.

"E. McDonald J."

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Prepared on 26 October 2026 · Esheria