PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Hawkes*, 2017 NSPC 4

Date: 20170131
Docket: 2965613, 2935614
Registry: Kentville

Between:

Her Majesty the Queen

v.

Brent Leroy Hawkes

Restriction on Publication: 486.4(1) name of complainant and of witnesses

DECISION

Judge:	The Honourable Judge Alan T. Tufts, A.C.J.P.C.
Heard:	November 14, 15, 17, 18, 21, 22, 23, 2016 in Kentville, Nova Scotia
Decision:	January 31, 2017
Charges:	Section**s** 156 and 157, *Criminal Code* (1970-1982)
Counsel:	Robert Morrison, for the Crown Clayton C. Ruby, C.M., for the Accused

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

- **(a)** any of the following offences:
  - **(i)** an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
  - **(ii)** any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
- **(b)** two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

INTRODUCTION

[1] The accused is charged with indecent assault and gross indecency under s. 156 and s.157 of the *Criminal Code*[1] respectively. Particularly, it is alleged that the accused had certain sexual activity with the complainant without his consent.

PUBLICATION BAN

[2] The Court imposed a ban on the publication of the identity of the complainant named in the Information[2] and of the identity of the other two crown witnesses[3]. For this reason, I will refer to the three Crown witnesses as Mr. A – the first witness to testify, Mr. B – the second witness to testify and Mr. C, the complainant and final Crown witness.

SUMMARY OF CONCLUSIONS

[3] The complainant gave a very vivid and detailed account of what he alleged the accused did to him in the bedroom of the accused's mobile home in the Spring of 1976. Upon first examination, it was very compelling testimony.

[4] I do not believe all of what the accused said during his testimony, yet he bears no burden to prove anything. The burden is on the Crown, and remains with the Crown, throughout the trial and never shifts to the accused.

[5] As I detail below, there are significant inconsistencies in the testimonies of the various witnesses, particularly between the testimony of Mr. C, the complainant,

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[1] See paras. 19 and 20, *infra*
[2] s. 486.4(1)(a)(ii) *Criminal Code*
[3] s. 486.4(1)(a)(ii) *Criminal Code*

and the testimony of the first Crown witness, Mr. A, who I found was a credible and believable witness. The complainant disputes and denies what Mr. A said he saw in the accused's livingroom that evening – oral sex between the accused and Mr. C. For the reasons I set out below this could not constitute the alleged offences. However, this inconsistency undermines the reliability of the complainant's testimony.

[6] Furthermore, the very intoxicated state the complainant was apparently in, which he described in his own words, undermines, in my opinion, the vivid details he said he recalls about that evening. Also, the process he described in eventually remembering the detail he described strongly suggests he re-constructed or re-created the events which occurred – again seriously reducing my confidence in the reliability of his recall of the subject events.

[7] I have identified other frailties in the complainant's testimony in para. 201 below. After a closer examination of all the evidence, the complainant's account does not have the compelling features it appears at first to have.

[8] In my opinion, his testimony is not sufficiently reliable, even together with all the other evidence, to satisfy the criminal burden of proof.

[9] In the end, it is not clear what happened in the bedroom that evening 41 years ago. It is easy to speculate, but that is something that is not permitted here. Likelihood or probability is not the standard. The standard of proof is proof beyond a reasonable doubt.

[10] I am not satisfied to that standard that the accused had sexual activity with the complainant either with or without his consent.

[11] He is found not guilty of both charges. A fuller and more detailed account of my reasons continues below.

OUTLINE

[12] I will first summarize the factual context. I will then review the elements of each offence, set out what the Crown is required to prove, and then identify the specific issues which need to be addressed, then outline the testimony of each witness, making only general comments regarding each testimony. Next, I will discuss the law around what is now called "sexual assault", credibility, and the Crown's burden of proof. Finally, I will analyze the evidence introduced by the Crown and defence and explain the reasons for the conclusions I have reached.

SUMMARY OF FACTUAL CONTEXT

[13] The accused attended Mount Allison University and graduated in 1972 and 1973 with Bachelor of Science and Bachelor of Education degrees respectively. In September of 1973 he began teaching at West Kings High School in Auburn, Kings County, Nova Scotia. He taught Grade 10 mathematics but was also involved with the school's basketball program and was an adviser to the school's student council.

[14] The accused first boarded with a family in the area and later moved to the west end of Kingston and rented a small home or "cabin". In January 1975 he purchased a mobile home which was located near the Greenwood Mall in Greenwood, Nova Scotia. It was at this location where the events in question occurred.

[15] The accused was the coach of the "B" basketball team and assistant coach of the "A" basketball team. Mr. A was on the B team but occasionally played on the A team. Mr. B and Mr. C played for the A team.

[16] The events giving rise to these proceedings appear to have happened in the school year 1975-1976, although the accused suggested they may have happened in July of 1976 after the school year ended.

[17] On the day or evening in question Mr. A, Mr. B and Mr. C were all at the accused's mobile home residence in Greenwood at the same time. It is unclear as to the context of their visit, i.e., why they went there, whether there were others there,

if so how many others were there, how the three arrived and how and under what circumstances they left. I will discuss this in more detail below.

[18] What occurred at the accused's mobile home is very much in dispute. It appears though that alcohol was consumed and perhaps games were played. It is not clear whether others beyond those I have mentioned were present for all or part of the time in question. However, it was on this day or evening the allegation giving rise to these charges arose.

ELEMENTS OF THE OFFENCE

[19] Sections 156 and 157 of the *Criminal Code* were in effect at the time that the events giving rise to this proceeding occurred. Section 156 provides as follows:

> 156. Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped.

[20] Section 157 provides as follows:

> 157. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.

[21] Regarding the charge under s. 156 of the *Criminal Code* the Crown is required to prove beyond a reasonable doubt the following:

1. Jurisdiction of the Court.
2. The identity of the accused.
3. That the accused is a male person.
4. That there was an assault – a touching or application of force without consent.
5. The touching was indecent, that is, sexual.
6. The touching was intentional.

7. The complainant was a male person.

[22] Regarding the charge under s. 157 of the *Criminal Code* the Crown is required to prove beyond a reasonable doubt the following:

1. Jurisdiction of the Court.
2. The identity of the accused.
3. An act committed by the accused with another person.
4. The act was an act of gross indecency.
5. The act was intentional.

[23] These sections are included in Part IV of the *Criminal Code* in effect at the material times – see Appendix "A" which includes all the related sections in force at that time. Many of the sections are gender-based. Some sections apply to male persons as accused and female complainants and some apply to male accused and male complainants. Section 156 is gender-based. Section 157 is not.

[24] These charging sections have all now been repealed but they were in effect at the material times and apply to this proceeding.[4]

[25] Section 156 requires proof of an assault. Absence of consent is an element of the offence of assault. During submissions there was discussion about "age of consent" being 14 years at the material time. This, of course, only applies to those sections dealing with offences involving sexual intercourse where specific provisions apply regarding consent or absence of consent in specific situations and below or between specific ages. Section 149(2) provides that consent is vitiated by false or fraudulent representations where the accused is charged under s. 149(1) with indecent assault on a female person. Section 156 does not appear to be subject to any qualifications or disqualifications regarding consent.

[4] *R v Johnson* 2003 SCC 46 at para 41

[26] Gross indecency under s. 157 is not defined. There are some case authorities which speak to this term[5]. It is not necessary to discuss these authorities here. Counsel have agreed that oral sex between two men is not in and of itself gross indecency. In this case, counsel have agreed that if the alleged oral sex was without consent of the complainant then the alleged act committed by the accused would amount to gross indecency. The Crown has not argued that the fact that the accused was the complainant's assistant coach or a teacher at the school where the complainant attended is a factor to be considered in either of the charges. I will comment later about the accused's relationship with the complainant in this regard.

[27] There is no dispute about the identity of the accused, jurisdiction of the Court, that the alleged touching was sexual in nature, or the accused and the complainant were both male. Also, if the alleged act occurred it was clearly intentional.

[28] In the end, the real issue here is whether the accused had sexual activity with Mr. C, whether it was without his consent and in either case did it amount to gross indecency. Has that been proven beyond a reasonable doubt? This turns on the credibility and reliability of the testimony of Mr. C particularly but of all the other witnesses as well.

TESTIMONY OF MR. A

[29] The Crown's first witness was Mr. A. He described an incident in the school year 1975 – 1976 when he was 16. He turned 16 years old in September of 1975 and was in Grade 11 at the time. He remembers only three events from that evening:

1. Going to the Top Hat Tavern.
2. The accused speaking to him about being gay and about matters related to spirituality.

[5] See *R v LaPage* 2014 ONSC 5855 at para 24 *et seq.*

3. Looking to his left and behind him while sitting on the accused's livingroom floor and seeing the accused performing oral sex on the complainant Mr. C.

[30] He described going to the tavern which was near the accused's mobile home. He said they had left the accused' trailer and went to the pub which was very close to where the accused lived. He recalls going in because they were underage. He remembers the server saying, "You're all Mount A men" because he had on the accused's Mount Allison University jacket. He said they drank beer. The server apparently played along with Mr. A and his fellow students' effort to be in the tavern underage. He did not specifically name the others who were with him.

[31] Eventually they returned to the accused's trailer. He recalls the accused talking to him in the bathroom. He said that the accused told him (that is Mr. A) that he was "eighty percent" sure Mr. A was gay. Mr. A said, "I don't think so". Mr. A was uncomfortable. In cross-examination he said he felt the accused was "hitting" on him and wanted to have some kind of sexual relationship with him.

[32] He said the accused then changed directions. He said the accused began talking about spirituality and God. He recalls the accused saying he could feel the hand of God in his. Mr. A thought this was strange and he wanted to leave.

[33] The next event he recalled was when "we were all sitting in the livingroom". It appears he was sitting on the livingroom floor and looked to his left and slightly behind and saw the accused performing oral sex on Mr. C, the complainant. He said people were playing drinking games, although he could not remember any alcohol. He said Mr. C's pants were off or down. Mr. A heard someone say, "[first name of Mr. C] what's going on?" He described that Mr. C leaned back, raised his hands with his palms facing out and stared like "I don't know what is going on here". This was Mr. A's impression of what Mr. C was saying. In cross-examination Mr. A said someone yelled, "What the hell is going on?"

[34] He did not recall any other sexual activity. Mr. A had little contact with the accused otherwise and was never to the accused's trailer before or after this incident. Mr. A described himself as a follower – "going with the flow". He told police that six to eight people were there but he cannot remember today who they were. He just remembers it was a crowd. These three events, he said, "absolutely happened". Mr. A did not remember Mr. B being there but assumed that he was.

[35] Mr. A did not have any memory of alcohol at the trailer. He did not recall stripping down or removing his clothing as some of the others described. He said, "I'm trying to forget things about that night". He said he had no memory of Mr. B stripping to his underwear.

[36] He said that the oral sex that he observed was "seared in my mind". He said someone said, "what the hell is going on?" and it was at that point Mr. C put up his hands the way it was described above. Mr. A had no memory of naked people going to the bedroom and had no memory of masturbating Mr. B, as Mr. B described. He said that Mr. C was alert and conscious during the oral sex.

[37] It is clear that Mr. A was a reluctant witness. He told police at first that he did not want to be involved in their investigation of this incident. Clearly, he changed his mind, although it is not precisely clear why. He suggested he wanted to "do the right thing". He said he has tried to forget what happened that evening, although he could not forget these three events he described. I am not confident that this is accurate, or that he just does not want to admit to more involvement. He was careful to say "I can't remember" as to whether certain events had happened rather than to say they did not happen, especially regarding the suggestion that he was masturbating Mr. B. He said he had tunnel vision – he only remembered certain events. He was clearly affected by his involvement in this matter as he was anxious to leave when his testimony concluded and he needed time to collect his emotions before he made his way from the witness box.

[38] My impression was there were things he did not want to talk about which he may have witnessed. It is hard to understand how he could remember some things

and not others, but perhaps, as he says, he simply tried to forget it all and was not able to forget these three particular events. He said it was more about what he could not forget rather than what he remembered. I am not sure how that impacts his credibility or reliability. I will discuss this below.

[39] He gave no detailed description of the oral sex he said he witnessed. It seems he only had a fleeting glace at what was happening, although it appears that Mr. C was at least sitting up as opposed to lying down. It is not clear how the accused was positioned. Was Mr. C against the wall or a piece of furniture? Were the complainant and the accused in a corner or was the furniture obstructing the view of others? There was no indication of lighting or how well anyone could see in the room. Finally, it was not clear where others were when this event was apparently happening.

[40] It is almost impossible to reconcile what Mr. A described he saw in the livingroom with the testimony of Mr. C. Mr. C never described what Mr. A saw. Mr. C said there was no oral sex in the livingroom involving him. Mr. A presented as a sincere and honest witness.

[41] It is, in my view, very improbable, as the Crown suggests, Mr. A saw something happening in the bedroom and remembers it happening in the livingroom. The circumstances the complainant described could not, in my opinion, be remembered the way Mr. A described. The complainant said that he was completely naked, as was the accused. He said they were lying down in the bedroom and the accused ejaculated on the complainant's shoulder. Mr. A described the complainant sitting up and clothed except with his pants off or down – nothing remotely similar to what the complainant described other than the oral sex.

[42] How can Mr. A's testimony be explained? Mr. B, who was there, never recounted this. It is difficult to believe that in the confines of this small room – about 14 feet by 16 feet that had this happened Mr. B would not have seen something, although it may be possible Mr. B was in another room – he said he had used the washroom at some point – at this time.

[43] Did Mr. A see someone other than the people he described? There is no evidence of that. There are a number of other explanations which would make sense of this for me, but regrettably they require me to speculate, as the evidentiary foundation is simply not present. I am not permitted to speculate. I will return to this below.

[44] Mr. A never identified nor was he asked to identify the accused in court as the person he described in his testimony.

TESTIMONY OF MR. B

[45] Mr. B was the Crown's second witness. He remembered only pieces of what occurred on an evening that he was at the accused's mobile home. He gave two statements to the police. His testimony had some variances with his earlier statements.

[46] He recalled being at the accused's trailer with Mr. C and Mr. A – he also said that others were there too – likely two others, but he cannot remember who. He was very vague on how he came to go to the accused's trailer. He said only that he went with the "rest of the gang". He said they brought seven beers – maybe six or eight – from their fathers' fridges and the accused had wine there. He suggested there was "something" in the wine.

[47] He said that they were playing caps. They got drunk and they played games including taking off clothes and they were in their underwear.

[48] He recalled seeing the accused and the complainant going down the hallway – they were nude. He said the accused was in front and the complainant was following him – they were not touching – he said the accused was not leading the complainant nor was Mr. C falling down or being supported by the accused.

[49] He said at one point while in the livingroom the accused jumped over some of the other individuals and kissed him. He said the accused was still in his underwear at that time. He said the accused was grinding on him as he tried to kiss

him. He said nobody tried to stop the accused. He said he had his "mind about me" but "my body was not". He said something was keeping him on the floor. He suggested throughout that there may have been something in the alcohol which had an additional intoxicating effect. He said "there was some other factor here" after describing how no one tried to stop the accused. He earlier said "something was spiked".

[50] He said at one point "four of them" – not the accused nor Mr. C - were in the bedroom, "doing bad things". He said at one point, "Mr. A and I jerked each other off". Later he said only Mr. A had touched him. He said the accused may have been in the doorway and suggested that the accused had encouraged this.

[51] He said it was four to five hours into the evening when he saw the accused and Mr. C go down the hallway towards the bedroom. He remembers saying "Hey [Mr. C's first name] where, where you going"? He does not remember anything after that. He was clear, however, that they did not go to the tavern as was suggested by Mr. A.

[52] Mr. B was very vague on details and sequence. The import of his testimony is that he was at the accused's trailer. Mr. C and Mr. A were there and others as well. There was drinking – beer and wine. His testimony that they brought beer seems unlikely as the others said that this did not occur. They were playing games and clothes were being removed in the course of the gameplaying.

[53] In his statement to police he said that all those present were naked "in the end". He said he didn't know how his underwear came off. At trial he retracted this statement. He said not everyone was nude and he did not take off his underwear. He also said that the accused did not make them take off each others underwear or "anything like that". It was simply part of the game.

[54] Finally, he said he did not see the oral sex Mr. A described and would have remembered it if it happened.

[55] The description about the masturbating with Mr. A and Mr. B or *vice versa* is very unclear, including any involvement with others. He said he saw Mr. C and the accused go down the hallway – it is not clear however where he was when this happened. He said he was on the rug lying down. Mr. C said he was on the sofa. Further, it is not clear whether he saw the accused and Mr. C naked or in their underwear or one naked and one in his underwear. He was, however, adamant that he and Mr. A did not give the complainant "thumbs up" or any sign of approval. He did say that he was intoxicated.

[56] Mr. B was never asked to identify the accused during his testimony.

TESTIMONY OF MR. C

[57] Mr. C is the named complainant in the charges before the Court.

[58] Mr. C attended West Kings High School from 1972 until 1976. He described a motor vehicle accident which happened on July 25, 1975. The accident is relevant because it was after this time that the allegations arose. Also, the circumstances of the accident were raised by the defence as giving rise to possible credibility issues.

[59] The circumstances of the accident were that Mr. C was driving a vehicle on a side road approaching the main thoroughfare. He was sixteen years old at the time. He applied the brakes of his vehicle but apparently they failed. A collision occurred and Mr. C and his family were found liable. The judge at the civil trial made adverse credibility findings against Mr. C. Essentially, he rejected Mr. C's testimony that the brakes had failed and attributed responsibility for the accident to Mr. C's conduct. I will address how this impacts this proceeding in further detail below.

[60] It was after this date that the subject incident occurred. Mr. C turned 17 in October of 1975. He recalled having been invited to the accused's trailer but could not remember the details of how and why he went there. He recalled the accused was known to have the video game Pong. He recalled the location of the accused's trailer as the others did, near the Greenwood Mall. He remembered being there with other

teenagers playing video games when alcohol was present. Teachers were also present. This was prior to the night in question.

[61] He also recalled the accused's involvement in the basketball program at West Kings. The accused was apparently the assistant coach of the A basketball team on which Mr. C played. He described Mr. A driving one of the vans that the team used to travel to Boston and he also described going to Prince Edward Island with the accused to see a football game.

[62] He recalled the night in question. He did not recall how he got there but he says that Mr. A and Mr. B were there, and possibly others. He said it was a cold and grey day. He remembered only isolated or fragmented portions of the time spent that day at the accused's mobile home. It is not clear whether it was daytime or evening or both.

[63] He testified that a group of teenagers, including himself, were playing "caps" and drinking beer. He said when they ran out of beer they drank whatever was there. He says they drank vodka and pink lemonade and also recalled crème de menthe – "minty green stuff" – being consumed.

[64] "Caps" is apparently a game where one places a beer cap on top of a bottle of beer and the opponent also holds their bottle and cap balanced. Each player tries to knock the others cap from the bottle with a bottle cap. The players sit on the floor and throw the caps at each other. If the cap it knocked off the other player must drink beer or perhaps *vice versa.* Mr. C said this continued until the accused suggested playing "strip caps" where players took off their clothes as part of the game. Mr. C said the accused at one point suggested the players touch each other as well. He said the accused was playing the game and was removing his clothes as well. He said at one point he remembers the accused in his underwear watching them while sitting on the couch. He said , "the last memory … distinct memory I have is him [the accused] sitting on the couch in his underwear" He said things then began to be disoriented.

[65] Mr. C testified that the accused then led him down the hallway to his bedroom. Mr. C said that he was naked and the accused "might have been in his underwear". Mr. C said he was barely able to stand up. He said he saw Mr. A and Mr. B sitting on the couch at that time and remembered one of them giving him a thumbs up or wave – like a sign of approval.

[66] He indicated in detail what occurred in the bedroom. He testified without being questioned further or prompted in any way. Rather than summarize this description I will simply reproduce the transcript of his testimony:

> Going to the bedroom, lying on the bed. I hear voices. I hear his voice.
>
> **Q.** When you say "his" voice, who ...
>
> **A.** Hawkes. I hear him telling me I was beautiful, I had a body like a Greek god. I remember him telling me, I want to take you to Provincetown because, and I quote, all the other faggots there would be jealous. I remember his hands on my body. I remember him biting me, kissing, sticking his tongue in my mouth, his stubble on my cheek, the stench of his body, the weight of his body.
>
> **Q.** If you need to take a break there, Mr. [C], we can do that. Just take ...
>
> **A.** Oh, no. I'm good. I remember him telling me he's going to give me a blow job. It would be the best blow job I ever got because nobody knows a man's like ... a man's body like another man. I remember him saying he knew he'd have me. He had been grooming me for two years by that point in time. I remember him sucking on my penis until I came. I remember him sucking so hard that it hurt. I remember him saying he (owed/owned?) me now and him putting his penis in my mouth. I tried to talk. He forced is penis into my mouth. He ground his hips against my face. He thrust his penis in and out of my mouth until he came. He pulled his penis

out and ejaculated on my shoulder. I remember the sensation. It was burning hot. He laughed and said, At least I didn't come in your mouth. That's what I remember.

I don't remember how I got home, where I went after that. God! I don't remember much of anything after that. For the next period of time, days, weeks, months, I know now what I did was disassociate from the event, so I protected myself because I didn't want to remember it. I still can't. And wanting to remember, to find out what happened, and not being able to is the hardest part. I buried it for so long. And when I started to finally go on that journey of recovery because carrying this shit for 40 years hurts, and to not be able to remember when you try to, oh, God, it's frustrating. Bits and pieces every now and then will flash back in. It's like a thought here, a memory here, a picture here, a scent, a sound, a something, a noise. It doesn't make sense. It just ... none of it makes sense.

[67] Mr. C was unsure how this event in the bedroom ended, when he left the bedroom or under what circumstances he left the accused's trailer.

[68] He said he told his parents some time later but he said they did not believe him. After that he avoided any contact with the accused.

[69] He described his next disclosure was in 2004 and eventually reported this to the police in 2014. He said he has had many recurring dreams and flashbacks and was tired of carrying this around for so many years.

[70] Mr. C explained that he wrote out his "story" in 2013 as part of his therapy. When he was interviewed by the police he simply read the "final version" of this narrative before answering any questions from the police.

[71] He was extensively cross-examined on his testimony and his statements to police. He said he was very intoxicated that evening – "It was like a movie where the soundtrack did not match the picture. It was a little out of focus and the whole experience was surreal". He said it was like an out-of-body experience. At first he said this was only when he was walking down the hallway but in cross-examination he acknowledged he was not sure when he had this experience. He also said it was like he was in a trance or being hypnotised. He said that after the event he disassociated from the event as a way to protect himself.

[72] He said he was very intoxicated that evening and had never drank to that extent before or since. He described his intoxication as "heavily, severely, falling down drunk, incapacitated …". In cross-examination he agreed he told the police it was like he was "in a trance".

[73] However, he said he has a patchwork of "really clear memories". He said he has pictures in his head as well as "sights, sounds and smells" – that are very real. He agreed, however, that his recall is not seamless and is not sequential. He was cross-examined at length about his memory and his experience in reducing it to writing. He explained how he confided in different people over the years and then joined a men's group in 2013 and began to reduce his experience to writing. He wrote "his story" as he described. He was doing this as he heard other similar accounts from other "survivors".

[74] He also acknowledged that he changed parts of his prepared narrative; for example, he originally wrote that the accused was masturbating while sitting on the couch and he changed that to "sitting on the couch". Originally he had not described the game including the players touching each other or rubbing each other but added that during his trial testimony. He acknowledged that when he thought about this evening things were "popping up" and his memory continues to evolve.

[75] Mr. C maintained that Mr. A and Mr. B had invited him to go to the accused's trailer that evening. He also believes that Mr. A and Mr. B were being used by the accused to get to him; although he did admit that there was no evidence of that.

[76] Mr. C also believed that the accused was his Grade 9 teacher, when the records, at least, indicate that the accused was not even at the school for Mr. C's Grade 9 year. Finally, Mr. C believed that the accused had sexually assaulted another student who alleged another teacher had perpetrated that assault. Again, Mr. C believed this, notwithstanding the assault was alleged to have occurred before the accused came to the school.

[77] He also recalled that Mr. A and Mr. B were on the couch naked masturbating. He could not say who was touching who. Mr. B's testimony contradicts this, and Mr. A, when asked, did not remember this happening.

[78] Also, he said the accused supported him when walking down the hallway although Mr. B did not witness this when he saw Mr. C and the accused going down the hallway. Mr. B said that the two were separated and were not touching each other at that time.

[79] Mr. C remembered the accused was taller and heavier than he was. He could not explain why he did not simply push the accused away during the events in the bedroom. He acknowledged that he has asked himself that question and cannot answer it. Mr. C believed the accused was six feet one inch tall and weighed 215 pounds at the time. He now acknowledged that the accused weighed approximately 160 pounds and was five foot seven inches tall. He testified he believed the accused to be larger and taller as a way to explain why he did not do anything to stop him. He also indicated that he remembered the accused as being larger partly because of his position as a teacher and coach. Mr. C testified he was six feet four inches tall and weighed between 185 and 200 pounds at the time.

[80] Finally, Mr. C had no recollection of any discussion with the accused about being gay. He had no recollection of going to the accused's trailer and discussing his sexual orientation as the accused described. He said that he would not have gone to the accused for that reason and that if he had any questions about his sexual orientation he would have gone to his godfather, who apparently was an openly gay man and he had spoken to him about that during this time.

TESTIMONY OF THE ACCUSED

[81] The accused testified in his own defence.

[82] The accused related how he attended Mount Allison University and started teaching at West Kings High School in the Fall of 1973. He left teaching at the conclusion of the 1975-1976 school year in July of 1976.

[83] As I mentioned above, the accused was involved in the school's extra-curricular activities. He felt this was an important part of his teaching duties.

[84] He described his experience of being a gay man at that time – in the early to mid-seventies. He described his efforts at trying to hide his sexual orientation for fear of the consequences to his job security if it became known that he was gay. He testified about finding out about the Metro Church in Toronto, his decision to join that church, and his "coming out" to his parents, and in particular, speaking to his father. He described that experience as "feeling God holding his hand when he spoke to his own father". He said he shared this experience with others.

[85] As a coach he said he was careful not to go into the boys' locker room unannounced. He described he would often entertain students and other teachers at his residence, including his mobile home, which he acquired in 1975. He said that there was alcohol for teachers and soft drinks for students. He denied "serving" alcohol to the students but acknowledged students drank alcohol at his residence and possibly helped themselves to beer or other alcohol he had in his home. He said he was concerned about underage drinking and related experiences with tragedies that happened in New Brunswick which were related to drinking and driving.

[86] He said that in the Spring of 1976 he decided to leave teaching, although he acknowledged his resignation letter was dated November 1975. In fairness to the accused, it is not clear when this November-dated letter was actually delivered to the school authorities. He described himself as a popular teacher and that many people – students and teachers – came to say goodbye in July of 1976. They often brought

cards and/or bottles of wine. There was no "one big party" but people came at different times. He said it was very casual.

[87] He said it was not uncommon for students to be at the homes of teachers for parties related to school activities such as hockey, musicals or special events. Those parties were attended by former students as well as teachers. There was nothing unusual about students therefore being at the home of a teacher.

[88] The accused described an occasion when Mr. A, Mr. B and Mr. C came to his mobile home residence. He believed it was July 1976 when others were coming to his home to say goodbye. He said it was the only time that these three teenagers were there together. He said that they may have been there individually before, but not as a group. He said that they were not specifically invited to attend.

[89] He said that they came with what he described as "a jug of moonshine cider" which is how he said the three teenagers described it to him. He said he tried a sip of it but it was "god awful" and he spat it out. This visit he said was uneventful except for the presence of the cider and his reaction to its taste.

[90] He said during this visit nobody was playing "strip caps" nor did he suggest that type of game. He said nothing stood out to him about anyone being intoxicated. He said the three teenagers were not specifically invited and he does not recall how they left or under what circumstances they left.

[91] He said he was not at the Top Hat Tavern that night. He said there was no sexual activity. Specifically, he said that there was no forced oral sex. He said "it's not true. It did not happen." He denied taking the complainant down the hallway to the bedroom.

[92] He testified he did not recall discussing with Mr. A the topics which Mr. A described – Mr. A's sexual orientation and the accused's experience with spirituality. He opined that because he had related the experience he had about the presence of God when talking to his father to others that perhaps Mr. A was aware of this through others. He did acknowledge though that he may have told Mr. A. He

said he never taught Mr. C nor was he ever his homeroom teacher. Specifically, he said he could not have been Mr. C's homeroom teacher in Grade 9 because he was not at the school when Mr. C was in Grade 9.

[93] The accused testified that at one point it became known in the community that he was gay. He said one evening Mr. C came to his door to talk to him. Mr. C told him, "is it true you are gay?" Mr. C told the accused he thought he was gay. The accused told him that there were people out there that would support him. He mentioned Provincetown as a place where gay men could go and because Mr. C was a "good looking guy" he should seek out others. He admonished Mr. C for dating girls. He essentially encouraged Mr. C to embrace his sexuality and his sexual orientation instead of acting in denial of it. Mr. C has denied that this visit took place.

[94] The accused acknowledged that while attending Mount Allison University he was involved in the football program as a manager and had more than one Mount A jacket. However, he denied his loaned the jacket to Mr. A and that he went to the tavern. Also, he denied taking Mr. C on a trip to Prince Edward Island.

[95] The accused was very careful in how he related his testimony. For example, he denied "serving" alcohol to the teenagers when it was clear he allowed them to serve themselves. This became apparent when the Crown proposed rebuttal evidence of the presence of alcohol at the accused's mobile home. The accused in argument acknowledged that alcohol was being consumed, it was just not "served".

EXPERT EVIDENCE

[96] In a mid-trial ruling I qualified Dr. Timothy Moore as an expert capable of giving opinion evidence in the following areas, all related to the psychology of memory:

1. How memories are formed and how gaps in memories can arise;
2. Factors that may compromise the reliability of autobiographical recollections;

3. The phenomenon of source amnesia;
4. The phenomenon of false memories;
5. Distinguishing an authentic memory from the one which may have arisen through imagination inflation;
6. The difficulty of distinguishing an illusory memory from one based on actual experience;
7. The notion of where the memory comes from;
8. The notion that imagined events can be mistaken for actual events; and
9. The constructive and reconstructive nature of memory.

Dr. Moore is a professor of psychology at York University's Glendon College and Chair of the Department of Psychology. I was satisfied that the four threshold requirements established by *R v Mohan*[6] had been met. The second requirement was the one which was contentious; that is, whether the opinion was necessary in assisting the trier of fact.

[97] The accused argued in his motion brief

> While the general proposition that memories tend to fade with the passage of time is commonly understood by a judge or a jury, understanding the phenomenon of false memories, imagination inflation, illusory memories, the reconstructive nature of memories, source amnesia, and factors that may compromise the reliability of autobiographical recollections require specialized knowledge and expertise in the psychology of memory. Therefore, Professor Moore's evidence is necessary to understand the psychological concepts that form the basis of the defence.

I accepted this submission. In particular, it was my opinion that it was necessary to understand the phenomenon of "imagination inflation" and "the

[6] [1994] 2 S.C.R. 9

constructive nature of memories" to assist in assessing the credibility of the testimony of the witnesses in this proceeding. Further, it was necessary, in my opinion, to understand that these phenomena could explain how memories which were vivid and detailed might be otherwise inaccurate or even false. I think it is common sense that memories fade over time and that small details around events and their sequence or timing can be inaccurate. Even remembering that particular persons were present who were not or other more significant details incorrectly is not uncommon. However, more detailed and vivid recall of an entire event which may be untrue is not necessarily a matter of common sense, in my opinion. I accepted that Professor Moore's evidence was necessary for understanding that phenomenon.

[98] I also accepted the necessity of hearing Professor Moore's opinion regarding alcohol effect on the transfer of memory from short to long term and on the phenomenon of "filling" in gaps of memory. While these latter two topics have an element of common sense, the scientific basis is beyond the experience of a trier of fact such that it is necessary to receive that opinion evidence.

[99] Once qualified, Professor Moore's report dated November 17, 2016 was admitted into evidence by consent. Also, he testified about the contents of his report. I will not describe in detail his report or his testimony because much of what he described was not necessary for my analysis and I did not rely on it. I will review the more relevant aspects.

[100] Professor Moore explained that memories are not stored like media files in our brains ready for playback. Rather, memories are both reconstructive and selective. They contain information that is added, deleted or modified over time. Gaps in memory are sometimes compensated by inferences which a person makes unconsciously. External influences over time can affect memories such that it is difficult to sometimes know which parts come from where and from which period in time.

[101] Professor Moore testified that memorable events are those which are unique or unusual and are personally meaningful. He said they typically contain rich detail

and coherence. He added that emotionally impactful experiences tend to be well-remembered. In his report he explained,

> Sometimes an entire event can be "remembered" as an experience, even in the absence of any historical reality. Envisioning an event can create a belief in its authenticity. Through a process called *imagination inflation*, an imagined experience can take on an aura of subjective reality. In such cases, a person will remember having experienced an event that, in reality, they only imagined. The "memory" can be vivid and can seem real to the person recounting it. consequently, they are not lying when they provide their reports; they are simply mistaken.

He also added that imagination inflation arising from repeated attempts at creating a written narrative and efforts made to remember a painful or emotional event can arise. He said "recovered" memories should be viewed with caution. I should add at this point that Mr. C testified that he has always remembered the events regarding the night in question from the outset and that they are not "recovered" memories.

[102] Finally, Professor Moore explained how alcohol affects memory and in particular how it may allow it to be fragmentary, which creates the tendency to "fill in gaps".

[103] In his testimony Professor Moore explained that real memory tends to have slightly more detail than false or imagined memory. This comes from comparing known false and true accounts. However, this does not help when accuracy is unknown. Therefore, a detailed account does not necessarily mean that it is accurate.

[104] Professor Moore was also asked to opine, particularly, about the testimonies of some of the witnesses. I have not considered this evidence. In my opinion Professor Moore's testimony and Appendix C of his report risks usurping the role of

the trial judge in assessing credibility. I did not consider his opinion of the reliability of the particular trial witnesses in my analysis set out below.

[105] I did find Professor Moore's testimony helpful regarding the phenomenon of imagination inflation and recreated memories in particular. It did provide a scientific basis for what is, for the most part, common sense. In my analysis I applied what trial judges and juries are directed to employ – logic, common sense and human experience – noting the strengths and weaknesses of the testimonies of each witness and the evidence as a whole.

[106] The indicia of unreliability which Professor Moore identified are ones I had identified in any event, as I will explain later.

[107] As I noted earlier I did find his evidence about how the phenomenon of imagination inflation and reconstructed memory as it relates to a memory which is vivid and has "richness of detail" to be informative.

EVIDENCE ISSUES

Prior Judicial Finding in Civil Case

[108] Earlier I explained how Mr. C was involved in a motor vehicle accident in July of 1975. Litigation ensued and those injured in the accident brought action against Mr. C and others seeking damages against him and his family. Following a trial in 1977, Mr. C was found by the trial judge to be the "sole cause" of the accident, notwithstanding that he testified that his brakes had failed. The trial judge made the following comment:

> I received the impression from [Mr. C] that he was reconstructing his actions before the accident rather than relating them from a direct memory of the event. I do not accept his evidence about his speed or brake failure immediately prior to the accident.[7]

[7] I have not included the citation of the civil case to protect Mr. C's identity

[109] The accused argues that I am obliged to accept the trial judge's finding regarding Mr. C's credibility and furthermore I am able and should use this to assess Mr. C's credibility in this proceeding. The Crown argues that this is an incorrect approach and that the commentary and finding in the civil case is irrelevant. The Crown relies on *Jeffrie v Hendriksen*[8]. There, Justice Wood, in referring to *R v Ghorvei,*[9] found that the opinion of another trial judge of a witness' testimony in another case involving different issues is irrelevant. In *R v Ghorvie, supra*, the Ontario Court of Appeal examined the subject of using prior judicial findings of credibility from other cases. There, the Court found that if the finding related to a conviction of perjury or was giving contradictory evidence the witness could be cross-examined on that conviction. While the facts in this case are somewhat different from *Ghorvie*, in my opinion, the same principles apply – the trial judge's comments and findings in an unrelated proceeding is "nothing more than a rejection" of Mr. C's testimony in that proceeding. That proceeding involved a different factual context and different evidence with different issues than are present in this proceeding. I agree with the Crown's submission.

[110] I will make my own assessment of Mr. C's credibility and reliability as a witness based on all the evidence presented in this proceeding.

Statements of Crown Witnesses Given to Police

[111] During the trial I was given statements made to police by the Crown witnesses. These were for the sole purpose of *aide memoires* to assist me in following the extensive and lengthy cross-examination of these witnesses about their statements to police. They were not admitted for the truth of their contents. The Crown consented to these statements being entered as exhibits. I want to clarify that only those portions that are referenced during cross-examination become evidence in this proceeding and only as they relate to their purpose – challenging the credibility of

[8] [2013] N.S.J. No. 99
[9] [1999] O.J. No. 3241

those witnesses. Only those portions of the statements which have been confirmed by the witnesses who made those statements in their testimony can be considered for the truth of their contents. The other portions of the statements which were not referred to form no part of the evidence in this proceeding for any purpose whatsoever. I have not referred to those portions, nor have I considered them.

THE LAW ON SEXUAL ASSAULT AND APPLICABLE PRINCIPLES IN THIS PROCEEDING

[112] I refer to "sexual assault" notwithstanding that the offences charged here are indecent assault and gross indecency. The common law principles regarding sexual assault in my opinion apply to the charge of indecent assault.

[113] While this case does not necessarily turn on the application of the principles around the law on sexual assault it is helpful, in my opinion, to set out some of the applicable principles here.

[114] The *actus reus* of sexual assault is established by proof of three elements:

1. Touching;
2. The sexual nature of the contact, and
3. The absence of consent[10].

The absence of consent is subjective. There is no implied consent. "No" means "no" and only "yes" means "yes". If the complainant testifies he did not consent and this is accepted as true – absence of consent is established. Age differences and the nature of the relationship between the accused and the complainant may be relevant to whether absence of consent has been established beyond a reasonable doubt. I will discuss this more below.

[10] *R v Ewanchuk* [1999] 1 S.C.R. 330

[115] It is not necessary to describe the *mens rea* of the offences charged or explain mistaken belief in consent, which often arises in these types of cases because they are not live issues in this proceeding.

[116] In 1975 and 1976, the *Criminal Code* contained provisions relating to the requirement for corroboration[11] and the doctrine of recent complaint existed.[12] These sections and that doctrine have since been repealed and because they are either procedural or evidentiary in nature, the repeal provisions operate retrospectively. These sections and that doctrine are therefore not applicable to these proceedings.[13]

[117] The failure of the complainant to make a timely complaint is not to be the subject of any presumptive adverse inference based on anachronistic assumptions of how persons react to sexual offences.[14]

[118] Gross indecency was never defined in the *Criminal Code*. In *R v Lapage*[15] the court analyzed the subject in some detail. It is not necessary for me to weigh into the discussion Justice Molloy entered, particularly as to whether present standards of moral decency should be relied upon or ones existing at the time. Here counsel agreed that if the sexual activity was without consent, the acts alleged would amount to gross indecency. Counsel did not make any submissions regarding the age difference or the position of the parties, that is, that the accused was a teacher at the complainant's school and the assistant coach of his basketball team. I will come back to this later.

[119] Here, the complainant was never asked specifically whether he consented or not to the alleged activities in the bedroom. Notwithstanding this, it is implicit, in my opinion, from his testimony as a whole that he was describing a non-consensual series of sexual acts. He referred at different times to this activity as being "forced

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[11] s. 139 – see also s. 274 of the *Criminal Code* R.S.C. 1985 c. 19; although the presence or absence of corroboration is a factor in assessing credibility – *R v Hunter* 2016 MBCA 2
[12] See s. 275 *Criminal Code* R.S.C. 1985 c. 19 which abrogates this doctrine
[13] *R v Bickford*, [1989] O.J. No. 835
[14] *R v Divitaris* (2004), 188 C.C.C. (3d) 390; *R v D.D.* (2000), 148 C.C.C. (3d) 41 (S.C.C.)
[15] 2014 ONSC 5855

oral sex" and "non-consensual". The import of his testimony was that it was non-consensual and he did not agree to engage in the sexual activity. Further, while Mr. C said he was very intoxicated, it was not argued that his intoxication resulted in him being incapacitated such that it vitiated any consent.

[120] Mr. A also described oral sex being performed by the accused on the complainant Mr. C. Mr. C, however, testified that this did not occur. There is no direct evidence of Mr. C's subjective consent or absence of consent. There were certain observations made by Mr. A about this incident which touch on the issue of consent. I will return to this later.

THE LAW ON CREDIBILITY

[121] Credibility has two different aspects: truthfulness or veracity on the one hand and accuracy – the ability to accurately observe and recall – on the other. The latter is often referred to as reliability and the former as credibility.

[122] A witness who is not credible cannot give reliable evidence whereas credibility is no proxy for reliability.[16] Sometimes a credible witness can give unreliable testimony. Some witnesses may honestly attempt to convey an accurate account of what they saw and heard but for various reasons may simply be incorrect, while other witnesses are simply shading or slanting the truth or being deliberately deceptive. Hereafter, I will refer to truthfulness or veracity as "credibility" and the ability to observe or recall as "reliability".

[123] Credibility and reliability assessments are not science nor some kind of mathematical exercise, nor purely intellectual.[17] Judges and juries as asked to use their common sense, logic and their own knowledge and experience with human behaviour when deciding issues of credibility and reliability. Yet, at the same time, these assessments are not a purely intuitive exercise. It cannot be based on

[16] *R v H.C.*, 2009 ONCA 56
[17] *R v Gagnon*, [2006] 1 S.C.R. 621

"impressions" which the judge may form of a witness. This risks placing too much emphasis on demeanour.

[124] While there are no "set of rules" courts have used certain factors. In *R v Filion*[18] Mossip, J. set out some of those factors:

> **27** In assessing the reliability and credibility of witnesses' testimony, I have considered factors that judges invite juries to consider such as:
>
> * Does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable.
>
> * Does the witness have an interest in the outcome of the case, or any reason to give evidence that is more favourable to one side than to the other?
>
> * Does the witness seem to have a good memory? Does any inability or difficulty that the witness has in remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions?
>
> * Does the witnesses' testimony seem reasonable and consistent as she/he gives it? Is it similar to or different from what other witnesses say about the same events? Did the witness say or do so something different on an earlier occasion.
>
> * Do any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because she/he failed to mention something? Is there any explanation for it? Does it make sense?
>
> * The manner in which a witness testifies may be a factor, and it may not, depending on other variables with respect to a particular witness.

[125] To this I would add the following factors:

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[18] [2003] O.J. No. 3419 (ONSCJ); see also *R v Domoslai,* 2016 NSSC 344 at para. 26

1. Plausibility – how does the witnesses' testimony comport with the surrounding circumstances and the other evidence, using human nature, common sense and life's experiences.[19]
2. The presence of detail and completeness of observation – both are helpful for assessing credibility and useful when assessing reliability when issues regarding the ability to observe are present. I will discuss these factors when discussing memory or recall later, and
3. Other supporting evidence – corroboration is not necessary, but evidence which supports a witnesses' testimony is useful in assessing both credibility and reliability.

[126] What the Court is doing is not judging character.[20] Furthermore, any reliance on demeanour should be made with caution. Demeanour is of limited value.[21] This is particularly so where, as here, reliability is the issue with much of the testimony.

[127] Care should be exercised when witnesses are describing events which occurred many years ago when they were younger. Courts have made specific comments about adult witnesses testifying about events which happened when they were children. To some degree that applies to witnesses relating events when they were teenagers – even older teenagers.

[128] Accordingly, inaccuracies or inconsistencies, particularly regarding timing and sequence of events, should not necessarily be a cause to reject or discredit the veracity or reliability of that witness' testimony. This is applicable in this case. Having said this, the criminal burden of proof remains the same. In some cases the quality of the testimony may have been affected by the long passage of time. Consequently, its weight may be reduced such that it does not discharge the criminal burden of proof.

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[19] *R v D.D.S.*, [2006] N.S.J. No. 103 (NSCA)
[20] *R v S.H.P.* 2003 NSCA 53
[21] *R v Rhayel* 2015 ONCA 377

[129] Further, with dated testimony it is unclear what other factors or influences may have had an impact on the witness' recall. This is particularly so when different witnesses have different memories of a particular event or the circumstances surrounding that event.

[130] Finally, I can accept or believe some, all, or part of a witness' testimony[22] and place different weights on different parts of his or her testimony. This applies to the expert testimony as well[23].

CRIMINAL BURDEN OF PROOF

[131] In *R v W.(D.)[D.W.]*[24] the Supreme Court of Canada confirmed that where credibility is determinative, the rule of reasonable doubt applies to that issue[25]. Justice Cory then sets out the often-quoted framework for applying the criminal burden of proof in such circumstances:

> 28 …
>
> 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.

[132] In *R v Mah*[26] Justice Cromwell explains how *W.D.* applies to credibility assessments:

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[22] *R v Nqumayo*, 2010 ABCA 100 at para. 18
[23] *R v Fisher*, [1961] O.W.N. 94 (ONCA) affirmed [1961] S.C.R. 535
[24] [1991] 1 S.C.R. 742
[25] *Supra*, para. 27
[26] 2002 NSCA 99, at para. 41

> **41** The W.D. principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt: see *R. v. Avetysan*, [2000] 2 S.C.R. 745; [2000] S.C.J. No. 57 (Q.L.) at 756. As Binnie, J. put it in Sheppard, the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[133] This proceeding is about reasonable doubt. Has the Crown proven beyond a reasonable doubt each of the elements of the offences charged?

[134] The standard of proof of beyond a reasonable doubt is fundamental to our criminal justice system because it is inextricably linked to the presumption of innocence guaranteed by s. 11(d) of the *Charter*. The burden is on the Crown throughout the case and never shifts to the accused. It is not a doubt based on sympathy or prejudice but one based on reason and common sense, but it is not essential that a reason be supplied[27]. It must be logically connected to the evidence or absence of evidence. The Crown does not have to prove its case to an absolute certainty, nor does it need to prove it beyond any doubt. It does not need to prove its case beyond an imaginary or frivolous doubt.[28]

[135] However, more is required than that the accused is probably guilty. If I conclude only that the accused is probably guilty, he must be acquitted. The criminal standard of proof is closer to absolute certainty than proof on a balance of probabilities.[29]

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[27] *R v Lifchus, infra* para. 30
[28] *R v Lifchus* [1997] 3 S.C.R. 320
[29] *R v Starr* [2000] 2 S.C.R. 144

[136] Having explained this, individual facts need not be proven to the criminal standard of proof – only the elements of the offence need to be proven to the criminal standard. Finally, a criminal trial is not a credibility contest. It is not about choosing one version of events over another. A trial judge does not have to believe one witness and reject another. However, where individual findings of fact are determinative of establishing an element of the offence the criminal standard will apply.

ANALYSIS

[137] Because credibility and reliability are the central focus in this proceeding I will use the *W.D.* framework to analyze the various witnesses' testimony and other evidence described above.

[138] Before doing that, however, I want to clarify some terms I will use in my analysis. First of all, to "believe"[30] a witness means to accept their testimony as being true. This should be distinguished from a witness who is "believable" or "credible". While their testimony may be true, it does not mean it is necessarily true. It simply means it is capable of being believed or that it could be true. A witness who is disbelieved or not believed simply means their testimony is not accepted as being true. It does not necessarily mean that it is false. However, a witness whose testimony is rejected has no evidentiary value.

[139] With this in mind, let me deal with each of the *W.D.* steps, which I set out as follows:

1. Do I believe the accused?

[140] Justice Cory, in *R v W (D)*, points out that if a trier of fact believes the accused obviously the accused must be acquitted. He used the word "obviously" because if I accept the accused's testimony as being true – that is I believe him – then clearly any evidence to the contrary would be rejected. It must be remembered that the accused bears no burden to persuade me to "believe" him. He has the presumption

[30] The Canadian Oxford Dictionary, Oxford University Press, Toronto 1998

of innocence and the burden is on the Crown and remains with the Crown throughout the proceeding. It never shifts to the accused.

[141] Here, a great deal of the accused's testimony has been contradicted by other witnesses. As I explain below, I do not believe the accused and do not accept a great deal of his testimony as being true. This does not necessarily mean, however, that it is not true, but at this stage of the proceeding I do not accept it as being true. Again, I repeat, the accused has no burden to persuade me otherwise. In my opinion, the accused was not forthright in his description of the alcohol use and the level of intoxication of those present on the evening in question. I found his testimony to be selective regarding the availability of alcohol. I accept the testimony of Mr. B and Mr. C about the alcohol consumption and the game playing, including the removal of clothing. Also, I do not believe the accused's testimony about Mr. C coming to his trailer to discuss his sexual orientation. It is necessary, therefore, to move onto the other legs of the *W.D.* test.

[142] I will deal with the second and third parts of the *W.D.* test together.

2. Does the accused's evidence raise a reasonable doubt and/or based on all of the evidence I do accept, am I convinced of the accused's guilt beyond a reasonable doubt?

[143] To deal with this I will review the evidence and make some factual findings while assessing the credibility and reliability of the various witnesses.

[144] When did this event occur? This is not a critical question, however, if it happened in the Spring or in July of 1976 it would support the accused's evidence that it occurred after he announced that he was leaving West Kings. The evidence on this point is not clear. Mr. A suggested the event happened in the Fall, although his support for that belief is not strong – they were wearing jackets. Mr. C said it was a cold and grey day. For example, there was no evidence of whether there was snow on the ground – although the accused's testimony was that it happened in July, Mr. C said it was between July 1975 and June of 1976 and appears to have happened

after the trip to Prince Edward Island, which I can only conclude would be in the Fall of the year during football season. In my opinion this event likely occurred in the Spring of the year consistent with when the accused said it happened and, in particular, after he announced he was leaving West Kings.

[145] Why did the three teenagers go to the accused's trailer and under what circumstances? Again, this is not critical, but it does help to explain the context of the events that occurred. Mr. C suggested that the others persuaded him to go to the accused's trailer. Mr. A and Mr. B denied this. He told the police in his statement that some mentioned the accused had "beer" and there were "video games". Mr. C said that they had played the video game Pong at the accused's trailer on an earlier occasion. It is not clear when that was. Interestingly, the accused was never asked either on direct or in cross-examination whether he had the video game Pong or any other similar game. None of the teenagers ever described playing video games on the night in question – only caps or strip caps.

[146] Mr. B said the three teenagers brought beer with them. Mr. C denied this and Mr. A had no recollection. Mr. B said they brought six to eight bottles of beer, which they got from their fathers' fridges. I did not find this credible. It may be possible that Mr. B brought alcohol or beer with him but I do not accept his evidence that others did the same. The accused said the teenagers brought a "jug of moonshine cider". None of the teenagers confirmed this, although Mr. C said in cross-examination it was possible. In the end it is simply not clear how, why or under what circumstances the three teenagers went to the accused's trailer on the night in question. The accused said it was because they wanted to say goodbye to him and they brought moonshine cider with them. I cannot conclude that they did not. It is certainly possible.

[147] The accused argues the Crown is obliged to show there was no collusion between the Crown witnesses. He said the possibility of collusion arises from the references Mr. A made in the livingroom about hearing another person ask "What's happening" or words to that effect. The accused also points to Mr. B and Mr. C sharing, for a brief period of time, an apartment in Alberta after this event.

[148] Collusion is an agreement between individuals for an improper purpose. In the legal context it is generally referred to in situations where individuals agree to concoct, modify or structure their accounts or testimonies for improper reasons. Collusion is a risk, particularly in cases where similar fact evidence is presented and in some cases needs to be addressed.

[149] In my opinion, there is no evidence of collusion here. Mr. A, Mr. B and Mr. C all testified they never spoke to each other about the event after this evening. Any possibility to discuss or agree upon what happened that evening occurred decades ago. Since then these witnesses have not seen each other. There is no evidence any of them discussed or reached any agreement about what happened that evening and to tell police or anyone else an agreed version of what occurred.

[150] Having said this, there is simply no evidence, however, about whether these three witnesses who arrived together left together that evening and discussed amongst themselves what happened earlier. It is simply common sense that this might be a possibility. However, I do not make any conclusion here because there is no evidence regarding when or under what circumstances they left.

[151] Further, collusion is an issue where witnesses have remarkably similar accounts. This is somewhat the case here, because they all describe sexual activity at the accused's trailer. However, their testimonies, in my opinion, are more characterized by the inconsistencies or differences in their accounts which, if anything, shows a lack of any agreement or collusion.

[152] Finally, as I alluded to below, there is the chance witnesses talked to each other when they left the accused's trailer – if they in fact left together. That may explain why their accounts, while somewhat similar, had significant variances. Their own memories may have been affected by what others said to them. However, this is something that is simply unknown. As I explained below, what is known is that there are significant inconsistencies and variances in their accounts.

[153] Before moving to deal with the other factual inconsistencies, I want to comment further on the credibility and reliability of the testimony of Mr. A and Mr. B. I found the events Mr. A described as believable. In particular, I found the account of what occurred at the tavern very compelling and I accept and believe that account. Whether it happened on the night in question is not clear, however. Mr. A did not say who was there but simply that they had left the accused's trailer to go there with the accused's Mount A jacket. It is not clear, in my opinion, as I indicated, that this happened on the night in question. None of the other witnesses were able to confirm this. Mr. B and Mr. C said it did not happen. It would seem to me that this was something they would have remembered, although it is possible Mr. A went with others - not Mr. B or Mr. C. Interestingly, Mr. A also attended Mount A University after high school. It is not clear whether he may have been confusing this with a future event. He was never questioned about that possibility.

[154] Also, I accept Mr. A's testimony about the conversation he had with the accused. Again, while Mr. A could not remember any other context or circumstances of that evening this account seemed detailed and compelling. Mr. A had no recollection of being intoxicated or of drinking at the accused's trailer. There is no evidence to suggest that he was under the influence of alcohol to any great degree. He never described any extreme effects of alcohol consumption like Mr. C, nor any suggestion that "something" was in the drinks, as Mr. B did. Again, whether this conversation occurred this evening is impossible to conclude, because there is no other context or circumstance that Mr. A could point to other than it happened in the bathroom or small bedroom. It is likely, in my opinion, that it occurred on that evening.

[155] I had the clear impression that Mr. A was not revealing everything he may have seen that evening. I found his comment, "I've tried to forget" and "what … I have been unable to forget" intriguing. He was not examined, nor cross-examined, on these statements. Is it possible to deliberately "forget" something? It seems to me that trying to forget something simply recalls and reinforces the memory. I took from this expression he made no effort over the years to "try to remember". Having said this, I had the impression that Mr. A "didn't remember" events he simply did not

want to describe, for whatever reason. Notwithstanding this, I found him to be credible or believable on the events he did describe.

[156] This leaves the testimony of Mr. A about seeing oral sex being performed by the accused on Mr. C. There is little detail other than the reference to oral sex itself. There is no detail about where in the room this was, what the lighting was or who else was there beyond the one person who yelled out, other than this event happened to his left and slightly behind him. Yet the act he described is hard to confuse with anything else. Mr. C, however, said that this event did not happen. The accused testified there was no sexual activity that evening. However, I found that Mr. A was a credible and believable witness and I accept that what he saw may have happened. I will return to this below.

[157] Mr. B, in my opinion, was attempting to give an accurate account of what happened. However, I had difficulty accepting some of what he recalled. As I indicated above I do not accept that all the teenagers brought alcohol with them as Mr. B described. Mr. B may have done that but the others did not. I do accept his testimony that there was drinking – beer, wine and perhaps other alcoholic beverages. Mr. B seemed to be extremely intoxicated. He said at one point that he could not move his body – "Something was keeping me on the floor". After describing the "kissing" and the "grinding" events and the failure of anyone to intervene he added, "There was some other factor here". This last statement was never explained. I interpret it to mean that other intoxicating substances may have been involved. At one point he said "Something was spiked", yet there is simply no other evidence to support this. The only evidence of other substances beyond beer, wine and possibly vodka and crème de menthe is the moonshine cider the accused described. Is there another interpretation of this phrase? It is not clear. Is he referring to some other nefarious motive? To offer any other explanation would amount, in my opinion, to speculation. I am not permitted to do that. What is clear, however, is that Mr. B was very intoxicated.

[158] The kissing and grinding incident described by Mr. B was, in my opinion, very unclear. The account had very little detail and there was little or no context. It

is impossible to fairly assess this. Again, the accused said there was no sexual activity.

[159] While it is very likely the accused may have jumped over Mr. B or others and made some contact with him, I cannot conclude even on the balance of probabilities that there was "kissing" or "grinding" that was of a sexual nature. The evidence is simply not reliable enough to conclude this. As I indicated above Mr. B's testimony included inconsistencies with his police statement over whether he and Mr. A touched each other or whether just Mr. A touched him. Also, he retracted his earlier statement that everyone was naked including himself.

[160] What happened in the small bedroom with Mr. A, Mr. B and the two other teenagers? In my opinion it is simply unclear. Mr. A says he "Can't remember". While I found Mr. A credible in the accounts he recalled, I found it difficult to accept that he would not have recalled this event, if it happened. Having said this, he offered no account of this event at all.

[161] As I mentioned earlier, Mr. B was extremely intoxicated. His testimony was not reliable. It seems something happened in the bathroom, however the full account, context or circumstances were not explained. It simply makes no sense that two other teenage boys would be there and apparently said or did nothing. In the end it is not necessary for me to come to any final conclusion about what, if anything, happened, or who was involved. Further, I cannot conclude the accused was involved in this or instigated or encouraged this event.

[162] Before examining Mr. C's account of what happened in the bedroom I will address some of the other inconsistencies and factual disputes.

[163] First of all, Mr. C was simply wrong, in my opinion, when he mentioned that the accused was his Grade Nine homeroom teacher, for the reasons I explained above. However, this is not fatal to any overall assessment of his credibility or reliability, as he could have simply been mistaken. However, his continued belief that the accused is responsible for the sexual assault alleged to have been committed

by another teacher who was criminally charged as a result of that allegation is more concerning. The allegation giving rise to those charges arose before the accused came to the school. Mr. C's insistence that the accused is responsible weakens my confidence in the reliability of his testimony.

[164] Mr. C said the accused took him to Prince Edward Island. The accused denied this. The Crown points to this as a possible grooming event which Mr. C said the accused was doing for two years, up until the night in question. Mr. C said the accused spoke to his parents and convinced them that it would be a "good idea" if Mr. C was able to go to Prince Edward Island to experience university football. Apparently, the accused knew the Mount A football coach because he had been the manager of the football program when he was attending Mount Allison University as a student. Mr. C's father had played professional football.

[165] Mr. C's mother has passed away; however, his father is still alive – aged 84 – and resides in Ontario and his health was described as "pretty good" notwithstanding he had a stroke and a heart attack. Again, there is simply no way to conclude whether the trip to PEI, which appears to be just Mr. C and the accused, occurred or not. The accused said it did not. Mr. C's father was never called as a witness. There is no evidence whether he would have been able to recall this event or not.

[166] There is no evidence of any "grooming" activity, as there was nothing in Mr. C's testimony whatsoever about the trip. In the end I cannot conclude whether or not there was a trip to Prince Edward Island. There is no evidence that any grooming activity occurred during this trip, if it occurred. The only other reference in the evidence to the PEI trip was Mr. C's testimony that when he was asked about the first time he had been at the accused's trailer, he replied, "Probably Grade 11, thereabouts. I know I didn't have much contact with [the accused] with the exception of the trip to PEI. I made a point basically to avoid him. There was a…". There was no explanation why Mr. C was avoiding the accused. It is not clear whether this was connected to the PEI trip.

[167] Also, Mr. C referred to a trip to Boston with other basketball players and coaches. There was no evidence to suggest that this was anything other than an uneventful trip. Finally, Mr. C indicated that he had been at the accused's trailer on a prior occasion but nothing was described that would amount to any type of "grooming".

[168] As I described earlier, Mr. C recalls the accused as much larger and taller than the evidence indicates he was. Today he also presented as a man of relatively small stature. Mr. C explained why he had that impression – he saw him as a teacher and coach and he thought his size may explained why he did not resist.

[169] I do not accept this. Of course, Mr. C does not have to resist in order for there to be no consent. That said, it is difficult for me to understand how Mr. C could recall a smaller man to be so much taller or larger. The difference in sizes is quite significant. This has affected my confidence in Mr. C's recall and the accuracy of his testimony about what happened in the bedroom.

[170] There are other additional inconsistencies which have some significance and which need to be addressed. I refer to Mr. C's testimony that he saw Mr. A and Mr. B masturbating on the couch, Mr. A or Mr. B giving him a "thumbs up" or other sign of approval before going down the hallway, and the different descriptions Mr. B provided about Mr. C going down the hallway to the bedroom, from what Mr. C described.

[171] Mr. B described an incident in a small bedroom where Mr. A was masturbating him. Mr. B said Mr. C could not have seen this. Yet Mr. C maintains that Mr. A and Mr. B were masturbating on the couch, or touching each other. He told the police that in his statement and confirmed this in cross-examination. He said, "That's the image I have". Mr. B, whose recollection is more complete than Mr. A, never described that. He was quite clear that nothing remotely similar to that happened while in the small bedroom. Mr. A has no memory of that. It is difficult to reconcile this, as one would expect, at least, Mr. B would have some recollection of

this. I found it interesting that Mr. C used the expression “That’s the image I have in my head”. I have little confidence in Mr. C’s testimony on this point.

[172] Did Mr. C see something that Mr. B in particular just does not recall? Are they both referring to the same bedroom event which Mr. B described? That seems unlikely. Or, does either or both of their recollections come from what they may have discussed when they left? Unfortunately, there is no evidence about when they left or whether they left together and whether they spoke about what had happened. The only evidence was that each of Mr. A, Mr. B and Mr. C said that they never spoke to each other about what happened that evening. In the end, it is impossible to reconcile this difference or to explain why Mr. B or Mr. C testified as they did.

[173] Mr. C said that he saw Mr. A and Mr. B on the couch and one of them gave him a “thumbs up” or other gesture as if “they were giving [him] permission” as he turned around while walking down the hallway. Mr. B and Mr. A have denied this. Also, Mr. C described him being helped at one point by the accused as he led him down the hallway. This is not what Mr. B witnessed. Mr. B said that the two were a couple of feet apart and he followed the accused down the hallway. Mr. C said that he was very intoxicated and agreed that he was literally “bouncing into the walls” a “couple of times”. This is not what Mr. B described. Again, this is impossible to reconcile. In my opinion, if this event occurred I accept Mr. B’s description.

[174] I cannot resolve the difference over the “thumbs up” incident. Mr. B denied this, as did Mr. A. Mr. B said he was lying on the floor in the livingroom, not on the couch as Mr. C described, when he saw Mr. C going down the hallway. Mr. C’s suggestion that this was a means for Mr. A and Mr. B to give Mr. C “permission” simply does not make sense unless the teenagers were participating more actively or willingly in some kind of sexual activity. There is no evidence however to support this.

[175] This brings me then to the allegation of Mr. C about what occurred in the bedroom. Also, I will deal more fully with the oral sex Mr. A described happening

in the livingroom, but before doing so let me summarize what I have concluded about the context and circumstances at the accused's trailer that evening.

[176] Mr. A, Mr. B and Mr. C came to the accused's trailer. It was likely in the Spring or late Spring of 1976. It is possible they brought alcohol with them – Mr. B perhaps bringing beer. It is also possible that they may have brought "moonshine cider" as well. Other persons may have been there initially and left, as suggested by one of the witnesses, although there is no way to ascertain that one way or the other. At one point Mr. A, Mr. B, Mr. C and possibly two other teenagers and the accused were left. I am satisfied that they were playing games, including caps and possibly "strip caps" or some other game where the players, including the accused, were removing some of their clothing.

[177] Alcohol was being consumed. There was beer and likely other alcoholic beverages including wine and perhaps spirits or liqueurs being consumed. Mr. B and Mr. C were intoxicated. Other than Mr. B's musings there is no evidence of drinks being spiked or drugs added to the drinks. The presence of the "moonshine cider" may explain Mr. B's suggestion, but again there is simply no way to make any firm conclusion about this.

[178] In my opinion, there is not sufficient evidence, or at least no reliable evidence, to determine what, if any, role the accused played in encouraging those present to remove their clothing or to conclude that the accused had some pre-determined plan to initiate or have any sexual activity. I am not satisfied the accused was "watching" the teenage players as they removed their clothing and were in their underwear, as was suggested. Further, I am not satisfied that any of the teenagers were fully naked, as may have been suggested. It is quite clear, in my opinion, that, contrary to what the accused testified, he was participating in the alcohol consumption, and while he may not have "served" the alcohol, he was making the alcohol at his residence available to those present.

[179] As I mentioned above, I do not accept Mr. B's account of the "kissing" and "grinding" incident. I cannot come to any conclusion about what Mr. B said

happened in the small bedroom. I am not satisfied Mr. C saw Mr. A and Mr. B on the couch masturbating.

[180] A dated or historic account is not, by itself, inherently incredible or unreliable. This is so even after allowing for expected frailties over timing, sequence and other details. Indeed, there are many cases where dated sexual accounts can be compelling and form the basis of a finding of guilt in some cases. I have presided over several such cases. However, what can be missing from a dated account is context and a sufficient account of the circumstances in which events are alleged to have occurred. This is so because, as here, the testimony is very much a patchwork of memories and gaps in the evidence. One witness here described it as "tunnel vision" – isolated events with no context.

[181] Judges and juries are not tasked with determining "what happened" or to act like detectives, however, plausibility or making sense of a witness' testimony is an important factor in assessing credibility and reliability, especially where there is a divergence in the witnesses' accounts and, as here, where the accused maintains there was no sexual activity and no forced oral sex. It is difficult to apply common sense, logic and human experience, which is what is required when a great deal of the context of an event is missing. This is what occurred here.

[182] Mr. C's description of what occurred in the bedroom was vivid and detailed, at least upon first examination. I need not repeat it here, as I reproduced the transcript of the central focus of his testimony-in-chief above [see para. 66 above]. His testimony was delivered with a great deal of emotion and the memories which Mr. C has are clearly painful. However, I must be careful not to let his emotions and his demeanour overwhelm my assessment of the credibility and reliability of this part of his testimony.

[183] As I mentioned above, a detailed and complete account can strengthen a witness' testimony and add to its credibility and reliability. However, one needs to look at other factors as well. It is clear Mr. C has taken a considerable period of time to reduce his account to writing – years, in effect. When interviewed by the police

he simply read what he had prepared from his therapeutic sessions. As was pointed out in his cross-examination, his therapy sessions are centered around how individuals feel rather than the accuracy of their accounts. It is not whether a person's "story" is accurate, it is how they feel and the pain and harm that they experience. This is understandable. However, it is not what a criminal investigation is about, and more particularly it is not what a criminal trial involves. This proceeding is concerned with facts and provable facts and when those facts form the basis of the elements of an alleged criminal offence, whether those facts can be established and proven beyond a reasonable doubt. I agree with the defence that Mr. C's account has, to some extent, been "recreated" over time. This is again understandable. We do not have the advantage of a more contemporaneous account from Mr. C of what happened that night. This, of course, does not mean "something" of a sexual nature did not happen. I caution myself that late disclosure, in and of itself, does not diminish the credibility or reliability of a complainant's testimony.

[184] His testimony disclosed that he had "buried it for so long" and "not able to remember when you try to". He said, "Bits and pieces now and then would flash back in". In my opinion, this supports the possibility that Mr. C has reconstructed or recreated the events in the bedroom.

[185] I would also add that I found it telling that many of the phrases and specifics Mr. C referenced were preceded with the phrase "I remember…", whereas much of his other evidence about the drinking and games were simply statements of what occurred. While this is not determinative it opens the suggestion that Mr. C was recreating what happened in the bedroom. Further to this, before he described going down the hallway, he said, in cross-examination, "The last memory…distinct memory I have is him [the accused] sitting on the couch in his underwear". This obviously happened some time earlier, before he said he went with the accused down the hallway. He said at this point, "Things seemed really disoriented". He said it was like a movie with a soundtrack out of sync. He then described bouncing against the walls and being helped to the bedroom by the accused. I question, then, whether Mr. C could have had the vivid and detailed memory he said he had and be able to provide the detail included in his account when he was clearly highly intoxicated

and disoriented. At the same time Mr. B never saw the unsteadiness and the "bouncing off the walls" Mr. C described. It is not really clear how intoxicated Mr. C was.

[186] This then, with the greatest respect to Mr. C, undercuts an important feature of his testimony – the detailed and vivid nature of his account. We simply do not know how much is his true memory of what he actually recalled as opposed to what he may have recreated or reconstructed. I say this with the greatest respect to Mr. C because I do not want to diminish the real pain I witnessed when he testified. However, given his very intoxicated state and the portions of his testimony I referenced, I cannot find necessarily that his testimony has the compelling features which at first it may have appeared to have.

[187] In the course of describing the bedroom events Mr. C said the accused "had been grooming me for two years by that point". This is not something he said that he remembered from that evening but a statement he made in the present. However, as I indicated above, there is simply no evidence of any grooming whatsoever. The Crown pointed to the trip to Prince Edward Island, however, after reviewing the evidence I could not find any reference to any acts by the accused towards Mr. C which could be remotely interpreted as "grooming". These types of actions are often present in these types of cases – actions such as suggestive talk, inappropriate or suggestive touching, invasion of one's personal space or other suggestive action. There is no evidence of any of these types of conduct on the accused's behalf towards Mr. C.

[188] While I do not accept the accused's evidence about Mr. C coming to his trailer and discussing his sexual orientation and the references to Provincetown, that in and of itself does not mean the accused told Mr. C about Provincetown in the bedroom. This is simply not logical. Also, the conclusion that the accused's testimony was not believed on this point does not mean he tried to use that explanation to hide the fact that he told Mr. C about Provincetown in the bedroom. I could only make that inference if I was satisfied the accused deliberately fabricated his testimony for that purpose. I am not satisfied of that. In fact, the accused was never challenged on that

point nor was that suggestion made to him in cross-examination. Finally, given what I described about how Mr. C recalled the bedroom event, it is simply unknown when he recounted that and under what circumstances. One must be cautious about attaching too much significance to the Provincetown reference.

[189] Finally I want to address the oral sex Mr. A said he saw in the livingroom. As I indicated above, I found Mr. A's testimony believable. Should I discount or discredit Mr. A's evidence because Mr. C said it did not happen? How does it affect Mr. C's credibility or reliability?

[190] First of all I am not satisfied I can simply reject Mr. A's testimony on this point simply because Mr. C did not confirm it and testified that it did not happen. As I will conclude below, Mr. C's testimony has significant reliability issues.

[191] Could both Mr. A's account and Mr. C's account be accurate? In other words, did the accused perform oral sex on Mr. C in the livingroom in Mr. A's presence and later in the bedroom? This seems unlikely because if there was oral sex in the livingroom it would completely undermine Mr. C's account about being led down the hallway and being subjected to "forced" oral sex in the bedroom. As I explained above, I am not satisfied Mr. A was describing the oral sex Mr. C said happened in the bedroom. Clearly, Mr. C was not describing something which happened in the livingroom. Mr. A and Mr. C were describing two different events, in my opinion.

[192] Could what Mr. A saw constitute the alleged offence? In my opinion it could not. While I found Mr. A believable it is simply impossible to conclude beyond a reasonable doubt that this event occurred when Mr. C said it did not. Furthermore, there was no evidence of any absence of consent. Obviously, Mr. C did not say he did not consent because he said it did not happen. Furthermore, it cannot be established beyond a reasonable doubt that what Mr. A described was without Mr. C's consent. Mr. A demonstrated in court Mr. C's reaction when someone called out words to the effect, "What's going on?" by raising his arms with his palms turned out and his facial expression consistent with a possible sign of acceptance or approval as to what was happening.

[193] I should add that there was nothing in the evidence to demonstrate that the accused's status as a teacher, coach, or being a possible person who had authority over Mr. C, played any part in vitiating any consent Mr. C may have provided in the livingroom incident. The only reference in this regard is Mr. C's testimony that he saw the accused as a larger man because of that position. I did not accept this.

[194] It should be remembered that at the time of this incident, unlike today, Mr. C's relationship with the accused would not make it impossible for him to consent and that absence of consent was an element of the offence of indecent assault.

[195] Consequently, notwithstanding Mr. C said the livingroom incident did not occur, I could not conclude beyond a reasonable doubt that it was without consent in any event.

[196] I was impressed with Mr. A as a witness, however I cannot simply make sense of what he saw. I cannot say I disbelieve him, but on the other hand it is difficult to accept what he said to be true, given Mr. C's testimony. I do not believe both events – oral sex in the livingroom and the bedroom – could have occurred. Again, this is possible, but it would require pure speculation and be contrary to any of the evidence in this proceeding.

[197] Other possibilities exist. It is simply unknown what other influences may have shaped Mr. A's memory. Again, did these three teenagers leave together and discuss what happened? There is no evidence that that occurred. Again, that would require me to speculate, something I am not permitted to do. In the end I cannot say one way or the other whether what Mr. A described was accurate. However, his testimony does impact the credibility and reliability of Mr. C's testimony.

[198] With respect to Mr. C, I do accept some of what he described – the drinking and the games, including the removing of the clothing, and the accused's participation. His testimony about going down the hallway is less clear and his testimony about the events in the bedroom, while detailed, is diminished by the comments and the analysis I outlined above.

[199] This brings me to the second and third part of the *W.D.* test, which is the real issue in this proceeding. Has the accused's testimony raised a reasonable doubt and am I satisfied of the accused's guilty beyond a reasonable doubt, having considered all of the evidence? I will focus primarily on the second aspect, being the third leg of the W.D. test. I believe it is helpful to remind oneself again that the Crown's burden continues throughout the trial and never shifts to the accused. The accused does not have to prove anything. As I explained earlier, the criminal burden of proof is not certainty but it is more than probability and closer to certainty than probability.

[200] Again, the focus here is what Mr. C said happened in the bedroom and it is his credibility and reliability which is critical to the Crown's case. The accused has quite adamantly denied that there was forced oral sex.

[201] In coming to a conclusion about whether the accused's evidence raises a reasonable doubt and whether I am satisfied beyond a reasonable doubt of the accused's guilt, I considered the following factors, mostly related to Mr. C's testimony:

1. From Mr. C's own testimony he was extremely intoxicated. He described himself as severely and heavily under the influence of alcohol. He described his experience as a movie out of sync and like being in a trance.
2. There are significant inconsistencies between the accounts described by Mr. A and Mr. C. They both cannot be true, at least based on the evidence I heard. I do not know who to believe. It is possible both of their accounts are not accurate.
3. The witnesses, including Mr. C, only had "patches" of memory. There were significant gaps in the context and circumstances surrounding the events that evening. It is impossible to understand the context and apply any reason or common sense, particularly where there are vast differences in the accounts provided by the three Crown witnesses and in particular between their accounts and that of the accused.

4. Mr. C's insistence that the accused was responsible for the other alleged sexual assault. Mr. C's insistence that the accused was his Grade Nine homeroom teacher, while incorrect, is less concerning.
5. I considered Mr. C's account at first seemed vivid, detailed and compelling. However, after a closer analysis, as I indicated above, I have come to a contrary conclusion. There is a strong possibility that Mr. C reconstructed and recreated and possibly embellished this event over time, as a result of memories that came to him later on.
6. Mr. B appears to corroborate Mr. C's account about going down the hallway into the bedroom. However, there are considerable inconsistencies about where he was when he made that observation and how it differs from what Mr. C described. Also, what Mr. B and Mr. C said about how the accused and Mr. C went down the hallway is strikingly inconsistent. Any corroborative value that Mr. C provides about the accused and Mr. C going down the hallway is greatly diminished.
7. Mr. C says that there was grooming for up to two years. There is simply no evidence of grooming, as I described above.
8. The height and size of the man Mr. C described in the bedroom does not match the accused's stature in 1976.
9. The accused testified, when asked about "forced oral sex" he answered, "It's not true. It did not happen". I cannot say I disbelieve or reject his testimony in that regard.

[202] All of the above creates a doubt about what, if anything, happened in the bedroom that evening, whether Mr. C and the accused went in the bedroom and whether any sexual activity occurred, either of a consensual or non-consensual nature. In my opinion that doubt is a reasonable doubt. There is simply not enough reliable evidence to conclude beyond a reasonable doubt that there was sexual activity between Mr. C and the accused in the bedroom that evening.

[203] I acknowledge that there is a likelihood or even a probability that some sexual activity happened in the bedroom, possibly between the accused and Mr. C. For the reasons I expressed above I am not convinced of that beyond a reasonable doubt. For that reason the accused is found not guilty.

J.

Appendix A

***Criminal Code*, R.S.C. 1970, c. C-34, s. 156.**

1974
Criminal Code, R.S.C. 1970, c. C-34.

PART IV
Sexual Offences, Public Morals and Disorderly Conduct

Interpretation

[Definitions]
138. In this Part
"guardian" includes any person who has in law or in fact the custody or control of another person. [...] 1953-54, c. 51, s. 130.

Special Provisions

[Corroboration]
139. (1) No accused shall be convicted of an offence under section 148, 150, 151, 152, 153, 154, or 166 upon the evidence of only one witness unless the evidence of the witness is corroborated in a material particular by evidence that implicates the accused.

[Marriage a defence]
(2) No accused shall be convicted of an offence under section 152, paragraph 153(b) or section 154 where he proves that, subsequent to the time of the alleged offence, he married the person in respect of whom he is alleged to have committed the offence.

[Burden of proof]
(3) In proceedings for an offence under subsection 146(2) or section 151, 152 or paragraph 153(b) the burden of proving that the female person in respect of whom the offence is alleged to have been committed was not of previously chaste character is upon the accused.

[Previous sexual intercourse with accused]
(4) In proceedings for an offence under subsection 146(2) or under section 151 or paragraph 153(b), evidence that the accused had, prior to the time of the alleged offence, sexual intercourse with the female person in respect of whom the offence is alleged to have been committed shall be deemed not to be evidence that she was not of previously chaste character. 1953-54, c. 51, s. 131.

[Consent of child under fourteen no defence]
140. Where an accused is charged with an offence under section 146, 149 or 156 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge. 1953-54, c. 51, s. 132.

[Limitation]
141. No proceedings for an offence under section 151, 152, paragraph 153(b), or under section 166, 167 or 168 shall be commenced more than one year after the time when the offence is alleged to have been committed. 1953-54, c. 51, s. 133.

[Instruction to jury]
142. Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 144, 145, subsection 146(1) or (2) or subsection 149(1), the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such

corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true. 1953-54, c. 51, s. 134.

Sexual Offences

[Rape]
143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,
(a) without her consent, or
(b) with her consent if the consent
(i) is extorted by threats or fear of bodily harm,
(ii) is obtained by personating her husband, or
(iii) is obtained by false and fraudulent representations as to the nature and quality of the act. 1953-54, c. 51, s. 135.

[Punishment for rape]
144. Every one who commits rape is guilty of an indictable offence and is liable to imprisonment for life and to be whipped. 1953-54, c. 51, s. 136.

[Attempt to commit rape]
145. Every one who attempts to commit rape is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped. 1953-54, c. 51, s. 137.

[Sexual intercourse with female under fourteen]
146. (1) Every male person who has sexual intercourse with a female person who
(a) is not his wife, and
(b) is under the age of fourteen years,
whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life and to be whipped.

[Sexual intercourse with female between fourteen and sixteen]

(2) Every male person who has sexual intercourse with a female person who

(a) is not his wife,

(b) is of previously chaste character, and

(c) is fourteen years of age or more and is under the age of sixteen years,

whether or not he believes that she is sixteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for five years.

[Where accused not more to blame]

(3) Where an accused is charged with an offence under subsection (2), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person. 1953-54, c. 51, s. 138; 1959, c. 41, s. 9.

[Age]

147. No male person shall be deemed to commit an offence under section 144, 145, 146 or 150 while he is under the age of fourteen years. 1953-54, c. 51, s. 139.

[Sexual intercourse with feeble-minded, etc.]

148. Every male person who, under circumstances that do not amount to rape, has sexual intercourse with a female person

(a) who is not his wife, and

(b) who is and who he knows or has good reason to believe is feeble-minded, insane, or is an idiot or imbecile,

is guilty of an indictable offence and is liable to imprisonment for five years. 1953-54, c. 51, s. 140.

[Indecent assault on female]

149. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped.

[Consent by false representations]

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female

person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act. 1953-54, c. 51, s. 141.

[Incest]
150. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

[Punishment]
(2) Every one who commits incest is guilty of an indictable offence and is liable to imprisonment for fourteen years.

[Compulsion of female]
(3) Where a female person is convicted of an offence under this section and the court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse, the court is not required to impose any punishment upon her.

["Brother" "sister"]
(4) In this section, “brother” and “sister”, respectively, include half-brother and half-sister. 1953-54, c. 51, s. 142.

Note: subsection 150(2) was amended by the *Criminal Law Amendment Act, 1972*, S.C. 1972, c. 13, s. 10.

[Seduction of female between sixteen and eighteen]
151. Every male person who, being eighteen years of age or more, seduces a female person of previously chaste character who is sixteen years or more but less than eighteen years of age is guilty of an indictable offence and is liable to imprisonment for two years. 1953-54, c. 51, s. 143.

[Seduction under promise of marriage]
152. Every male person who, being twenty-one years of age or more, who, under promise of marriage, seduces an unmarried female person of previously chaste character who is less than twenty-one years of age is guilty of an indictable offence and is liable to imprisonment for two years. 1953-54, c. 51, s. 144.

[Sexual intercourse with step-daughter, etc., or female employee]
153. (1) Every male person who

(a) has illicit sexual intercourse with his step-daughter, foster daughter or female ward, or

(b) has illicit sexual intercourse with a female person of previously chaste character and under the age of twenty-one years who

(i) is in his employment,

(ii) is in a common, but not necessarily similar, employment with him and is, in respect of her employment or work, under or in any way subject to his control or direction, or

(iii) receives her wages or salary directly or indirectly from him,

is guilty of an indictable offence and is liable to imprisonment for two years.

[Where accused not more to blame]
(2) Where an accused is charged with an offence under paragraph (1)(b), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is more to blame than the female person. 1953-54, c. 51, s. 145; 1959, c. 41, s. 10.

[Seduction of female passengers on vessels]
154. Every male person who, being the owner or master of, or employed on board a vessel, engaged in the carriage of passengers for hire, seduces, or by threats or by the exercise of his authority, has illicit sexual intercourse on board the vessel with a female passenger is guilty of an indictable offence and is liable to imprisonment for two years. 1953-54, c. 51, s. 146.

[Buggery or bestiality]
155. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years. 1953-54, c. 51, s. 147.

[Indecent assault on male]
156. Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped. 1953-54, c. 51, s. 148.

[Acts of gross indecency]
157. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years. 1953-54, c. 51, s. 149.

[Exception re acts in private between husband and wife or consenting adults]
158. (1) Sections 155 and 157 do not apply to any act committed in private between

(a) a husband and his wife, or

(b) any two persons, each of whom is twenty-one years or more of age,

both of whom consent to the commission of the act.

[s. 155: Buggery or bestiality
s. 157: Acts of gross indecency]

[Idem]
(2) For the purposes of subsection (1),

(a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and

(b) a person shall be deemed not to consent to the commission of an act

(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or

(ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or imbecile. 1968-69, c. 38, s. 7.

[Parent or guardian procuring defilement]
166. Every one who, being the parent or guardian of a female person,
(a) procures her to have illicit sexual intercourse with a person other than the procurer, or
(b) orders, is party to, permits or knowingly receives the avails of, the defilement, seduction or prostitution of the female person,
is guilty of an indictable offence and is liable to
(c) imprisonment for fourteen years, if the female person is under the age of fourteen years, or
(d) imprisonment for five years, if the female person is fourteen years of age or more. 1953-54, c. 51, s. 155.

[Householder permitting defilement]
167. Every one who
(a) being the owner, occupier or manager of premises, or
(b) having control of premises or assisting in the management or control of premises,
knowingly permits a female person under the age of eighteen years to resort to or to be in or upon the premises for the purpose of having illicit sexual intercourse with a particular male person or with male persons generally is guilty of an indictable offence and is liable to imprisonment for five years. 1953-54, c. 51, s. 156.

[Corrupting children]
168. (1) Every one who, in the home of a child, participates in adultery or sexual immortality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and is liable to imprisonment for two years.

[Limitation]
(2) No proceedings for an offence under this section shall be commenced more than one year after the time when the offence was committed.

["Child"]

(3) For the purposes of this section, “child” means a person who is or appears to be under the age of eighteen years.

[Who may institute prosecutions]

(4) No proceedings shall be commenced under subsection (1) without the consent of the Attorney General, unless they are instituted by or at the instance of a recognized society for the protection of children or by an officer of a juvenile court. 1953-54, c. 51, s. 157.