

SUPREME COURT OF YUKON

Citation: *R. v. L.F.G.*, 2021 YKSC 7

Date: 20210122
S.C. No.: 19-01516
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

L.F.G.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before Chief Justice S.M. Duncan

Appearances:
Ludovic Gouaillier
Raymond Dieno

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

Introduction

[1] DUNCAN C.J. (Oral): The accused, L.F.G., was charged with sexual interference (s. 151) and sexual assault (s. 271) of his then four-year-old daughter, D.G., between January 2019 and May 19, 2019. The nature of the allegations was that he licked his daughter's vagina, breasts, belly button, bum, and back. The evidence in support of the allegations was a video-taped statement of his daughter, taken by an RCMP officer on May 23, 2019. The mother and the grandmother also testified that the

daughter had disclosed the same allegations to them at home, several days earlier.

The daughter, now five years old, has no present memory of the allegations. The accused testified, and denied the allegations.

[2] The video-taped statement was admitted after a lengthy *voir dire*. The determination of the reliability of the statement for the purposes of trial was left until the end of trial.

Relevant Facts

[3] Many of the background facts are not in dispute. L.F.G. and B.W. testified that their romantic relationship started in August 2012, and ended sometime in 2017. They had been staying together off and on between March 2013 and March 2016 at the house B.W. shared with her mother, S.R., and her two older children, M.W. and D.W. B.W. and L.F.G. had a son together, M.G., born in September 2013, and a daughter, D.G., born February 6, 2015.

[4] B.W. described L.F.G. as "staying" at the house, because L.F.G. frequently travelled, or went to live or visit with his parents either in Watson Lake or in the Okanagan area of British Columbia. L.F.G. said he lived with B.W. between March and May 2013 and between March 2014 and March 2016. He confirmed that he did travel, or visit with his parents during those times.

[5] B.W. and L.F.G. became engaged to be married in March 2013, while on holiday in Cancun, Mexico. They did not marry.

[6] It was acknowledged by the family members who testified that S.R. did not like L.F.G. Even D.G. said that her grandmother (S.R.) wanted her dad to "go away" and when she told him that, he did. The relationship between S.R. and L.F.G. was a source

of conflict in the household, and was one of the reasons L.F.G. moved out for good in 2016.

[7] The romantic relationship between B.W. and L.F.G. continued throughout 2016 and 2017. Sometime in 2017, it became clear that L.F.G. was romantically attached to T., a woman he had met while on holiday in Panama in March 2017. He and T. were married in September 2018.

[8] L.F.G. testified that in the fall of 2017, he moved into a house with the assistance of Yukon Housing. B.W. testified that she thought he moved in 2018. The access arrangement of L.F.G. with M.G. and D.G. was flexible. L.F.G.'s visits occurred, first, at the Canada Games Centre, L.F.G.'s sister's house, or in the park, until he moved into his own house. Thereafter, M.G. and D.G. would go to L.F.G.'s house. At the time of his arrest in May 2019, L.F.G. was caring for the children after school for two hours on Tuesdays and Thursdays every week, and from Saturday morning until Sunday at 4 p.m. every week.

[9] No court order addressing custody or access has been sought by either parent.

[10] The disclosures by D.G. to S.R. and later to B.W. of the information leading to the arrest of L.F.G. occurred on Monday, May 20, 2019. These disclosures led to B.W. contacting Family and Children's Services and, on their advice, the RCMP. Both B.W. and S.R. gave statements to the RCMP. D.G. was also brought to the RCMP Whitehorse detachment on May 23, 2019, to provide a video-taped statement to Cst. Carol Locke.

[11] The video-taped statement was admitted into evidence after a lengthy *voir dire* application. The ruling noted that the statement met the threshold reliability test for

admissibility. A full reliability assessment was reserved until the end of trial. The evidence on the *voir dire* was also the evidence relied on for trial.

[12] In the statement taken by Cst. Locke, D.G. said that her daddy licked her boobies, her lolo (her word for vagina), her belly button, her bum and her back, at her daddy's house, in her room. On the basis of this statement, L.F.G. was arrested and charged under ss. 151 and 271.

[13] L.F.G. adamantly denied at trial that he had ever licked D.G.'s lolo, boobies, bum, belly button, or back.

Legal Principles

Presumption of Innocence and Reasonable Doubt

[14] The presumption of innocence and the standard of proof beyond a reasonable doubt are both fundamental principles in our system of justice to ensure that no innocent person is wrongfully convicted. The accepted description for reasonable doubt is set out by the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 S.C.R. 320. The Court wrote at para. 39:

...

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the

Crown is not required to do so. Such a standard of proof is impossibly high.

...

[15] Although the Supreme Court of Canada in *Lifchus* wrote these instructions for the purpose of a jury trial, the same standard is applied by a judge sitting alone on a criminal trial.

[16] Reasonable doubt applies to the essential elements of the offences. It also applies to credibility assessments.

Principles from W.D.

[17] Since L.F.G. has testified and provided evidence that is inconsistent with guilt, this case requires the application of the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. The principles help to explain what reasonable doubt means in the context of conflicting testimonial accounts, where the credibility of those conflicting accounts is at issue. I adopt the articulation of the *W.D.* principles, modified through appellate court decisions, as set out by Justice David M. Paciocco in his article "Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessments" (2017), 22 Can. Crim. L. Rev. 31, at p. 34, as follows:

- (1) Criminal trials cannot properly be resolved by deciding which conflicting version of events is preferred;
- (2) A criminal fact-finder that believes evidence that is inconsistent with the guilt of the accused cannot convict the accused;
- (3) Even if a criminal fact-finder does not entirely believe evidence inconsistent with guilt, if the fact-finder is left unsure whether that evidence is true there is a reasonable doubt and an acquittal must follow;

- (4) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the mere rejection of that evidence does not prove guilt; and
- (5) Even where the fact-finder entirely disbelieves evidence inconsistent with guilt, the accused should not be convicted unless the evidence that is given credit proves the accused guilty beyond a reasonable doubt.

[18] In other words, a trial is not a credibility contest between Crown witnesses and defence witnesses. It is wrong to decide a criminal case where, as here, there is conflicting evidence simply by deciding which version of events is the preferable one. The question is whether, considering the evidence as a whole, the Crown has proved the guilt of the accused on the alleged charges beyond a reasonable doubt. The burden never shifts to the defence.

Essential Elements of Sexual Assault and Sexual Interference

[19] The act of sexual assault consists of the following three essential elements:

- (1) the accused knowingly touched the complainant;
- (2) the touching was of a sexual nature; and
- (3) the complainant did not consent to that sexual contact.

[20] The essential elements of sexual interference are:

- (1) the age of the complainant at the time of the alleged sexual interference was under 16 years of age;
 - (2) the accused touched any part of the body of the complainant, directly or indirectly, with an object or a part of the accused's body; and
 - (3) the accused intentionally touched the complainant for a sexual purpose.
- "For a sexual purpose" means one or more of the following:

- a) sexual gratification;
- b) the violating of the complainant's sexual integrity; or
- c) the sexual domination of the complainant

(*R. v. T.L.P.*, 2015 BCSC 618).

Credibility and Reliability

[21] When assessing the evidence of witnesses, a court must consider both credibility and reliability. The Court in *R. v. Nyznik*, 2017 ONSC 4392, at para. 15, explained the difference between the two.

... **Reliability** has to do with the accuracy of a witness' evidence — whether she has a good memory; whether she is able to recount the details of the event; and whether she is an accurate historian. **Credibility** has to do with whether the witness is telling the truth. A witness who is not telling the truth is by definition not providing reliable evidence. However, the reverse is not the case. Sometimes an honest witness will be trying her best to tell the truth and will fervently believe the truth of what she is relating, but nevertheless be mistaken in her recollection. Such witnesses will appear to be telling the truth and will be convinced they are right, but may still be proven wrong by incontrovertible extrinsic evidence. Although honest, their evidence is not reliable. Only evidence that is both reliable and credible can support a finding of guilt beyond a reasonable doubt. [emphasis added].

Child Witness

[22] This case requires an assessment of the evidence of a child witness, who was four years old at the time she provided a statement and five years old when testifying at trial.

[23] The Supreme Court of Canada in *R. v. W.(R.)*, [1992] 2 S.C.R. 122, referenced two major changes in the approach of courts to the evidence of children: the removal of

the belief in the inherent unreliability of the evidence of children; and the removal of the requirement for corroboration. The Court wrote at p. 134:

As Wilson J. emphasized in *B.(G.)*, **these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases.** Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a "common sense" basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case.

It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards — to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. **Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.** ... [emphasis added]

[24] Thus, a child's evidence should be assessed in the context of his or her age at the time of the events and at the time of testifying.

Evidence

Evidence of L.F.G.

[25] L.F.G.'s testimony about the allegations was brief. His straightforward denial was not tested directly on cross-examination. The rest of his testimony included details of his past relationships with various women and their families, with more detail provided about his relationship with B.W. and S.R.; details of his activities with M.G. and D.G.; his

parenting; his medical issues as a result of his motor vehicle accidents; and his marijuana use.

[26] Much of this testimony was not relevant to the allegations. It was relevant to some extent to the credibility and reliability assessment.

[27] L.F.G. is 42 years old and has nine children with six different women. He has no children with his current wife, T. His first child was born on or about 1996, when L.F.G. was in Grade 11 and approximately 18 years old. His youngest child is D.G., born in February 2015. L.F.G. was married twice before his current marriage to T. He did not have any children with his first wife, whom he married when he was 19. They were divorced after 11 months of marriage. He married his second wife approximately 15 years ago. They had an on-and-off relationship and had two children together. It is not clear whether he still sees those children.

[28] He has a good relationship with the mother of his children, B.G. and A.G., and sees these sons regularly. His relationships with the other mothers range from congenial to hostile, and with some he has no relationship at all. His testimony suggested that in some cases the ending of one relationship blurred into the next without clear demarcation until a crisis occurred, such as when the status of the newer relationship was clarified.

[29] This happened, for example, when he was living with M.O., the mother of X., at the same time that he was dating B.W. during the fall/winter of 2012-13. L.F.G. testified that his relationship with M.O. at that time was friends only. He moved in with M.O. at her invitation because he was living in his truck and winter was coming. His Facebook announcement of his engagement to B.W. after their trip to Mexico in February 2013

resulted in M.O. throwing all of his belongings into the snow in front of her home, towing his truck away, and removing a Bobcat that he had borrowed and parked in her garage. L.F.G. complained during his testimony about the unfairness of this treatment.

[30] L.F.G. testified that his relationship with B.W. in the year or so before his arrest was civil, although not without some tension. They co-parented reasonably well, although L.F.G. complained that B.W. became more unreasonable in providing him access to M.G. and D.G. after T. came to Canada. There was also some stress as a result of the inability of S.R. and L.F.G. to get along.

[31] One of the more serious incidents occurred in April 2019, when L.F.G. brought the children home late, with pizza for their dinner. L.F.G. testified that S.R. was shouting and swearing furiously at L.F.G. for being late. She threw the pizza box on the ground, causing the children to cry. L.F.G. video recorded her with his phone and posted it on Facebook. He said he did this "to get advice" from others about dealing with the conflict. He took it down after being advised to do so by friends.

[32] L.F.G. testified he regularly took M.G. and D.G. to play at the playground; to ride bikes or walk along the Millennium Trail; and to the pool to swim, although this was a source of conflict with B.W. because she believed it made them sick. L.F.G. testified in some detail about taking M.G. and D.G. to Squanga Lake for the day on the May long weekend before his arrest. He also testified he liked them to get together with their half-siblings when possible, as family was important to him.

[33] L.F.G. was hurt in two car accidents: one in 2007, in which he suffered herniated discs in his back; and a second one in 2011, in which he suffered a concussion and whiplash. He testified he has post-concussion syndrome, which manifests as difficulty

with his short-term memory and, at times, his medium-term memory. He also testified he has less ability to multi-task and handle high levels of stress, is more emotional (for example, he cries at "chick-flick" movies), is more naïve and less inhibited than he used to be, and sometimes struggles to explain himself. He did receive treatment at a trauma recovery centre for a few months after the accident. Now he sees a counsellor from time to time, but does not currently receive any treatment for cognitive issues.

[34] He takes anti-inflammatory and muscle relaxant medication for nerve pain resulting from his compressed, herniated and bulging discs, although the doses are reduced from what they were closer to the time of the accident.

[35] L.F.G. consumes marijuana daily. He says it is for his pain. He used to smoke, but now ingests edibles most of the time, only smoking a joint once in a while. In the past, he consumed 12 to 14 grams a day. Since approximately 2017, he has been consuming about two grams a day. He denies B.W.'s description of him as an addict.

[36] L.F.G. has a licence from the federal government to grow his own supply of marijuana. He is also entitled to sell to a limited number of people for medical use.

L.F.G. said he supplied B.W.'s brother, D., with marijuana because of their fear of the risk of a fentanyl overdose if D. bought from others.

[37] L.F.G. used to "be a drinker" but now drinks only very occasionally.

[38] L.F.G. has a criminal record, consisting of approximately 20 offences, including bank fraud and theft under \$5,000 from 20 years ago. He said he decided to change his life and this was when he stopped drinking and engaging in criminal behaviour. He obtained a pardon for these offences at some point. However, on cross-examination the status of that pardon became unclear. He said he was unsure whether the breach

of his release conditions that occurred in 2019, related to his arrest for these current offences, resulted in a revocation of his pardon. He said he did not understand the letter he received about this.

[39] L.F.G. testified that the breach of his release conditions occurred when he went to the Takhini Hot Springs one Friday in November 2019. His release conditions forbade him from going anywhere there may be children. L.F.G. testified he had asked the Crown to clarify that condition, as it was too broad. The Crown agreed to do so and set a court date. L.F.G. said he did not realize he had to be in court for the amendment to the conditions.

[40] When he was at the Hot Springs, the day of the court appearance to vary the conditions, he said there was a child in the warm pool, who had entered after L.F.G. had fallen asleep in the hot pool. The RCMP arrested him at the Hot Springs. He was convicted of the breach and sentenced to time served of four days. L.F.G. testified that this arrest seemed unfair because of his previous conversations with the Crown's office and their assurance to him that it would be varied.

[41] L.F.G. has a no contact order issued about eight or nine years ago with one of his children, X., who was approximately four or five years old at the time of the order. X. has a mild form of autism, possibly undiagnosed. The no contact order arose from a spanking incident outside Pizza Hut, after which L.F.G. was arrested and charged with assault. He agreed to a no contact order with X. in exchange for a stay of the charges. The length of the no contact order was still unclear to him, and he said it is still in place. L.F.G. testified in detail about this incident, explaining that the spanking was successful

in correcting X.'s behavioural issues on that day. He appeared to be suggesting that the assault charge was unfounded.

[42] L.F.G. testified that he had discomfort in changing diapers and touching the private parts of his daughters when they were young. D.G. was the only girl he had cared for more than sporadically when she was a young child. His concern was that in relationships where the parents have separated, fathers have been unjustly accused of inappropriate touching of their daughters. He said this was a concern for him, even before he had children. He denied that the concern was because of any sexual implications of him touching a young girl's privates.

Evidence of S.R.

[43] S.R., the grandmother of M.G. and D.G., owns a house in Riverdale where she lives with B.W. and her four children. She agreed that she set the house rules. S.R. lived upstairs where there were three bedrooms. B.W. and her two older children lived in the downstairs one-bedroom suite. Once M.G. and D.G. were born, the two older children moved upstairs.

[44] S.R. made it clear that she did not like L.F.G. and they had many confrontations. She testified that she did not like him living at the house because he did not follow the house rules and she did not agree with his parenting of M.G. and D.G. For example, she said that he ignored them when they were acting up or crying.

[45] L.F.G.'s regular consumption of marijuana was a source of conflict between him and S.R., who did not like it around her home. In particular, she did not like the fact that L.F.G. supplied her son, D., who also lived at the home of S.R., with marijuana, as it affected him negatively, in S.R.'s view. She testified that she "kicked [L.F.G.] out" in

2016. She said she did not know whether the relationship between him and B.W. continued after he moved out. She agreed her relationship with L.F.G. did not improve after he moved out. She acknowledged they had a confrontation in April 2019, during which she threw the pizza on the ground because she was very angry with him.

[46] S.R., who is retired, has been the main caregiver for M.G. and D.G. over the last several years, as B.W. was working at two or three jobs.

[47] S.R. described the incident leading to D.G.'s visit to the police station. She was giving D.G. and M.G. their baths on the Monday night of the May long weekend. B.W. was still at work. D.G. was finished her bath first and M.G. was undressed ready to go in. As D.G. was passing M.G., she bent towards his "doeey" (their word for penis) as though to lick him there and made "mmm" sounds while doing so. D.G. did not touch M.G. S.R. asked her what she was doing and told her to stop. D.G. replied that it was okay for her to do it because her "daddy licked [her] lolo all the time." S.R. testified that D.G. then said, "Daddy said he wasn't going to do it any more because he says I'm ready." S.R. said she was shocked by all of this and told D.G. she had to tell her mother. S.R. did not ask D.G. any further questions about the details of the incident or what she thought her dad might have meant by saying she was "ready".

[48] S.R. said that when B.W. came home from work, she was in the bathroom and S.R. told her from outside the bathroom door what had happened and that B.W. had to deal with it. Later that evening, S.R. said B.W. told her she had talked to D.G. and D.G. had said the same thing to her.

[49] S.R. described some behavioural issues before this disclosure. Both M.G. and D.G. would strip their clothes off after coming home from visiting their father, get under

the blankets, and masturbate. D.G. would also rub herself on pillows. D.G. was constantly angry, would have screaming tantrums, destroy her stuffed animals, and would be mean to the cats. S.R. also said D.G. would lick people.

[50] D.G. went to counselling after L.F.G.'s arrest. S.R. said that she did not ask about how the counselling was going, although she did take D.G. there from time to time when B.W. was working. Generally, she said this was B.W.'s department. S.R. also attended group counselling.

[51] S.R. confirmed that B.W. was making mortgage payments on the home in exchange for living there and receiving help from S.R. in caring for the children. On cross-examination, S.R. said she had been having trouble making mortgage payments at one point in the past because of illness, and this was when she asked B.W. to put her name on the mortgage and assist with payments. She said if B.W. had moved out with L.F.G. she would have sold the house and found some kind of subsidized seniors' living arrangement.

[52] S.R. agreed that she knew C., the mother of M. O. and grandmother of X., who was in the courtroom each day of this trial. S.R. said they had met at a garage sale and became friendly. She agreed that they shared a dislike of L.F.G.

Evidence of B.W.

[53] B.W., like her mother, S.R., was and is a hard worker, holding down three jobs at one stage. She currently works at two jobs. She testified that she was upset about the frequency of L.F.G.'s absences from Whitehorse and his consequent failure to assist her in parenting their children. This was one of the reasons she said that she did not look for a place for the two of them to live.

[54] She testified that after he moved out in 2016, primarily because of the conflict between him and S.R., their relationship continued until sometime in late 2017. She said they were still trying to work things out. Once T. came to Canada in March 2018, B.W. realized and accepted that any hope of a relationship with L.F.G. was over. She became very angry at both L.F.G. and T. However, throughout this time, she provided L.F.G. with access to M.G. and D.G. and they maintained a functional co-parenting relationship. There was additional tension in 2019 when B.W. said M.G. and D.G. expressed fears that their dad was going to take them away from her.

[55] B.W. testified that when she got home from work on Sunday of the May long weekend (she later revised that to Monday), S.R. said that she had to tell her something that D.G. had said. While she put D.G. and M.G. to bed, D.G. told her the same thing that she told S.R. B.W.'s response to D.G. was "[t]his is not something I want to hear" and then she quickly said, "[i]t's ok, you can tell me", after D.G. appeared perplexed by that first statement. B.W. said she did not remember what she said after that. When B.W. emerged from putting D.G. to bed, S.R. told her what D.G. had done and said earlier. B.W. replied that she knew because D.G. had just told her.

[56] The next evening, when B.W. was putting D.G. to bed again, she asked D.G. again about the allegations and recorded her, repeating them on her iPhone. She later emailed the recording to the RCMP.

[57] She testified that, other than these two times, she did not ask D.G. any additional questions about where, how often, when, whether anyone else was there, or any other details about the allegations.

[58] These statements led B.W. to contact Family and Children's Services, where she spoke to Rachelle Knight, who advised her to contact the RCMP. She did so, and B.W. and S.R. both provided statements and brought D.G. in for the video-taped statement.

[59] B.W. testified that from the time L.F.G. had moved out, she had remained flexible with access of M.G. and D.G. to their father. She said she was surprised by the allegations, as she did not ever suspect L.F.G. would do something like this.

[60] B.W. said that D.G. likes to lick people. She also said D.G. was mean to the cats.

[61] B.W. described D.G.'s behaviour for a time before the disclosure as "weird" in a "sexual way". She said that she would push herself against B.W.'s leg. She said D.G. got rashes in her genital area from the time she was very young on a regular basis. S.R. also confirmed this. On one recent occasion, D.G. would not let her mother put cream on her rash. B.W. said this was unusual.

[62] B.W. said both she and her mother were listed on title to the house and on the mortgage documents. She said that this was not the reason she did not actively search for a place for her and L.F.G. to live, as he had requested in the summer of 2013 while he was working for his parents in [a Yukon community]. The reason she gave was that she was not interested in living with someone who was never there.

Statement of D.G.

[63] In this case, the video-taped statement of D.G. is the evidence of the Crown in support of the charges. D.G. testified that she has no present recollection of the acts she described in the statement. The other statements D.G. made to S.R. and B.W. do not constitute evidence for the truth of their contents. They are hearsay prior consistent

statements admitted for the purpose of the narrative to explain how D.G. came to provide a statement to the RCMP at that time (*R. v. Dinardo*, 2008 SCC 24, paras. 36, 37 and 40; *R. v. Murray*, 2020 BCCA 42, paras. 100-103).

[64] In the interview of D.G. by Cst. Locke, after some general ice-breaker questions, which D.G. answered mostly with "Yeah", Cst. Locke showed D.G. the diagrams of a girl and a boy. She went through each from top to bottom asking D.G. to name the body parts. D.G. did, using her own words, that is, "lolo" for vagina, "dooney" for penis, and "boobies" for breasts. Cst. Locke made a joke on both diagrams about "belly button" being a funny word and also laughed once at the word "boobies".

[65] About halfway through the interview Cst. Locke asked why did you come here today. D.G. said because Mom said I had to. It was not until the last third of the interview that D.G. began talking about the allegations, after prompting from Cst. Locke to remind D.G. of her conversations with her grandmother and mother a few days earlier. D.G. did not remember talking to her grandmother but said she did talk to her mother "about going to a my Dad's.... house...." D.G. said her mom said, "don't do at my Dad's house", and then said she could not tell Cst. Locke any more about that.

[66] Cst. Locke provided several more reassurances that D.G. would not get in trouble in that room; that it was okay to talk about what she told her mother and why she did not want her to go to her dad's. D.G. repeated that she could not go to her dad's right now because her mom said, "No", and because she gets in trouble at her dad's. In answer to the question of why she would get in trouble at her dad's, she said, "I don't know that....word."

[67] Cst. Locke then asked if she wanted to look at a picture, to which she said yes, the picture of the girl. This was the same diagram they had reviewed earlier, naming various body parts. D.G. pointed to the "boobies" on the picture and said, "I keep them with these"; and then pointed to the "belly button" on the picture and said, "I keep it like this"; and third, pointed to her "lol[o]" and said, "I keep it like this". There was no follow-up question by Cst. Locke to try to discover what D.G. meant by these statements.

[68] Cst. Locke then asked D.G., "you don't wanna say the word so what, what, what word is it at Dad's?" D.G. replied, "Uh he's been licking my boobies."

Q: So he was licking your boobies?
A: Yeah
Q: Can you tell me about that?
A: Yeah
Q: What else can you tell me about Daddy licking your boobies?
A: I don't know that (INAUDIBLE)....
Q: you don't know anything else?
A: Yeah
Q: And what else can you tell me about the word you had said?
A: He just
Q: Okay where are you pointing okay what you're pointing at your lolo, what can you tell me about that?
A: Uh I can't remember that (INAUDIBLE)
Q: Oh it's okay, you did really well you told me that Daddy was licking your boobies.
A: Yeah
Q: And then what about your lolo?
A: He was licking my lo he was licking my belly button....
Q: yeah...
A: he was licking my lolo.
Q: So Daddy was licking your boobies, licking....
A: and was....
Q: your belly button...
A: and bum....

- Q: and your bum. So Daddy was licking your boobies, licking your belly button and licking your lolo and then you flipped it over and said licking your bum.
- A: Yeah
- Q: Okay and your back....
- A: (INAUDIBLE)....
- Q: and licking your back. Now we'll flip this back over and this was just a bit ago or how long ago?
- A: Long
- Q: So it's been a little bit?
- A: Yeah
- Q: Yeah and did you say anything when that was going on?
- A: I said stop and stop and stop.
- Q: Umhem and what happened?
- A: Long ago he did not hear me and he kepted doing it.
- Q: So you told him to stop, stop, stop and he didn't listen and didn't hear you and kept doing it?
- A: Yeah
- Q: Okay and did it do a lot of times?
- A: Yeah times
- Q: Yeah ok like ten times? And who did you tell?

[69] A few questions later, D.G. was asked where the licking happened at her Daddy's house and after Cst. Locke drew a sketch of a house, D.G. answered, "Uh in my, in my room ... On my bed".

[70] When Cst. Locke asked if there was anything else D.G. could tell her, she said, "Uh he, he licked my bunny too." Cst. Locke then asked five questions in rapid succession about where on the bunny he licked. D.G. did not answer. Cst. Locke asked no questions about where her bunny was, as D.G. had only described her teddy bear (pink) as being on her bed. She did say that her Dad had bought a bunny and a teddy bear for her. On cross-examination, she was shown a photograph of her bedroom at her dad's house, which she identified. On her bed was a beige stuffed teddy bear (not pink) and no bunny.

Analysis

L.F.G.

[71] I have concerns about the evidence of L.F.G. As a general impression, he presented himself always in the best light possible, shifting the blame for negative circumstances to others, and providing justifications for his behaviour. While this may be understood in part as a natural human instinct, in L.F.G.'s case, the tendency was extreme, to the point where plausibility was strained. His failure to accept responsibility in many of the situations he described and, instead, presenting himself as a victim of another's bad behaviour is immature and not realistic.

[72] Examples of this are:

- attributing blame for the inferred overlaps in his relationships with women to the women because they made advances on him;
- blaming the women with whom he had relationships for becoming unfairly jealous and angry with him, when they discovered his ongoing other relationships;
- his minimizing of the criminal assault charge of X.;
- his characterization of selling D. marijuana as doing D. a favour because of fear of fentanyl overdose;
- his expectation that B.W. would find them a place to live on her own, without any assistance from him or contribution towards household expenses, and blaming her for not doing so;

- his testimony that it was traumatic for him to be away from his new-born child for the first several months of his life, without any evident regard of how it must have been for his fiancée, B.W.;
- his characterization of his arrest for his breach of release conditions at the Hot Springs as unfair;
- his Facebook posting of a video of S.R. in a rage for the purpose of "seeking advice"; and
- his asking people through Facebook to protest on his behalf outside the courthouse while his trial was occurring.

[73] A lack of forthrightness in his testimony was evident when asked about the status of his pardon for his criminal offences of dishonesty from 20 years ago on cross-examination. It was only on cross-examination that the distinct possibility that his pardon had been revoked because of his conviction for breaching his bail conditions was raised.

[74] The question is whether these identified concerns are sufficient to affect my interpretation of his denial of the allegations. The lack of details surrounding the allegations meant there was little else L.F.G. could do, other than deny them. He was not cross-examined about the allegations. It is impossible to assess his evidence about the allegations, other than to make inferences about its credibility and reliability from the testimony on other matters.

[75] The examples set out above of L.F.G.'s lack of judgment and forthrightness, and his failure to accept responsibility for his part in conflict and serious incidents all negatively affect the assessment of his character and his self-perception. I find it hard

to believe that his discomfort with changing his daughter's diapers or touching her private parts in the context of caregiving was not because of a concern about the sexual implications.

[76] As a result, I have concerns about the credibility of much of L.F.G.'s testimony.

[77] However, it is an unfounded leap from this assessment to a conclusion that his denial of the allegations cannot be believed. There is also evidence of his clear delight in his role of a father; his desire for as many of his children to have a relationship with each other as possible; his evolution from a life of criminal behaviour and excessive drinking 20 or so years ago to one of relative good behaviour.

[78] I conclude that I am unsure as to whether I believe L.F.G.'s denial of the allegations.

Character Evidence Provided by Mother of L.F.G.

[79] I have also considered the character evidence led by the defence from L.F.G.'s mother, L.G. This was not evidence of L.F.G.'s general reputation in the community, but testimony about his love of fatherhood and other facts from his past to show the unlikelihood of him committing these offences. She also testified about the good relationship she herself had with the grandchildren and even with B.W.'s son from her previous marriage.

[80] Courts have held that good character evidence is of diminished probative value in cases of sexual misconduct (*R. v. Profit* (1992), 11 O.R. (3d) 98 (CA)). Given that the evidence is from his mother, consisting of her personal observations and opinions of her son, I give it little weight.

S.R.

[81] S.R. was not a reliable historian to the extent that she was not good at remembering dates and times. This was not particularly significant.

[82] S.R. was defensive about the state of her home, including her decision to occupy the top floor and relegate B.W. and her family to the downstairs cramped one-bedroom suite.

[83] There was a pervasive anger in S.R., primarily directed at L.F.G. She was evasive whenever she was asked a question that might reveal something positive about L.F.G., such as the help he tried to provide around the house. She made no secret of her degree of dislike and disapproval of L.F.G.; her desire to have him out of their lives; and she made no attempt to minimize the high conflict nature of their relationship. This was consistent with the testimony of B.W. and L.F.G. about their relationship.

[84] It was odd that S.R. would not ask more follow-up questions to D.G. about the allegations and, in particular, what was meant by "I'm ready", or "Daddy ... says I'm ready."

[85] Further, S.R.'s apparent lack of interest in or knowledge of the counselling process for D.G. was strange.

[86] The question is whether this pervasive anger directed at L.F.G. could have led to S.R. to coach D.G. to make these allegations about L.F.G. It is not necessary for the defence to prove that there was a conspiracy initiated by S.R. to coach D.G. to provide the statement she did to the RCMP against her father in order to ensure L.F.G. would no longer have contact with her or the rest of the family. The defence has raised this

inference through questioning in order to contribute to a reasonable doubt about the guilt of L.F.G.

[87] I do not agree that there is evidence of S.R. coaching D.G. to make these allegations, nor can I make an inference of this from the evidence. Defence suggested that S.R. depended on B.W. to continue to live at her house and pay the mortgage in exchange for S.R.'s help with child care. S.R. felt threatened by B.W.'s relationship with L.F.G. because of the possibility that she would move out with him. Thus, it was in her interest to have L.F.G. out of their lives.

[88] At the time of D.G.'s disclosure, L.F.G. had been gone from the home for three years, he was married to T., and the romantic relationship with B.W. was clearly over. S.R. had no further motivation or need, other than her general dislike of L.F.G., to falsely accuse L.F.G. from the perspective of any financial concerns. Further, it would require a great deal of ongoing effort to ensure D.G. provided consistent testimony to the RCMP and be able to say quite convincingly at trial that the statement was "all true" at the time she said it. I do not think this is feasible with a child as young as D.G. and with her imperfect recall.

[89] Overall, despite the concerns expressed above, I do find S.R.'s evidence at trial about D.G.'s actions and statement that led to them reporting the matter to the RCMP credible and reliable, subject to the exception I will note below in discussing B.W.'s evidence. As noted, this is for the narrative, and not for the truth of the contents of the statement by D.G. to her grandmother, which is a hearsay prior consistent statement. S.R. at no time tried to minimize her past and present anger with L.F.G. If S.R. had put

D.G. up to this, then she may have tried to minimize the intensity of her anger to reduce this suggestion.

B.W.

[90] B.W.'s testimony was, for the most part, delivered in a deliberate, straightforward, and unemotional manner. At times, she was evasive, resorting to answers such as "I don't remember" when asked questions in some areas, such as why she would not assist L.F.G. by telling him that D.G. needed cream and a salt bath for her rashes; and why at some point she no longer wanted M.G. and D.G. to be with their half-siblings when they were with L.F.G.

[91] There were several conflicts in the evidence of S.R. and B.W. about D.G.'s disclosure of the information. One was when the matter was first discussed between them. S.R. said she told B.W. about it as soon as she came home from work on that Monday. B.W. said S.R. said when she came home from work, she had something to tell her about D.G. after she had put her to bed but did not mention the subject matter to her until after D.G. had already disclosed it to her that night. B.W. also said that S.R. told her that D.G. had grabbed M.G.'s "dooney" and put it in her mouth. S.R. said she told B.W. what S.R. testified at trial, as set out above.

[92] There was also conflicting testimony from B.W. about the dates she talked to D.G. about the allegations between the preliminary inquiry and her evidence on direct examination at trial. At the preliminary inquiry, she said she spoke to D.G. about it first on the Monday of the May long weekend and then recorded her the second time on the Tuesday after the May long weekend. At trial, she initially said the days were Sunday and Monday. However, after hearing the preliminary inquiry evidence on

cross-examination and after checking her phone, she testified that it must have been Monday that the first disclosure was made and Tuesday was the day she recorded it.

[93] I do not find these inconsistencies about timing material. B.W. corrected herself after being presented with evidence of her initial mistaken recollection at trial. A mistake about whether it happened on a Sunday or Monday evening on a long weekend is not concerning in a reliability assessment.

[94] I do find significant the discrepancy between what B.W. said S.R. told her D.G. had done to M.G. and what S.R. described at trial. For something as serious as this, an accurate and consistent description of the precipitous event would be expected. Given the intensity of S.R.'s feelings about L.F.G., in my view, this discrepancy reflects more on the reliability and credibility of S.R.'s testimony than on B.W.'s testimony.

[95] The apparent failure of B.W. to ask D.G. more questions about her disclosure to elicit more details is also unexpected.

[96] I do not find the testimony about D.G.'s rashes leads to a conclusion that they were caused by her dad or from activities at her dad's. The evidence was clear that D.G. had rashes from the time she was a young child and they were hygiene related, as confirmed by the hospital after her examination in May 2019. If B.W. had had significant concerns, it would have been expected that she would speak with L.F.G. about them and also tell him how to treat them. She did not do so.

[97] Like S.R., B.W. is very angry with and hurt by L.F.G. Her anger is quieter than that of S.R. Despite B.W.'s anger and hurt, she and L.F.G. had a reasonable co-parenting relationship. Certainly there were disagreements about certain activities,

such as swimming, transferring clothes, and spending time with the half-siblings.

However, B.W. did not worry about her children's safety when with L.F.G.

[98] Both S.R. and B.W. had a good relationship with L.F.G.'s mother.

[99] As noted earlier, I do not believe, as defence counsel suggests, that B.W. and S.R. conspired to manufacture this allegation and coached D.G. to make it. As much as B.W.'s anger and hurt dominate her views of L.F.G., the fact she was able to continue a reasonable co-parenting relationship with him for well over a year, from the time it was clear that L.F.G. was romantically involved with T., shows that she was able to separate her feelings about him from her feelings about his relationship with the children.

[100] I accept that the statements were made by D.G. to her mother as described by B.W. and led B.W. to contact Family and Children's Services and the RCMP.

D.G.

[101] D.G., in her statement, made the allegations that led to the charges. The question is the reliability of the statement.

[102] In the case of a child witness, ascertaining the suggestibility of the witness is an important part of the reliability assessment. The investigative techniques and the interview itself must be closely scrutinized. The environment created by the interviewer; the manner in which the questions are asked; the wording used; the level of detail obtained; the body language of the interviewer and the child all become very important in the assessment of a child's testimony.

[103] The environment created by the RCMP and Cst. Locke was a comfortable living room type of space with couches, a carpet, and a coffee table, instead of an austere, intimidating interview room bare of comforts other than a functional chair and table.

Cst. Locke sat on the floor with D.G. when they were drawing pictures and naming body parts on the diagrams. Her initial questions to establish rapport and assess D.G.'s cognitive abilities were appropriate, although she could have attempted to elicit more answers from D.G. than "Yeah". Overall, D.G. seemed relaxed and engaged. There was no issue of her competency as defined in the legal test to understand and answer questions.

[104] For the most part, Cst. Locke asked open-ended questions, used D.G.'s wording, and did not suggest specific answers, subject to the naming of body parts which I address below.

[105] There were, however, some unusual answers given by D.G. to questions asked by Cst. Locke. There was no attempt to clarify or follow up on these unusual answers.

Examples are:

- when D.G. was asked who lived at her house, she said, "Mickey." When asked if Mickey was a person, she answered, "No", and then said, "He's a boy". It was later clarified in direct examination that Mickey and Princess were cats;
- in drawing on the boy diagram, D.G. said, "too much hair" in pointing to the top of the head. There was no attempt to find out what she meant by that;
- when D.G. was asked, "tell me about Dad day", she answered, "Uh in two minutes ago", and a few questions later in answer to how she and M.G. build a house at their dad's, she said, "At three minutes ago". She was

not asked if this was her understanding of the last time she was at her dad's house or something else;

- D.G. said, "my yiyah is at [B.] and [A.]'s house" and there was no follow up to try to get clarification; and
- when D.G. said, after pointing to three of the body parts on the diagram just before making the allegations, "I keep them with these" and "I keep it like this", there was no attempt to clarify.

[106] I appreciate the difficulties in questioning a four-year-old, especially given the sensitivities of the subject matter here, and the need to retain a rapport with the child and not precipitate a clamming-up in response to overly intrusive or difficult questions. I also appreciate that we now have the benefit of hindsight. However, I am of the view that Cst. Locke could have done more to improve the reliability of the answers. There was no follow-up questions after any of these unusual answers, which are likely attributable to the cognitive development stage of D.G. Attempts to clarify even some of these unusual answers may have provided more insight into and understanding of D.G.'s world, and could have also helped to elicit more detail around the allegations.

[107] The pace of questioning maintained by Cst. Locke was rapid. Not a lot of time was provided to D.G. to answer before Cst. Locke was on to the next question.

Cst. Locke did quite a bit of talking, especially at the outset. While it did appear to help develop a rapport, it did not provide D.G. a full opportunity to respond other than with one-word answers. Despite this, D.G. did make some spontaneous statements from time to time.

[108] There are difficulties with D.G.'s statement that affect its credibility and reliability. First, no detail is provided, other than the bald allegation and the fact that it happened in her room at her dad's house, about 10 times. Examples of the absence of detail include:

- there was no attempt to get her to describe the licking;
- whether she was licking too;
- whether it happened when M.G. was in the room;
- whether it was at night, or in the morning, or at another time;
- whether L.F.G. said anything while this was happening;
- why she told him to stop;
- whether or not it hurt;
- whether she thought it was funny or how it made her feel;
- whether she told him to stop when he was licking her bunny;
- more details about her bunny; and
- whether she got in trouble with her dad or with her mom or grandma, or both.

[109] This absence of details makes it difficult to assess plausibility, consistency, and reliability. It is not necessary to have all of these details articulated, and the limits of a four-year-old's ability to articulate are recognized. However, the inability to gain more understanding of the allegations, other than the bare minimum as set out in the statement, makes a credibility and reliability assessment difficult. For example, it is not clear what D.G. means by "licking". It may mean to her something different than an

adult's understanding. This is highlighted by her apparent difficulty to articulate the "word" to Cst. Locke, assuming that word was "licking", which was not clarified.

[110] Another concern is D.G.'s reluctance to talk about the allegations. It took some persistent prompting from Cst. Locke before D.G. articulated the allegations. There may be good reasons for this, including an understandable reluctance to discuss with a police officer something that may have been a painful experience for her. Or, since she knew it was a controversial subject matter that would get her into trouble because of the way her mother and grandmother had talked to her about it, she may have been reluctant to discuss it. Or, as the defence suggested, if D.G. were being coached, it may explain the reluctance.

[111] The reluctance became more obvious because of the need to use diagrams before the allegations were made. The exercise of going through the diagrams from top to bottom and naming body parts had been done with Cst. Locke earlier in the interview. There was no context for that exercise; it was initiated by Cst. Locke pulling out the diagrams and asking D.G. questions.

[112] After that exercise, when the questions turned to what D.G. talked to her mom about, and then when D.G. could not or would not say the "word", Cst. Locke asked her if she wanted to see the picture. D.G. repeated the body parts first that Cst. Locke had joked about — the boobies and the belly button — and then referred to the lolo, saying after each one, "I keep it like this". Then she said her dad had licked her boobies, belly button, lolo, bum, and back. These last two body parts were the only ones on the one side of the diagram, while the other three were lined up in a row, as they appear anatomically, on the side showing the front part of the body.

[113] It is possible that the exercise of going through the body parts near the beginning of the interview had a suggestive effect upon her at the point of making the allegations. On the other hand, they could have provided helpful encouragement for her to articulate the allegations. While there may also be some significance to the fact that these particular body parts were mentioned, Cst. Locke did put additional emphasis upon the belly button and boobies by saying they were funny words and also reinforced, on at least one additional occasion after D.G. said it, the fact D.G. and her mother had lolos. The back and bum were the only two body parts on the flip side of the page.

[114] Without more details to assist in the assessment of the credibility and reliability of her evidence, it is hard to know whether or not the diagram exercise and the diagrams were suggestive to D.G.

[115] A final comment is about the positioning of the camera in relation to D.G. and Cst. Locke. It was in the ceiling above them. There was no view of their faces, especially when they were sitting on the floor around the coffee table. It was difficult to see the body language of either of them. The relevance of this is that it was impossible to assess whether the body language of the officer was contributing to any suggestibility towards D.G. While demeanour may not be given too much weight in assessing D.G.'s credibility and reliability, the inability to get any view of her or Cst. Locke's face was inhibiting.

[116] D.G.'s testimony at trial through CCTV and in the presence of a support person revealed a sweet child who did not seem angry or traumatized. She was consistent in saying she had no present recollection of the incidents that led to the arrest. She did remember attending the police station and talking to Cst. Locke, which was sufficient to

constitute adoption of the statement. However, in general, her memory appeared to be quite short-term. She seemed to live in the moment and remember, for the most part, events closer in time to the present.

[117] I am mindful of the jurisprudence (*R. v. Meddoui* (1990), 61 C.C.C. (3d) 345 (Alta. C.A.); *R. v. K.W.P.*, 2015 MBQB 131) which cautions triers of fact, in situations such as this one, where the complainant has no present recollection of the events, leaving defence with the video-taped statement only. Without defence counsel's ability to cross-examine about the allegations meaningfully, they cannot be thoroughly tested. As a result, triers of fact are warned, similar to a *Vetrovec* warning, "of the dangers of convicting based on the videotape alone" (*R. v. F.* (C.C.), [1997] 3 S.C.R. 1183, at para. 44).

[118] In this case, the statement raises significant questions about its reliability for the reasons I have noted.

Conclusion

[119] I have carefully assessed the evidence provided by D.G. in her statement to the RCMP. I have done this in the context of my views of D.G.'s testimony in the *voir dire* at trial. I am concerned about the degree of suggestibility that may have been created by the diagram exercise and some of the words and phrases emphasized by Cst. Locke; the complete absence of any details surrounding the allegations; and the failure of Cst. Locke to clarify some of the unusual answers that may have provided additional insight into D.G.'s testimony.

[120] As a result, I do not find the statement sufficiently credible and reliable to cause me to reject the exculpatory evidence of L.F.G. and to satisfy me beyond a reasonable

doubt of L.F.G.'s guilt. I have also considered all of the other evidence, some of which I have found credible and reliable. This is not to say that I necessarily believe L.F.G.'s denials, based on a general credibility assessment, but I am unsure whether or not to believe them, for the reasons stated above.

[121] The law is clear that if I am unsure as to whether or not I believe L.F.G.'s denials of the commission of these offences, I must therefore have a reasonable doubt. Having considered all of the evidence, including that of S.R. and B.W., I am not convinced beyond a reasonable doubt that L.F.G. committed the offences of sexual assault and sexual interference. L.F.G. is acquitted.

DUNCAN C.J.