Citation: *R. v. J.B.*, 2011 YKYC 3

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S.C. No. 10-01504
Registry: Whitehorse

IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge L.F. Gower

REGINA

v.

J.B.

Publication ban pursuant to ss. 110 and 111 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

Appearances:

Ludovic Gouaillier — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR JUDGMENT

A. INTRODUCTION

[1] This is a rather unusual matter because the accused, J.B., is charged both as a youth on an information in the Youth Justice Court of Yukon and as an adult in the Supreme Court of Yukon. The youth charge is that she committed a sexual assault on R.D. in Teslin, Yukon, on or between September 14, 1984 and January 4, 1986, contrary to s. 246.1(1) of the *Criminal Code*. The adult charges are set out in a six-count indictment alleging various sexual offences against R.D. over a period from January 5,

1986 to September 13, 1990. For the completeness of the record, I will simply reproduce the charges as they are worded on the indictment:

1. On or between the 5th day of January, 1986 and the 11th day of December, 1988, at Teslin, Yukon Territory, did commit a sexual assault on R.R.D., contrary to s. 246.1 of the *Criminal Code* of Canada.
2. On or between the 12th day of December, 1988 and the 13th day of September, 1990, did commit sexual assault on R.R.D., contrary to s. 271 of the *Criminal Code* of Canada.
3. On or between the 5th day of January, 1986 and the 31st day of December, 1987, did commit buggery with R.R.D., a male child, contrary to s. 155 of the *Criminal Code* of Canada.
4. On or between the 1st day of January, 1988 and the 13th day of September, 1990, did commit anal intercourse with R.R.D., a male child, contrary to s. 159(1) of the *Criminal Code* of Canada.
5. On or between the 1st day of January, 1988 and the 13th day of September, 1990, did, for a sexual purpose (invite, counsel or incite) R.R.D., a person under the age of fourteen years, to touch, directly or indirectly, (with a part of his body, or with an object) the body of J.B. (nee D.), contrary to s. 152 of the *Criminal Code* of Canada.
6. On or between the 1st day of January 1988 and the 13th day of September, 1990, did, for a sexual purpose, touch directly or indirectly, (with a part of her body or with an object) a part of the body of R.R.D., a person under the age of fourteen years, contrary to s. 151 of the *Criminal Code* of Canada.

[2] The accused's date of birth is January 5, 1968, and she is presently 43 years old. The complainant's date of birth is September 14, 1977, and he is presently 33 years old.

[3] Crown and defence counsel agreed at the outset of this matter that, because of the sensitive nature of the evidence and the practicalities of the case (e.g. the accused now resides in British Columbia), there would be one body of evidence that would apply to both sets charges. I was therefore invited to sit as a Youth Justice Court judge for the purposes of the trial, even though some of the evidence relates to a time when the accused was an adult. I have proceeded on that basis and, for reasons which will become clear in a moment, given an important concession made by the Crown at the close of the evidence, there is effectively no need for me to address the adult charges at

all. Therefore, I am providing a single set of reasons sitting as a Youth Justice Court judge and, given the Crown prosecutor's concession, I would invite him to either withdraw or stay the indictment so that I do not have to provide a duplicate set of reasons in the Supreme Court to resolve those charges.

[4] The concession fairly made by the Crown is that there was no sexual contact between the accused and the complainant after the birth of the accused's first child on July 18, 1985. Although I assume there are various reasons for this concession, I expect that first among them would be the admission by the complainant that none of the incidents he alleges happened after the accused had this child.

[5] The Crown prosecutor also conceded at the close of the evidence that there was no, or insufficient, evidence to support a finding that there had been anal intercourse between the complainant and the accused. That concession would have resulted in verdicts of not guilty on counts #3 and #4 on the Indictment. However, because all of the counts on the Indictment post-date the birth of the accused's first child on July 18, 1985, I would have rendered not guilty verdicts on all those counts in any event. That is why I now invite the Crown to withdraw or stay the Indictment in its entirety.

[6] If either counsel wish further direction, or an opportunity to make submissions, on the point, I will remain seized of this matter for that purpose.

B. THE CASE FOR THE CROWN

1. *The Complainant*

[7] The Crown relies on two pieces of evidence to prove its case. The first is that of the complainant regarding the commission of the alleged sexual assaults. The second relates to a family meeting which occurred in Teslin in March 2009, just prior to the

accused's first appearance on the within charges, about which there is evidence from both the complainant and his girlfriend, T.F.

a) Direct Examination

[8] The complainant testified that the accused, who is his aunt, began sexually assaulting him when he was about six or seven years old, and that she continued to do so until he was about 11 or 12 years old. He said that all the incidents occurred in Teslin, and more particularly, they began during a time when the complainant was living with his grandmother, I.D. (the accused's mother), in her house beside Teslin Lake. He said that he was staying with his grandmother at that time because his mother and father were out on a trap line and that they would typically leave Teslin around October or November, come back for Christmas, and then return to the trap line until March or so.

[9] The grandmother, I.D., died on May 30, 1998.

[10] The complainant testified that most of the incidents of sexual assault occurred at his grandmother's house. He said that there were only two bedrooms in the house and only two beds, and that he would always sleep in the same bed as the accused. He said that the sexual assaults started with the accused making him touch her on her chest and in her vaginal area. Then the sexual contact proceeded to "dry humping". The complainant said that after about a month or two, the sexual contact progressed to sexual intercourse. He said the accused would cause him to get an erection and then would have him penetrate her vagina. He also said that a few times he had to "go down on her", and that a few times she "had gone down on me also". He said these incidents happened every other night at least and sometimes during the day, if no one else was around. He

said that this went on for at least a couple of years during times when he was living with his grandmother.

[11] The complainant testified that after these first couple of years, his mother stopped going out on the trap line during the winter months and he returned to living with her year-round from that point forward. He said that the sexual assaults “pretty much” stopped after that point. However, he further specifically described three incidents, which all happened when he was somewhat older. The details of these allegations are found below at paras. 93 to 95.

[12] The complainant was asked how he remembered when these things happened, and he testified that it was because of where he was in school at the time and by which house he was living in. He said that he started school at the age of five and talked about attending kindergarten. He was therefore six years old in grade one and seven years old in grade two.

[13] The information in the Youth Justice Court was sworn December 29, 2008. The accused’s first appearance on that charge was on March 26, 2009. The complainant testified about a family meeting that his aunts arranged around the date of that first appearance, for which the accused returned to Teslin. The accused and the complainant both attended the meeting. Although the complainant was initially reluctant to meet with the accused, he eventually agreed to do so with the expectation that it might be an alternative to proceeding through the courts. He said the meeting took place before the accused’s first appearance at the house where he was living with his girlfriend, T.F., and his half-brother, P.B. He said that his mother, A.D., was present, along with his aunts, R.G., J.D. and M.D., as well as his half-brother P.B. The complainant’s girlfriend, T.F.,

was in a bedroom the entire time. He said that when everyone initially got together for the meeting, the accused began telling him things about what happened to her sexually when she was younger. He said that “after that” his aunts and P.B. all went outside and left him and the accused alone in the kitchen to talk further. He then said the accused more or less apologized for what she had done to him, and that he forgave her. He said the accused also told him that the reason she had never come home was because she did not want to face the people who had done stuff to her and that she did not want her children to be a part of that. He could not think of anything else that may have been said at that time. After that, his aunts and P.B. came back into the house and there was no further discussion between him and the accused.

[14] The complainant said that the accused would have been in her teenage years when she started sexually assaulting him. He said that during the initial two-year period when he was at his grandmother's house during the winter months, the accused was living in Teslin. However, during the time from when the complainant was approximately eight, until he was 11 or 12, he acknowledged that the accused lived in Whitehorse, but came back and forth to Teslin “every once [in] a while”. He thought she was living in Whitehorse during the last incident, which was the one at his parent’s new house in the Smarchville area.

[15] The complainant said that he started drinking about the age of 10 and that by the time he was 15 or 16, he was drinking every other day. On one occasion, when he was 15, he was sent to a detox facility. He acknowledges that alcohol continues to be a problem for him, but he has recently been sober for about a year.

b) Cross-Examination

[16] In cross-examination, the complainant acknowledged that when he grew up, people around him were often drinking and were drunk, and that this was quite traumatic for him.

[17] He said that none of the incidents of sexual assault occurred when he was in kindergarten.

[18] He said that the accused lived in Teslin when he was about 10 years old, which would have been between September 1987 to September 1988, approximately. After that, he said she was back and forth from Whitehorse.

[19] The complainant thought he was in grade two or three when his grandmother moved from her old house to her new house, which would have been in 1985 or 1986. He confirmed that the initial incidents of sexual assault all occurred at his grandmother's old house (down by the lake), prior to the move.

[20] When asked how many times he was sexually assaulted by the accused, he initially said “many times”, then said it was “more than 30 or 40 times”, and later allowed that it could have happened more than 100 times.

[21] The complainant also acknowledged being sexually assaulted by one D.S. Jr. at about the same time that he was sexually assaulted by the accused. He said he was about six or seven years old when he was assaulted by the former.

[22] He said the last of the incidents of sexual assault may have occurred in 1989. Later, he testified that he told the police that by 1989 “it was over” and that this answer was correct to the best of his memory.

[23] The suggestion was put to him that the accused did not live in Teslin with her mother after August 1984, because she had moved to Whitehorse in September of that year. Accordingly, it was further suggested that there could have been no unlawful sexual activity between him and the accused during the timeframe specified on the information in the Youth Justice Court. Nevertheless, the complainant maintained that the accused still sexually assaulted him.

[24] The complainant admitted that, in addition to his abuse of alcohol, he also used marijuana and cocaine until about 1999.

[25] The complainant was also asked a series of questions regarding the family meeting in March 2009, in which the accused's recollection of their conversation was put to him. He acknowledged that he told the accused that at one point when he was a child, but older than six or seven years old, a person by the name of S.S. came into his mother's room and raped her while he was forced to stay and watch. He agreed that he also told the accused that he had broken his neck, that he was taking painkillers, including morphine, and that he had a card for legalized marijuana, but had never used it. He agreed that he also told the accused he had broken a window at the local nursing station. He agreed that he told the accused he could not read and write when he was younger and that he could not have any children. He further agreed that the accused told him that, as a child, she would be woken up many times by someone attempting to take the blankets off of her, or to put a hand in her shirt, and that there were nights when she would go and hide when people were around her house drunk. He further agreed that the accused told him a story about somebody trying to rape her and her mother.

2. *T. F.*

a) Direct Examination

[26] T. F. testified that she is 34 years old and is employed in the field of education. She is the complainant's girlfriend and has been seeing him for just over two years. She said she was present in a bedroom of the complainant's house during the family meeting in March 2009. She said she remained in the bedroom during the entire meeting, with the bedroom door closed. She maintained that she could hear conversation in the kitchen, although she was not trying to listen to everything that was going on. She said that when the group first arrived, they were just making small talk and:

> "…Basically it was started-[the aunt R.G.] was just saying that - that we were - they were all there so that [the accused] could apologize to [the complainant], maybe they could come to some sort of terms, maybe agreement to take this situation and bring it to Circle Court, settle it among amongst themselves, and that was the purpose, is basically how everything started, after small talk."

[27] T.F. said that R.G. suggested that the other family members would go outside so that the accused and complainant would have time to talk alone. After that point, T.F. claimed to hear crying and heard the accused saying something about not wanting her children to live in Teslin because of the "things that go on there" and the stuff that had happened to her in the past. T.F. said the accused gave an example of how a couple of men had come into her mother's house, broke the windows, and assaulted her. T.F. said the accused was crying a lot and that she asked if the complainant "would have it in his heart to forgive her". T.F. then testified that the complainant said "that he could probably forgive her", but that she did not hear him say anything else after that. She continued that

after everybody left, the complainant came into the bedroom where she was and was “pretty shaken up, sobbing” and crying a lot.

b) Cross-Examination

[28] T.F. testified in cross-examination that the distance between the kitchen table and the door to the bedroom which she was in, was approximately 3 metres. She also said that she was laying on the bed watching television in the bedroom, and that the distance between the bed and the bedroom door was a further 2 - 3 metres.

[29] She confirmed that she specifically heard the accused say to the complainant, “Do you have it in your heart to forgive me?” and she was crying. However, she conceded that this evidence was not in her statement to the police. Rather, what she had attributed to the accused in her statement was that she had said “I don't know why this happened but I'm sorry for what I did.”

[30] T.F. said that she did not hear the accused say to the complainant that she had left Teslin with her children, only that she did not want her children living in Teslin. She then acknowledged that she had told the police in her statement that the accused had said to the complainant during the conversation she had been sexually abused when she was younger “and that is why she left town with - with her children, and so she didn't want her children around Teslin anymore.”

[31] Finally, T.F. testified that, after the private conversation between the accused and the complainant, his aunt, R.G., came up to the complainant and gave him a hug, but did not say anything to him. She was then confronted with her statement to the police that R.G. also asked the complainant “How are you?”.

[32] When asked about these differences between what she told the police and what she told this Court, she said, “I must be getting confused… here. Yeah, I guess I said two different things. I don't know”, and later, “I guess so. Well, I don't know. I really don't know. I'm just having a hard time try remember everything as when I was - I don't know.”

C. THE ACCUSED’S EVIDENCE

a) Direct Examination

[33] The accused denies any form of sexual contact with complainant whatsoever.

[34] She said that her father died when she was six years old, and from that point onward she lived with her mother (the complainant's grandmother), I.D., in a log house down by the lakefront. At that time, her older brother, E.D., also occasionally lived in the house, but he was a lot older than she was and was not then attending school.

[35] The accused said that she and her mother moved to a new house in 1982. She said the reason she remembers that year is that, in the summer of 1982 she was interviewed for a housekeeping job offered by the Teslin Tlingit Band. She specifically recalled being interviewed by one M.J., being hired, and working for about six weeks or so in that summer position.

[36] The accused said that she stayed in Teslin until close to the end of August 1983, and then moved to Whitehorse. She explained that she had failed her grade nine year and was supposed to repeat grade nine in 1983-84 in Whitehorse. She also explained that, at that time, her mother was drinking heavily and that there were frequent parties at her mother's house. She said that meals were not being regularly prepared and food was not always available. She said that there were many fights between drunken guests at the house, and often people would pass out and stay overnight. She said that she was

not always able to find a place to sleep and that various drunken males would approach her in an inappropriate manner. She resorted to hiding in the attic, in a crawlspace, and in a wooden food cache. She said that she was sexually assaulted by men at some of these parties.

[37] Upon initially moving to Whitehorse, the accused said that she was living with her older brother E.D. and his girlfriend, N.J. She testified that E.D. and N.J. had an apartment in a building beside the old swimming pool, which was then referred to as the “Y.M.C.A.”. She said that she stayed with E.D. and N.J. until 1984 when she met J.B.

[38] During 1984, the accused said that she began a relationship with J.B. and started living with him and his mother near Lake Laberge. This eventually became a full-time residence for her from approximately March until June or July 1984.

[39] At that time, the accused said she did not have any transportation of her own and depended on her boyfriend's family, E.D., N.J., and her sister J.D. in that regard.

[40] The accused said that her relationship with J.B. soon became extremely abusive. She said that she would often be slapped, beaten and mentally abused. She described one instance where she was stripped naked, tied to a chair and urinated on. She also described incidents where guns were held to her head and knives were held to her neck. On another occasion, she said she was chased out of J.B.'s mother's house while she was naked.

[41] The accused said that she became pregnant by J.B. and, during that pregnancy, there was one occasion where he punched her in the stomach causing sufficient injury that she had to be medevaced to Edmonton.

[42] Before the baby was born, she and J.B. obtained an apartment in Riverdale with the assistance of her sister J.D.

[43] The accused's first child was born on July 18, 1985 and she continued to reside with J.B. after the birth until sometime in 1986, when she separated from him.

[44] The accused said that she then went through a period of having no fixed address in Whitehorse, moving around between the residence of her sister, J.D., and her then-boyfriend, M.S., as well as her brother, E.D., and N.J.

[45] At one point the accused said that her young baby became very ill. She hitchhiked with her baby to Teslin in mid-winter 1986 and dropped the baby off with her mother and her sister A.D., who is the mother of the complainant. She said that she longer wanted to have the child. She said she then returned to Whitehorse and continued her transient lifestyle for a period of time.

[46] She said that this trip with her baby was the only occasion when she returned to Teslin, after having moved to Whitehorse in September 1983.

[47] The accused said that she met her current husband, A.B. Jr., in April or May 1987. She said that she lived with him and his mother, N.B., in Carcross for brief period, and eventually moved to Alberta around the end of July 1987.

[48] The accused testified she got married to A.B. Jr. on May 8, 1988, and has since had a number of children with him. The family lived in Alberta until 2007, but they now reside in British Columbia.

[49] During the time that she was residing with her mother, I.D., the accused did not recall any period when the complainant was also staying there.

[50] The accused gave the following evidence about her meeting with the complainant in March 2009. She acknowledged that she attended at the complainant's house with her aunts R.G., M.D., and J.D. She said that when she and the complainant were left alone, she waited for him to start talking. She testified that he began pacing around saying that his life was really screwed up, and he spoke of events that he had to witness and endure as a child. He said that he wanted this to end. She said he spoke about his mother being raped by one S.S. in Teslin and how he was forced to stay in the room while this event took place. She said the complainant talked about D.S. Jr. sexually assaulting him when he was six or seven, and that he was also sexually assaulted by one D.D. She said the complainant spoke about getting in trouble with the law and that he was tired of drinking and tired of the kind of life that he was living. She said the complainant said that he was not able to think straight anymore, that he had broken his back while working and had to take morphine for the pain daily. She said he also had a prescription for medicinal marijuana.

[51] The accused testified that she responded to what the complainant had told her as follows: “I sympathized. I felt bad for what he had to endure as a kid and that there were many people in that community that had experienced the same things.” The accused also acknowledged telling the complainant about her mother's heavy drinking and the fact that there were lots of parties at her home with people passed out. She further told him that she remembered a night when two guys were trying to break into their home and that she climbed out of a window to hide in the crawlspace. She denied telling the complainant anything about an incident where she and her mother were involved in a sexual assault or an attempted sexual assault. She then said she confronted him about what he was

doing to her and her family and that these allegations by the complainant were now public and would be something that “we could never erase.” The accused said that the complainant then walked around in circles, running his hands through his hair and over his face, swearing and saying “What the “f” have I done?” She testified that she got up, told the complainant that she had a Bible for him and that maybe if he read it, it would help him. She said the complainant responded by saying that tomorrow he would go down and talk to the judge and tell them that he wanted this dropped. She denied apologizing to the complainant saying, “No, I have nothing to apologize for.” She said that she then walked to the door, opened it and told her sisters that she wanted to leave.

b) Cross-Examination

[52] In cross-examination, the accused confirmed that her reason for moving to Whitehorse was to repeat grade nine, because she had failed that grade the previous school year, which was 1982-83. Therefore, she said she was “pretty certain” that she left Teslin in August 1983 in order to repeat her grade nine year. She remembered her brother's girlfriend, N.J., showing her clothes which she had just purchased for her own daughter to start school. She further recalled her brother, E.D., telling her to get registered for the school year, but that she failed to carry that through.

[53] When asked again whether the complainant ever came over to her house while she was still living with her mother she responded “not to my knowledge, no.” She said the same thing with respect to the complainant's sister, M.D., whose evidence I will come to shortly.

[54] The accused also testified that she was afraid of the complainant’s father, T.D., and would not go over to the complainant's house of her own free will. However, she

acknowledged that it was possible she did do so, but that she would have been with her mother at such times.

[55] The accused maintained that she was certain that she had not returned to Teslin after she moved to Whitehorse until the time she did so with her sick baby in 1986.

D. THE OTHER WITNESSES

1. *R.G.*

[56] The accused's sister, R.G., testified that, after the meeting between the accused and the complainant in March 2009, she hugged both of them to make sure they were all right. She said that they seemed okay, that they were calm and showed no signs of any particular emotion.

2. *Me. D.*

[57] The complainant's sister, Me. D. testified that she was born on July 5, 1979 and started school at the age of five, which would have been in September 1984. At that time she said that the complainant was also in school, and the two of them were living with their mother, A.D. However, prior to that, because the complainant was two years older than she was, there was a time when the complainant stayed in Teslin with their grandmother, I.D., in order to attend school, while Me. D. was with her parents in the bush.

[58] Me. D. recalled the accused bringing her baby to I.D.’s house. She thought that this only occurred one time and remembered the baby being little. She did not remember seeing the accused in Teslin after that.

3. *N.J.*

[59] N.J. testified that she lived in Whitehorse with the accused's older brother, E.D., in September 1983 at the old Y.M.C.A./Fourth Avenue residence. She said that she and E.D. were trying to get the accused into school, but she did not know if that actually happened.

4. *J.D.*

[60] The accused's sister, J.D., testified that their mother, I.D., moved into her new house in the summer of 1982. She said she remembers that because she helped her mother with the move, and that it was a really sentimental time for her because she grew up in the old house down by the lake.

[61] J.D. said that she recalled the accused leaving Teslin and moving to Whitehorse towards the end of 1983. When asked how she remembered that, she said that it was because she herself left Teslin not long after, in 1984. She explained that she separated from her husband in June 1984, then stayed in Teslin for the next three months, moving to Whitehorse in September or early October 1984. J.D. testified that she did not see the accused in Teslin between the time that she left in late 1983 and the time J.D. moved to Whitehorse.

[62] J.D. also said that, during the period when she still lived in Teslin in 1983 - 1984, she would check up on her mother, I.D., at her house every day. She said that she had to go by the house everyday to walk her own children to school and that was the reason she did so. During that time, she never saw the accused at her mother's house.

[63] J.D. further testified that the accused stayed with her and her boyfriend, in their residence in Riverdale on and off, after J.D. had moved to Whitehorse.

[64] J.D. also recalled that the accused worked with her at the same business in Whitehorse, from approximately November 1984 to March 1985.

[65] With respect to the family meeting in March 2009, J.D. saw both the accused and complainant after their private meeting and did not report that either looked anything but “normal”.

5. *W.J.*

[66] W.J. testified that she was a very close friend of the accused (“like sisters”), and is about six months older than her. She said that the accused left Teslin in September 1983 to go to school in Whitehorse for a year. W.J. said that she herself moved to Whitehorse to attend school from September 1983 to June 1984. She said that during that school year she would often return to Teslin on weekends, but she could not recall the accused doing so. W.J. said that she returned to Teslin to attend school from September 1984 to June 1985, and took part in a school exchange to the province of Québec. She said that during that school year she did not see the accused in Teslin. She then qualified her answer by saying that she could not recall seeing the accused in Teslin, but she was not saying that it could not have happened. In September 1985, W.J. said she moved back to Whitehorse and again attended school until March 1986, when she dropped out. An excerpt from W.J.'s 1986 yearbook from F.H. Collins High School in Whitehorse confirmed that W.J. was a student at the school in that year.

[67] W.J. testified that she was aware of the accused staying with N.J. and E.D. in Whitehorse and that in 1984 the accused began living with J.B. She further recalled the accused moving into an apartment in Riverdale with J.B. in 1985 and having her first child with J.B. in the same year. She recalled the accused leaving the Yukon 1987.

[68] W.J. also testified that she is the housing clerk with the Teslin Tlingit Council in Teslin and is in charge of that First Nation's housing records. She has had this position since March 2000. She says that she knows where everybody lives, and has been living. A colour photograph of a house on a sheet entitled "Teslin Indian Band 1987 Housing Survey" was introduced through W.J. It identified the occupant of the house as I.D. (there was no dispute that this was the accused's mother) and described the house as being five years old. W.J. identified this as the house I.D. moved into in 1982. When asked how she was so sure that the move took place in that year, W.J. said she recalled this because her grandparents passed away the same year and the accused was there to support her family. She also said that the 1987 housing survey indicates that the house was built five years before and she remembers back to that time. She conceded, however, that she was not sure how the people who did the housing survey obtained their information.

[69] W.J. said she also knew the complainant's family and recalled the complainant and his younger sister, M.D., being in Teslin over the period from 1982 to 1984. She also recalled the complainant and his sister and their mother visiting I.D. in her new house. She conceded that there were probably times when the complainant, his mother and M.D. visited I.D. in her old house before the move in 1982.

[70] W.J. was also shown a colour photograph from the same 1987 housing survey with the occupant listed as T.D. (the complainant's father). It describes the house as being built in 1986. W.J. confirmed this information.

6. *A.D.*

[71] A.D. is the complainant's mother and the accused's sister. She was 51 years old at the time of the trial.

[72] A.D. recalled leaving the complainant with her mother, I.D., from late October until December 1983, while she was out on a trap line. She explained that the complainant was starting school at that time, and that was the reason for leaving him with I.D. in Teslin for a period of about two to two and a half months. She said that she returned to Teslin in December 1983 and then had the complainant living with her and her daughter Me.D.

[73] The following winter of 1984-85, she said that the complainant and Me.D. were placed with A.D's sister, Ma.D., while A.D. went back out on a trap line.

[74] With the exception of those two periods, A.D. said that the complainant never stayed for a long period of time with any one else but her. Although she would occasionally visit I.D. with the complainant, these would be relatively short visits during the day.

[75] A.D. said that before the accused moved to Whitehorse, she lived with I.D. She was not sure when the accused left Teslin for Whitehorse, but she thought it was in 1982 or 1983. She recalled that the accused was living with her brother, E.D. and his girlfriend in Whitehorse. She then recalled the accused forming a relationship with J.B. and having a baby with him in 1985. She said the accused did not return to Teslin until she brought her baby down for a visit, but that she did not stay long at that time. A.D. conceded that the accused might have "infrequently" visited Teslin at other times.

[76] A.D. recalled her mother, I.D., moving into her new house in 1982 because she, A.D., moved into the old house at about the same time. She said the move was in the spring or early summer of 1982. She identified the colour photograph of I.D.'s residence as the new house. Thus, A.D. said that when the complainant was staying with I.D. in 1983, it would have been in the new house.

[77] A.D., the complainant and Me. D. would visit I.D. regularly. Similarly, I.D. and likely the accused would also visit A.D. and her children in her home. However, A.D. implied that these visits back and forth were relatively short and during the day.

[78] A.D. recalled using babysitters for her two children from time to time. She said these were mostly young girls, although some were older. She named three of them as examples. She testified that at times, the babysitters would stay overnight at her house, and sleep either on the couch or with the children. A.D. said she knows that because she would find them in those locations when she came home.

[79] A.D. said the accused never babysat for her. When pressed on that point in cross-examination, she admitted that she was “not 100%” sure that the accused never did so, but said that she was “more on the sure side that she did not’. She also allowed that the accused might have watched her children briefly during the day, if she ran out for an errand, but that this would not have happened very often.

[80] When asked about the family meeting in March 2009, A.D. admitted attending. She said she was drinking some beer that evening, but was not intoxicated. She confirmed that the others in attendance included R.G., M.D., J.D., the accused and complainant. She recalled being outside the house for a while with her sisters, sitting around a campfire talking, while the complainant and the accused remained inside. She

said she saw her son immediately after the meeting and that he did not appear to be upset or anything but normal.

[81] When asked in cross-examination if she felt stuck between her son and her sister in this conflict, she paused and tearfully answered “I'm not stuck between them, I'm with them both.” She conceded that she was not saying she did not believe her son when he says that something happened to him, but that she supposed whatever was done to the complainant was not done by her sister. When pressed further, she speculated that it might have been one of the babysitters she used over the years.

E. ANALYSIS

1. *Law*

[82] I will begin my analysis with a discussion about whether the time frame in the information is an essential element that must be proven by the Crown in this matter. I conclude it is not.

[83] First of all, s. 601(4.1) of the *Criminal Code* has essentially codified the principle that a variation between the evidence and an indictment (information) “is not material” with respect to the time when the offence is alleged to have been committed, providing there is no limitation period at issue.

[84] Secondly, *R. v. B.(G.)*, [1990] 2 S.C.R. 57, clearly established that it is not necessary for the Crown to prove with precision when an alleged offence occurred (para. 42).

[85] Thirdly, the issue of the timing only clearly arose after the cross-examination of the complainant at the commencement of this trial in January 2011. Until that time, the accused mistakenly believed that she had left Teslin in September 1984 and not

September 1983. She said she only came to realize her error when she received a copy of the birth certificate of her firstborn child and connected the year of his birth, 1985, with the year of her move. She also discussed this with one or more of her sisters. Therefore, it seems to me that it would be prejudicial and unfair to the Crown to allow the accused to take advantage of this late change in the theory of the defence, when that theory was never explicitly put to the complainant. Thus, to be clear, were I conclude that it has been proven beyond a reasonable doubt that the accused sexually assaulted the complainant sometime in 1983, for example, I would be prepared to make a finding of guilt.

[86] The next general consideration in this analysis is how to treat the evidence of adults who are testifying about matters which happened when they were children. One of the leading cases in this area is *R. v. W.(R.)*, [1992] 2 S.C.R. 122, where McLachlin J., as she then was, delivered the judgment of the Court. At paras. 24 and 26, she made the following comments:

> "… Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection.
>
> …
>
> …In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying."

[87] I must also be mindful of the distinction between a witness' credibility and their reliability. This was addressed by Moldaver J.A., delivering judgment of the Ontario Court of Appeal in *R. v Joudrie*, (1997), 100 O.A.C. 25, at para. 28:

> "…The importance of the distinction between credibility and reliability was canvassed by this Court in R. v. S.(W.) (1994), 90 C.C.C. (3d) 242. Like the case under appeal, S.(W.) involved allegations of a dated sexual assault where the complainant's evidence, although sincerely given, was contradicted in a number of significant ways. On behalf of the court, Finlayson J.A. wrote as follows at p. 250:
>
> > It is evident from his reasons that the trial judge was impressed with the demeanour of the complainant in the witness-box and the fact that she was not shaken in cross-examination. I am not satisfied, however, that a positive finding of credibility on the part of the complainant is sufficient to support a conviction in a case of this nature where there is significant evidence which contradicts the complainant's allegations. We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not the sincerity of the witness but the reliability of the witness's testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record: see R. v. Norman (1993), 87 C.C.C. (3d) 153 at pp. 170-4, 26 C.R. (4th) 256, 16 O.R. (3d) 295 (Ont. C.A.), for a discussion on this subject." (my emphasis)

[88] In the context of historic sexual offence cases, where witnesses are expected to testify about events in the distant past, greater emphasis must be focused on the witness' ability to accurately observe, recall and recount the historic events at issue. In practice, corroborative evidence, while not strictly required, is often sought in determining the credibility and reliability of a complainant. As was stated in the text "The Trial of Sexual

Offence Cases", by Justice M.K. Fuerst, Mona Duckett Q.C. and Judge F. P. Hoskins, (Carswell: 2010), at p. 59:

> "Given the nature of sexual assault, which is usually committed in the absence of other witnesses, it is extremely important to closely examine all the evidence, including extrinsic evidence, to ensure that any evidence that tends to corroborate or confirm the evidence of the complainant is reviewed."

[89] Finally, I must be cognizant that the apparent absence of motive to fabricate can be considered in assessing a witness' credibility; however, its relative importance must not be misused. The presence or absence of a motive to fabricate is only one factor to be considered in assessing credibility: see *R. v. Brown*, 2006 BCCA 100, at para. 14.

2. *The Complainant's Evidence*

[90] In assessing the complainant's credibility, I must say at the outset that I was impressed by the apparent sincerity of his testimony. He also appears to have no motive to fabricate these allegations. However, that is not the end of the matter. I must go on to assess the reliability of his testimony in the context of the evidence as a whole, and in particular, examine any extrinsic evidence which tends to confirm or undermine his allegations.

[91] The complainant said that the sexual abuse by the accused started when he was about six or seven and then continued until he was about 11 or 12. The following table indicates how old the complainant would have been in each year commencing with his birthday on September 14, 1981, until he turned 13 on September 14, 1990.

September 14 to September 14			Age
1981	1982	-	4
1982	1983	-	5

1983	1984	-	6
1984	1985	-	7
1985	1986	-	8
1986	1987	-	9
1987	1988	-	10
1988	1989	-	11
1989	1990	-	12

[92] Similarly, the accused's date of birth is January 5, 1968. Therefore, she would have been the following ages in the following years:

Year		Age
1982	-	14
1983	-	15
1984	-	16
1985	-	17
1986	-	18
1987	-	19

[93] As stated above, the Crown conceded that the accused did not sexually assault the complainant after the birth of her first child on July 18, 1985. At that time, the complainant would have been seven years old and the accused would have been 17 years old. This concession was presumably based in part on the complainant's own evidence in direct examination:

> "Q Did any of those incidents that you mentioned in your testimony happen after she had her child?
>
> A No.
>
> Q Did any of these incidents happen, to your knowledge, while she was pregnant?
>
> A Not to my own knowledge, no."

[94] Notwithstanding this evidence, the complainant maintained that, after the first couple of years when he lived with the accused's mother (at age six or seven), there were at least three other instances of sexual assault by the accused.

[95] The first was when he was living with his mother and father in a trailer in Teslin. He thought he was eight or nine years old at that time. There were other kids around that night and they were playing a game of tag or something. As he was running around, every time he would come close to the accused he would say "excuse me" or something. She would reply "squeeze me", and would then put him against the wall and dry hump him. Nothing else happened beyond the dry humping on that occasion.

[96] The complainant also recalled another time when he was staying at his grandmother's new house located below the school in Teslin. He thought he was then about nine years old, and that the incident happened after the incident at his parent's trailer. He said that his grandmother had just moved into the new house and he was spending the night there. Once again, he had to stay in the same bedroom as the accused. He said that the accused fondled him and eventually had intercourse with him.

[97] The last time the complainant said he was sexually assaulted by the accused was at his parents "new house" in the Smarchville area of Teslin. He said that he was about 11 years old at the time. He thought it occurred about a year or so after the incident at his grandmother's new house below the school. He said that the accused was babysitting that evening and was in the basement watching TV. The complainant went into the basement to ask her if he could also watch TV, and she made him climb into bed with her and perform oral sex on her. He said there was no intercourse on that occasion.

[98] I have three problems with the complainant's reliability regarding these last three allegations.

[99] Firstly, the complainant described these three incidents in a fairly detailed manner compared with his evidence of the relatively more generic sexual assaults which occurred when he was six or seven. However, his testimony on all of these incidents is internally inconsistent with his own evidence that the accused did nothing to him from July 18, 1985 onward, and perhaps even earlier when she was visibly pregnant.

[100] Secondly, the evidence is externally inconsistent with the fact that his parent's Smarchville residence was not built until 1986, which would have been at least six months or more after the point in time when the complainant himself says he was no longer being sexually assaulted by the accused.

[101] Thirdly, his evidence about these three instances is externally inconsistent with the uncontradicted evidence of the accused that she moved to Alberta with her husband-to-be in August 1987, when the complainant would have been nine years old. Therefore, she could not possibly have committed the sexual assault described by the complainant when he was "about 11".

[102] Of course, I must remember to be accommodating when it comes to an adult's evidence about events which happened when he was a child, particularly with respect to time and place. However, if I am to believe the complainant that any of these latter three instances of sexual assault occurred, they would all have had to have happened when the complainant was seven years old or younger, which is significantly younger than the ages he testified he was when these instances occurred and, most importantly, at a time when the Smarchville house had not yet even been built. Thus, I am led inescapably to

conclude that, despite the apparent sincerity of the complainant in testifying about these latter three instances, he must clearly be mistaken, at least with respect to the accused being the perpetrator, and that this adversely affects his reliability as a witness in this case overall.

[103] The second major concern I have regarding the complainant's overall reliability is that his testimony conflicts with the evidence of the accused that she moved from Teslin to Whitehorse September 1983. While I appreciate that I must be cautious here, given the accused's own evidence that she was initially confused about the year in which she moved, there is simply too much corroborative evidence on the point to ignore. Indeed, the strength of that evidence (set out below) is sufficient for me to find as a fact that the accused did move to Whitehorse in September 1983.

[104] While I agree with the Crown that N.J. was a somewhat argumentative witness, and that, at the end of the day, she had no particular documentation or other independent evidence to confirm her memory of being in Whitehorse in 1983, her evidence that the accused was residing with her and her boyfriend, E.D., who is the accused's brother, is in turn corroborated by W.J. and A.D.

[105] Further, the evidence of J.D., whom I found to be a credible witness, was that she specifically recalled the accused moving from Teslin towards the end of 1983 because she herself made such a move approximately a year later, following her separation from her husband. J.D. also testified that she did not see the accused in Teslin during the period from the fall of 1983 to the fall of 1984. In particular, J.D. said she checked up on their mother, I.D., in her new house, on a daily basis during that time period, and did not see the accused there at any time.

[106] My finding of fact on this point is additionally supported by the evidence of W.J., whom I also found to be a credible witness. Her memory of the accused leaving Teslin in September 1983 was specifically linked to her own move from Teslin to Whitehorse to attend school for the 1983-84 school year, and her subsequent return to Teslin for the following school year, during which time there was a school exchange trip to Québec. It is not surprising to me that these events would figure prominently in her memory and I have no reason to doubt her accuracy. Also, given that she was a close friend of the accused and that their relationship was like one of sisters, her evidence that she did not notice the accused being present in Teslin during the 1984-85 school year is significant because, as such a close friend, it is logical to infer that, had the accused been present at any time while W.J. was also in Teslin that year, W.J. would likely have known about her presence.

[107] The accused testified that after moving to Whitehorse in September 1983, she did not return to Teslin until her trip in the mid-winter of 1986 to drop her baby off with her mother, I.D., and her sister, A.D.

[108] While it is certainly theoretically possible that the accused could have travelled to Teslin at other times between her move in September 1983 and the birth of her child in July 1985, there is no independent evidence to suggest that that is anything more than conjecture. Rather, the evidence strongly suggests that it did not happen. First, the accused was not seen in Teslin by any witness over that time period. Neither J.D. nor W.J., whom I both found to be credible witnesses, saw the accused in Teslin over that time period. Further, after Me.D. started school at age five and was living with the complainant and their mother, A.D., which would have been from September 1984

onward, she did not recall seeing the accused in Teslin. Also, while A.D. was less certain about when the accused left Teslin, she seemed relatively certain that she did not see the accused after the move, until she returned to Teslin with her baby. Second, there is no evidence that the accused had her own means of transportation. Third, the accused would have been pregnant from about mid-October 1984 and was in the midst of an extremely abusive relationship with J.B. It hardly seems likely that she would have taken the time and trouble, in those difficult circumstances, to find her own way back to Teslin and taken the opportunity to sexually assault the complainant. Fourth, it also seems highly improbable in those circumstances that the accused could have sexually assaulted the complainant anywhere near the number of times he says it happened, which ranged at different times in his testimony from more than 30 or 40 to in excess of 100 times. Finally, the theory that the accused sexually assaulted the complainant during this period is at odds with the complainant's evidence that all of the early sexual assaults occurred in I.D.'s old house, which would have been prior to the summer of 1982.

[109] The next major difficulty I have with the complainant's evidence is his testimony that the vast majority of the numerous sexual assaults committed by the accused over the two-year period he was residing with his grandmother, I.D., and that these all occurred at his grandmother's old house down by the lake. Further, he specifically said that his memory of these incidents was tied to his memory of which school grade he was in at the time and also by which house he was living at. However, once again there is overwhelming evidence, in my view, that I.D. moved from her old house down by the lake to her new house below the school in the summer of 1982.

[110] According to the 1987 housing survey, it would appear that the house was built, or at least completed, in 1982. The evidence of W.J., whom I found to be credible, corroborates that. Further, the evidence of J.D. is also corroborative. She said she specifically remembered helping her mother with the moving in the summer of 1982, and that it was an emotional time for her, because she grew up in the old house. W.J. also specifically remembered I.D. moving into the new house in 1982, because that was the year that her grandparents passed away and she recalled the accused being supportive towards her family at that time. Finally, A.D., whom I also found to be a credible witness, specifically testified that the move was in the spring or early summer of 1982. She recalled that because she moved into the old house after her mother moved out. Once again, that is a memory which would logically be a prominent one for A.D.

[111] In conclusion, I find as a fact that I.D. moved from the old house to the new house in approximately the summer of 1982, at which time the complainant would have been four years old. I also find that to be in significant contrast with the complainant's evidence that he was six or seven years old when the vast majority of sexual assaults occurred. It would also have been at a time before he started school, when he likely would have been with his mother and father on the trap line, and therefore not physically present in Teslin, for much of the time.

[112] A further significant point adversely affecting the complainant's reliability is the evidence of A.D., the complainant's mother. She testified that she left the complainant with I.D. for about two to two and one-half months in the fall of 1983, from late October to December, by which time the accused was living in Whitehorse. A.D. further testified that the following winter of 1984-85, both the complainant and his younger sister, Me. D.,

were left to stay with A.D.'s sister, Ma. D. She specifically remembered this because there was an incident during that period of time, where the complainant and Ma. D.'s son of the same age cut off one of M.D.'s pigtails.

[113] The Crown complained that the evidence of A.D. with respect to her children staying with their aunt Ma. D. in 1984-85 and her evidence regarding her frequent use of overnight babysitters was never put to the complainant in cross-examination and that this offends “the confrontation principle”, which is otherwise known as the rule in *Browne v. Dunn*. The rule is succinctly stated in the text *McWilliams’ Canadian Criminal Evidence*, looseleaf, 4th. ed. (Aurora: Canada Law Book, 2011), at p. 18-104:

> “A party who intends to challenge the credibility of a witness, whether by calling contradictory evidence or simply as part of closing submissions to the fact finder, should generally provide the witness with an opportunity to address or explain the point upon which credibility is attacked. Simply put, the witness should be confronted in cross-examination with any material point on which his or her credibility is to be challenged. A failure to do so *may* detract from the strength of the parties case or entitled party who called the witness to a remedy…” (emphasis already added)

[114] My response to the Crown's concerns in this regard is as follows. First of all, A.D. was known to the Crown as a potential witness from the outset of this investigation. For reasons unknown to me, it appears that she was never interviewed by the police. That seems rather strange, given that one would expect the mother of the complainant and the sister of the accused to potentially have relevant evidence to give in this matter. In submissions, Crown counsel mentioned that the Crown is not obliged to call a witness whom they do not think capable of providing credible evidence. While I do not quarrel with that precept, it suggests there may be more to this than meets the eye. Nevertheless, I found A.D. to be very thoughtful and careful in providing her evidence.

She also appeared to be making a genuine effort to remain as impartial as possible. For example, as I noted above, when asked by the Crown on cross-examination whether she felt that she was stuck between her sister and her son, she paused for some time, and tearfully answered “I’m not stuck between them, I’m with them both.” In short, Crown counsel could have called A.D. as his own witness, but he chose not to do so.

[115] What is even more curious here is that, at one point during the presentation of the case for the accused, defence counsel indicated that he may not call A.D. as a witness, contrary to his earlier stated intention to do so. At that point, Crown counsel stood up and said that if A.D. was not called by the defence, then the Crown may apply to call her as a rebuttal witness. That would seem to run contrary to the Crown’s implication that A.D. was insufficiently credible to testify.

[116] Second, the confrontation principle is not a strict rule in criminal cases. As noted in *McWilliams*, cited above, at p. 18-105:

> “It is for this reason that contemporary courts recognize that the rule in *Browne v. Dunn*, to quote the Supreme Court of Canada in *Harvey v. Lyttle,* “is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case.”

[117] Third, the Crown did not object to the disputed evidence of A.D. when it was elicited.

[118] Finally, it remained open to the Crown to recall the complainant to give further evidence in response to A.D., if he felt it was essential to the Crown's case. See for example, *R. v. McNeill* (2000), 144 C.C.C. (3d) 551 (Ont.C.A.), at para. 47. M*cWilliams*, cited above, commented on this potential remedy at p. 18-111 as follows:

> "Perhaps the most obvious way to correct any harm caused by a failure to confront the witness in cross-examination is to recall the witness so that he or she can be asked the questions and given an opportunity to respond. *R.v McNeill* calls this remedy "the first option worth exploring."

There was no application in this case by the Crown to recall the complainant.

3. *The Family Meeting*

[119] The theory of the Crown regarding the family meeting in March 2009 is that the accused apologized to the complainant for having done something wrong to him, that this apology was overheard by the complainant's girlfriend, T.F., and that the apology is circumstantial evidence consistent with the guilt of the accused. However, there are numerous problems with both the evidence of the complainant and T.F. in this regard:

1. The evidence of the complainant was vague and imprecise as to what he actually heard the accused say at the time. In his direct examination he testified as follows:

> "Q Okay. So everybody leaves, and it's just you and Ms. B. Then what happens?
> A She more or less said she's- she more or less apologizes for what she's done, and.
> Q Okay. When you say she more or less apologized, do you remember her exact words?
> A No, I don't.
> Q So if you don't remember the exact words, how do you know it was an apology?
> A Because she pretty much said she was sorry for what had happened between us, and that she didn't want it to ruin our family, and she wanted us to come back together as a family, and.
> Q And what about yourself? Did you say anything during the conversation?
> A I said I could forgive her, and I told her that I had - I told her I had to bring this forward, because I had to deal with this." (my emphasis)

2. The complainant testified that, at the beginning of the meeting while everyone was together, the accused began telling him things about what happened to her sexually when she was younger. However, none of the other witnesses said anything about this.
3. A number of things which the accused testified about as topics of her private conversation with the complainant were corroborated by the complainant. For example, the complainant agreed that he had told the accused about the rape of his mother by one S.S., which he was forced to watch. The complainant also agreed that he had told the accused about the fact that he broke his neck and was taking morphine as a painkiller for that injury. As well, he agreed that he told the accused he had a prescription for medical marijuana. Lastly, he agreed that he told the accused about getting into trouble with the law. In contrast, none of these topics of conversation were overheard by T.F.
4. T.F. said that she was in her bedroom and on her bed watching television during the private conversation between the complainant and the accused. She said the bedroom door was closed the entire time, but nevertheless said she could hear the conversation between them. She said that when the larger family group initially walked in, there was small talk and she heard the complainant's aunt, R.G., saying that they were all there so that the accused could "apologize" to the complainant and maybe they could come to some sort of terms and take the matter to a Circle Court or settle it amongst themselves. However, there was no evidence about any of this

from R.G. herself. Nor was there any such evidence from any of the other witnesses who were present during the initial gathering.

5. T.F. said that once the complainant and the accused were alone, she could hear the accused “crying a lot” during their conversation. However, none of the other witnesses noticed anything unusual about the emotional state or the demeanour of the accused immediately after the private conversation had come to an end.

6. T.F. said that she overheard the accused asking the complainant “whether he would have in his heart to forgive her” and that the complainant said that “he could probably forgive her”, but that she did not hear him say anything else after that. However, in her statement to the police on December 16, 2010, T.F. was asked the following question and gave the following answer:

> “Q Do you know what she had done to [the complainant] or anything?
> A She just apologized. I just heard a lot of crying. Mmm, I didn't hear anything. Like. <u>He didn't say anything.</u>” (my emphasis)

She admitted she was wrong about that part of her answer.

7. T.F. testified that the distance between the kitchen table, which the private conversation was apparently focused around, and the door to her bedroom was a distance of about 3 metres, and that the distance between the bedroom door and the bed on which T.F. was lying was a further 2-3 metres. Therefore, T.F. was between five and six metres away from where the conversation was taking place on the other side of a closed door. It is reasonable to infer from this that T.F. did not hear everything that was said

verbatim and may have misheard what she did hear. Indeed, this is apparent from the fact that she did not hear portions of the conversation which the complainant himself admitted to.

8. T.F. was not called upon to recall the details of the private conversation until December 16, 2010, when she provided her statement to the police. That was over one and a half years after the family meeting took place. Therefore, it is also reasonable to infer that T.F.’s memory of what she overheard would have likely faded over time.

9. Defence counsel raised a number of other inconsistencies between T.F.'s testimony and her statement to the police during cross-examination, which generally detract from T.F.'s reliability.

[120] One last point in this area is to note that the accused’s version of the conversation was that she listened for some time to the complainant talking about his difficult upbringing as a child, the fact that he had been sexually assaulted by D.S. Jr. and D.D., that he was tired of drinking, and tired of the kind of life he was living. In response, the accused said she “sympathized” with him and felt bad for what he had to endure as a kid. It is therefore conceivable that she might have said that she was “sorry” for what happened to the complainant, or words to that effect. If this was overheard by T.F. under imperfect listening conditions and out of context, it is entirely possible that T.F. might have interpreted these words to be an apology rather than an expression of sympathy.

[121] For all these reasons, I do not find T.F. to be a particularly reliable witness and I am not satisfied beyond a reasonable doubt that she overheard the accused apologize to the complainant for what she had done or that the complainant said that he forgave her.

4. *The Accused's Evidence*

[122] The accused was asked why she initially instructed her counsel that she had moved from Teslin to Whitehorse in September 1984, in contrast with her current testimony that she did so in September 1983. She explained that she had made an error in her initial calculation about the year of the move, because she had linked it to the birth of her first child.

[123] The trial began on January 12 and 13, 2011, and then had to be adjourned because of some problems regarding Crown disclosure. During that initial part of the trial, the complainant was cross-examined and the proposition was put to him that the accused had moved from Teslin in September 1984. Following the adjournment, the birth certificate for the accused's first child was made an exhibit at the trial. It shows the date it was issued as January 10, 2011. If the document was mailed to the accused or her counsel on or shortly after the date it was issued, it seems unlikely that it would have been received by January 12, when the complainant was cross-examined by defence counsel. This is consistent with the accused's evidence that she did not realize her error until after the trial had commenced and was adjourned.

[124] In any event, the accused testified that it was after she received this birth certificate that she realized her first child was born in 1985. When asked why she needed the birth certificate to remind her of the child's birth year, she responded that it was because her life with J.B. was so traumatic that when she left Whitehorse, she left the memories of that relationship in the past. She explained that her error in instructing her counsel was due to this trauma and the blurring of her perception of time and events from when she was in her relationship with J.B. She further conceded that she had

reconstructed her memory of this time period, with the assistance of N.J. and her sister J.D. After being extensively cross-examined about the error, she was asked whether she agreed that her memory of 1983-84 is not that great on its own without assistance, and she answered “Yes”.

[125] I find the accused’s explanation for this error to be a credible one in the circumstances and that her error does not significantly detract from her reliability.

[126] In more general terms, as I indicated earlier, the evidence of the accused was extensive, but essentially comes down to a blanket denial of any wrongdoing. Ordinarily, when an accused testifies, the trial judge is required to go through some type of an analysis along the lines of the case *R. v. W.(D.)*, [1991] 1 S.C.R. 742. However, that is unnecessary in this case, as I am left with a reasonable doubt based on the Crown’s evidence alone. Further, and for greater clarity, there was nothing in the direct or cross-examination of the accused which I found to be inculpatory. Suffice it to say that the Crown has not proven its case beyond a reasonable doubt, and the accused’s evidence in her defence might reasonably be true.

CONCLUSION

[127] I find the accused not guilty of the single count of sexual assault in this Court.

Gower J.