CITATION: R v SM1, 2012 ONSC 4686
COURT FILE NO.: CRIMJ(P)1547/11
DATE: 2012 08 16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
HER MAJESTY THE QUEEN	V. Puls, for the Crown
- and -	
S.M.1	K. McCallum, for the Defence
Defendant	
	HEARD: August 8 – 10, 2012

Subject to any further Order by a court of competent jurisdiction, an Order has been made in this proceeding directing that the identity of the complainant and any information that could disclose such identity, shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR JUDGMENT

HILL J.

INTRODUCTION

[1] The complainant, J.R., is currently twenty-two (22) years of age. She alleged in this trial that S.M.1, her uncle, sexually assaulted her in the time period of 1999 to 2002 when she was 9 to 12 years of age. The assaults are said to have occurred in the basement of the complainant's grandfather's home at M[…], a three-floor condominium townhouse.

[2] The accused denies any sexual impropriety with his niece.

[3] The complainant has two sisters – E. (aged 32) and K. (aged 27). Her parents are D.R.1 and D.R.2. Her maternal grandparents were B.M. and M.M.. Her grandmother died in 1997. In October 1998, a friend of J.R.'s grandfather, S.M.2, moved into the residence. The couple had S.M.2's granddaughter, C.M., who she had raised, with them most weekends. In June 1999, B.M. married S.M.2. C.M. subsequently came to live with them on a full-time basis. On the accused's evidence, he resided full-time in the residence from the time of the death of his mother in 1997 to June 1999 and thereafter was at the house most weekends. B.M. recalled his son living at the house for no more than a year after his wife's death.

[4] The accused, now aged 53, testified that he resided at the […] house beginning in 1976. Having completed grade 12, and after securing employment in the field of sales of electronic goods, he moved out of his parents' home. He moved back in after his mother's death in 1997. On the accused's evidence he

remained there off and on until 1999 not residing in the house on a full-time basis after the June 1999 marriage between his father and S.M.2. Thereafter, he regularly visited the home on weekends.

[5] S.M.1 confirmed that his bedroom was in the basement and that after he moved out in 1999 C.M. took it over. When he subsequently came over on weekends, he would sleep on a couch in the basement recreation room or in a spare bedroom on the second floor of the residence. B.M. recalled that C.M. moved into the basement bedroom in 2000 while S.M.2 recalled the date as June 2001.

[6] The complainant testified that she had no recall of S.M.2's granddaughter, C.M., residing in her grandfather's home. D.R.2 testified that she considered that C.M. "stayed" at her father's (B.M.'s) house, described both as "on the odd occasion" and "quite frequently", but did not live there. To the witness' recall, C.M. was sometimes at the house when J.R. was. The accused testified that C.M. was at the house most weekends in the 1998 to 2002 time period and he believed that she moved in full-time in 1999. B.M. and S.M.2 testified that there was no rapport between the complainant and C.M. who was about four years older. They did not spend time together.

THE RESIDENCE LAYOUT

[7] The finished basement of J.R.'s grandfather's home had a number of rooms including a large recreation room entered by the stairs from the main floor, as well as a washroom, a pantry area, a solarium, the accused's bedroom, and utility rooms. There was a couch across from a TV in the recreation room. Renovations were undertaken to the basement in two stages in 2000. B.M. and S.M.2 testified that there was no operating washroom in the basement until December 2000.

[8] To reach the basement from the main floor of the residence it was necessary to descend stairs – two sets of seven stairs divided by a landing. There is no door at the top of the stairs – it is an open stairwell.

[9] J.R. testified that the recreation room was below the livingroom.

FAMILY VISITS

[10] D.R.2 testified that her family visited her father's Mississauga home about twice a month, usually on weekends, when J.R. was aged 9 to 12 years. The witness stated that outside of holidays, she and her husband and J.R. visited but not J.R.'s older sisters. "Most of the time", J.R. was the only child in the house when they were there with her husband D.R.1, her father, the accused and S.M.2 also in attendance.

[11] In her in-chief evidence, the complainant stated that from the time she was 9 year of age, depending on schedules, she visited her grandfather's home

about twice a month typically for Sunday dinner. She was the only child there except for the odd occasion of a holiday visit or a larger family get-together when other children were present. J.R. testified that her sisters seldom accompanied the family to dinners at her grandfather's home. They were teenagers and allowed to decide that they did not wish to attend. Only on special occasions, would the whole family be together at her grandfather's residence. In her view, she had a good relationship with her uncle.

[12] The complainant testified that when she was at her grandfather's house her mother "put" her in the finished basement while the adults remained upstairs on the main floor drinking alcohol, talking and playing cards. She would read, colour or watch TV. J.R. testified that her mother felt she would be more comfortable downstairs and did not want her around cursing, alcohol and cigarettes. S.M.2 testified that cigarette-smoking was only permitted outside the home after she moved in. J.R. testified that she ate her dinner on her own in the basement.

[13] J.R.'s mother testified that J.R. liked to go to the basement to play with toys and the organ. The witness stated that while the complainant did on occasion eat at the table with the adults, she did not find it fun to do so and most often preferred to eat downstairs. D.R.2 testified that she would not expect a lot of cursing or swearing from the adults at a dinner party at her father's home.

According to D.R.2, S.M.2 had no rule about children always eating with the adults.

[14] J.R. testified that she could be downstairs three to four hours without her mother or anyone checking on her – everyone trusted her. D.R.2 testified she did not usually check on her daughter – only occasionally – she might go and listen at the top of the stairs – J.R. knew where to find her. S.M.2 testified that she would go on occasion to check on the children having regard to the fact that D.R.2's children did not really care for C.M. who would also be downstairs. She had no recall of J.R. ever being downstairs on her own. B.M. had no recall of any of the adults going to the basement to check on the children during family visits although he thought it possible that had occurred.

[15] D.R.2 testified that she was unable to say one way or the other whether the accused was ever alone in the basement with J.R. To her recall, people were coming and going. She did not pay attention to this. B.M. testified that the accused played cards with the adults during family visits although he did, from time to time, watch football downstairs.

[16] The accused testified that he was staying at his father's home virtually every weekend (Friday night to Monday morning) when J.R. was aged 8 – 9 years. He did not recall his niece being at the house often. When she was present, it would be for a family dinner. Friends, neighbours or other family might

also be present. To the accused's recall, when J.R. was in the house there was usually at least one other child there, for example, one or other of her sisters, or C.M.. He conceded that there were occasions when only the complainant came with her parents.

[17] The accused agreed that after a family dinner, usually held on a Sunday and rarely on a Saturday, that people talked and played cards in the dining-room. To his recall, these evenings ended at about 9:00 to 9:30 p.m. and that the house cleared out within minutes of the card game ending.

[18] B.M. testified that family dinners were generally held on a Saturday or Sunday. J.R. would be at his house no more than once a month or once every month and a half. The witness had no recall of J.R. ever coming over and being the only child in the house as "invariably" at least one of her sisters would be present – "that's how they travelled". As well, C.M. was quite often there.

[19] B.M. informed the court that after a family dinner the children would have the run of the house. J.R. would spend most of her time in the basement while the adults socialized upstairs. The witness further stated that family dinner visits generally concluded, after chatting and cards, in the range of 8:00 to 10:00 p.m.

[20] S.M.2 testified that she did not recall J.R. coming to the house without one or both of her sisters except on one occasion when D.R.1 was doing some

renovation work at the home, an occasion also recalled by B.M.. The witness estimated that J.R. and her family came to the house perhaps once every month or two months for dinner generally on a Saturday. After a family dinner there was talk and cards for the adults while the children were downstairs watching TV or playing with the organ or toys although they were not confined to the downstairs. Evening events generally wrapped up by about 10:00 p.m.

[21] S.M.1 testified that he was unaware of any foul language or cursing by the adults at his father's home. B.M. testified that bad language was never permitted in his home. S.M.2 testified that bad language was never used in the home.

[22] The accused testified that ground rules of his father's house required that everyone eat at the dining-room table. This included J.R. who ate with the adults on the main floor. B.M. testified that children always ate meals at the dining-room table at his house – S.M.2 was strict about no messing in the balance of the home. A child was only allowed to eat a snack downstairs. To his knowledge, J.R. was never told to eat downstairs. S.M.2 informed the court that meals were always consumed in the dining-room. There was then only one room for her to clean. A child could eat a cookie or a piece of bread in the recreation room. The witness testified that J.R. was at no time sent downstairs to eat.

THE ALLEGED SEXUAL TOUCHING

[23] On J.R.'s evidence, when she was aged nine (9) and ten (10) years, on occasions when she was the only child visiting her grandfather's home, a routine developed of her uncle coming downstairs after dinner, in an inebriated condition. He would sit on the couch beside her as she watched TV. She tried to ignore him, acting on her mother's advice to do so, when he was in that state.

[24] According to the complainant, on the first occasion of inappropriate contact, when she was 9 years of age, her uncle touched her hair, shoulder and face. She turned her head and tried to squirm away and continue watching her TV show. She said nothing. The accused said nothing. Then, over her clothing, which may have been a jumper and a sweater, her uncle touched her breasts and her vaginal area. When she told him to stop, he persisted and mumbled to her that she should be quiet. After a couple of minutes, the accused left and went to his bedroom. She continued to watch TV. J.R. testified that she felt embarrassed and as though she had done something. She did not tell anyone what had happened.

[25] According to the complainant, she could not recall how many times she was inappropriately fondled by her uncle in this manner over her clothing until the age of 10 but it happened each time she was at her grandfather's home. Her grandfather and other adults were upstairs on each occasion. In her in-chief evidence, J.R. stated that from the ages of 9 to 12 she was taken to her

grandfather's home about twice a month. In cross-examination, the complainant agreed that she told the police in her 2006 statement that "[s]ometimes we'd go every week, sometimes every other week" and that in some months she might have been molested as many as five times. At trial, J.R. testified that she had given an estimate in speaking to the police.

[26] In his evidence, the accused stated that he had a very good relationship with his niece. He denied that he fondled his niece or ever touched her in a sexual fashion. S.M.1 testified that when the complainant was younger they had wrestled, played tag, had pillow fights, and he had thrown her in the pool. There were uncle/niece cuddles, Eskimo kisses and hair "rumpling" to about the age of 6 years. When J.R. was 9 to 12, there were only "regular hugs", a kiss on the forehead and a rumpling of the hair.

[27] The accused agreed that it was possible that in the 1999 to 2002 time period he had been in the basement alone with J.R. sitting on a couch. It was also possible they had watched TV together but he had no specific recall of doing so. In cross-examination, the accused conceded that it was possible he and J.R. alone watched a movie or a cartoon together. During football season he would run downstairs from a family dinner to check the game scores. The accused testified that he did not really pay attention to whether J.R. was spending most of her time in the recreation room. S.M.2 testified that she had no recall whether

the accused was downstairs with J.R. or watching TV there. On her evidence, the home's only TV was in the basement until 2001.

[28] Trial witnesses testified that at family dinner visits to the Mississauga home everyone consumed alcohol. D.R.2 testified that her brother, the accused, "drank quite a bit" – to excess. In her view, he had a drinking problem in the 1999-2002 time period. B.M. testified that his son did not have an alcohol problem. The accused drank beer at dinner. He was not told to go downstairs "to sleep it off" at any point. S.M.2 had no recall of the accused being ordered to go downstairs on account of having had too much to drink.

[29] The accused testified in-chief that he did not have a problem with alcohol in 1998-2002. He was not a problem drinker and was not sent downstairs having consumed too much alcohol. In cross-examination, the accused maintained that he had not been a problem or heavy drinker or an alcoholic and that since 2006 he had improved his alcohol consumption on account of health and weight concerns reducing from three to four beers to two beers on any one occasion.

[30] The accused was cross-examined upon statements he made to the police in his videotaped statement of January 21, 2006 in which he related, "I have been a heavy drinker" and that "possibly" he had had a problem with alcohol which he had "overcome" on his own. Confronted with these statements, the accused acknowledged that he was "a heavier drinker" in the past but that he

had cut down his level of consumption “a little bit”. This was consistent with the accused’s statement to the police that he had come down from four beers to two. S.M.1 testified that he never drank to excess – he was never drunk – “I’m not really a drunkard”. The accused testified that while he accepted that alcohol consumption was capable of affecting memory, and might have that effect upon him as well, he had no lack of recall regarding the family visits reviewed at trial although he could not recollect the specific dates of those visits.

THE ALLEGED RAPES

[31] J.R. testified that there was an occasion, when she was about 10 years of age, following a typical family dinner at her grandfather’s home when her uncle again came downstairs. Her parents, grandfather and S.M.2 remained upstairs. The accused sat beside her, touched her hair, told her to quiet, and then began to take her clothes off by removing her sweater and then instructing her to stand while he removed her pants and underwear. She was nude. She lay on her back on the floor when told to do so between the TV and the couch and closed her eyes as she was scared. She could not recall if there was carpet or flooring there.

[32] J.R. testified that her uncle stood up, she heard a zipper noise, and then he lay on top of her. She could hear him breathing and mumbling. She could not hear what he was mumbling. She never opened her eyes or said anything. The accused began moving back and forth. His head was above her head as he was

taller. His hands were beside her head. J.R. testified that she felt a sharp and throbbing pain in her vagina from the accused's penis. Asked in-chief why she was able to identify her uncle as the person assaulting her, she replied, "I believe it was him" and that he was the only one there and she could smell beer and cigarettes which she associated with her uncle. Asked why she was of the view that a penis was inside her, the complainant did not respond. She at no time saw a penis. The complainant could not recall how long the accused was on top of her.

[33] J.R. testified that when she heard a noise upstairs, like footsteps, the assault ceased. No one came downstairs. Her uncle went to his bedroom. She gathered her clothes and went to the bathroom naked to clean up and get dressed. At trial, and for the first time, J.R. reported seeing some blood on her thighs. She then went back to the couch to continue watching the TV. She did not see her uncle again that day. According to the complainant, she was too scared to tell her mother – she feared her parents wouldn't believe her.

[34] While J.R. was unable to say when she was again molested by her uncle after being raped for the first time at age 10 years, she maintained that she was then raped by the accused in the basement of her grandfather's home on each occasion after family dinners. The other adults in the house were "steps" away. On each occasion after the first rape, the accused told her to take her own

clothes off. She never yelled out, tried to run or complained to those upstairs. Her eyes were closed during each rape. J.R. was not asked about the presence of ejaculate. The complainant had no recall of her uncle ever speaking during or after sexual intercourse. The assaults were never interrupted by anyone else coming to the basement. The alleged assaults ceased in 2002 when she was about 12 years of age. In cross-examination, J.R. agreed that she told the police in 2011 that she had been raped by the accused "maybe two or three" times a month for about a two-year period until she was 12 years of age. At trial, J.R. stated that this had been an estimate – she did not count or record when it happened.

[35] Between 2002 and 2006, to J.R.'s recall, she only visited her grandfather's home on holidays or for larger family gatherings.

[36] The complainant testified that the sexual abuse including the acts of forced sexual intercourse by the accused on the basement floor in front of the TV were all at the hands of her uncle. From the perspective of descending the stairs to the basement, J.R. described the TV as along a wall of the recreation room to the right of the stairs as depicted in Exhibit #3. The accused, his father and step-mother testified that the TV was positioned along the wall to the left of the stairs prior to renovations being completed in 2000 when it was moved to the location depicted in Exhibit #3.

[37] In his evidence, the accused denied having sexual intercourse with the complainant. He was also certain that his could not have occurred while he was under the influence of alcohol.

DISCLOSURE

[38] D.R.2, and B.M. and S.M.2 testified that from their knowledge there was a normal uncle/niece relationship between the accused and J.R. Nothing was observed or said during the 1999 to 2002 time period to raise any suspicion that sexual abuse was occurring.

[39] J.R. testified that in grade 8, when she was about 13 years of age, she "generally" told her best friend what had been happening with her uncle. The complainant testified that at about age 16, for reasons she explained, she made disclosure to a school guidance counsellor who in turn involved the police. The complainant provided a videotaped interview to the police on January 21, 2006 (the first statement) and another on January 6, 2011 (the second statement).

[40] In the complainant's first videotaped statement given in 2006 she reported the accused touching her over her clothes but did not disclose any instances of rape by her uncle. J.R. agreed that rape was different than mere fondling – it was "a completely different situation". Her explanation for not doing so is that she was in therapy and still working some things through. She was

only fifteen (15) years of age and “not ready” to talk about the escalated acts of sexual abuse.

[41] In cross-examination, the complainant agreed that in her 2006 videotaped statement to the police she had several opportunities to add any further information to her report of the accused touching her over her clothing including the following:

> Q. …is there anything else you can think of that … that I didn’t ask or anything else you think of that I should know?
>
> …
>
> Q. …and again, um, if there’s anything else you think I should know, uh, please let me know, and, uh, I’ll be back in another minute or two, okay?
>
> A. Okay.
>
> …
>
> Q. Okay. And at any time, again, at any time, um, did he touch you under your clothes at all?
>
> A. (Shakes head no.)
>
> …
>
> Q. Okay. Is there anything else you can think of that I haven’t asked that I should know about?
>
> A. (Shakes head no.)

[42] In her 2006 statement, J.R. informed the police that all sexual molestation stopped when she was about 10 years of age because her family stopped going to her grandfather’s home except on occasions when her cousins would also be present.

[43] Then, in 2011, on a date set for the preliminary inquiry, J.R. informed the investigating officer that she had been raped by the accused. By this time there

was a rift in the family. Since 2006, when the charges were laid, the complainant and her mother had not spoken to B.M. or S.M.1.

[44] In her 2011 videotaped statement to the police, J.R. described the first rape at the hands of her uncle in these terms:

> …once he was like done and he got up and he left. And then I kinda understood what was going on, so I just went to the washroom, put my clothes back on and started watching TV again.

[45] In the same statement, the complainant stated:

> Q. Okay. And at any time while this was taking place, um, did you suffer any kind of injuries as a result?
>
> A. Not that I can think of.
>
> Q. Okay. I'm just, um…
>
> A. Do you mean physical or…
>
> Q. Yeah, I, I, I mean physical. Yeah.
>
> A. Not that I can think of.

[46] In cross-examination as to why the presence of blood had never been disclosed prior to this trial, J.R. responded that she had learned in health class that on the first occasion of sexual intercourse the presence of blood was normal – this was "common knowledge". In speaking to the police in 2006 and 2011, she did not think this was pertinent as it happens to every woman.

POSITIONS OF THE PARTIES

The Crown

[47] On behalf of the prosecution, Ms. Puls submitted that it was proven beyond a reasonable doubt that the accused sexually assaulted his niece when

she was aged 9 to 12 in the basement of B.M.'s home. It is said that the evidence established that the accused took advantage of being able to slip away from the main floor of the residence, where other adults were socializing, to assault J.R. He was inebriated when he did so.

[48] The Crown submitted that the accused's evidence ought to be disbelieved – there were internal inconsistencies, inconsistencies with other testimony including defence evidence, a lack of common sense to his account, and the manner of presentation of his evidence suggested fabrication.

[49] It was argued that the accused's evidence was marked by a pattern of "distancing" himself from any situation tending to place him in an unfavourable light.

[50] By way of example, although the accused told the police he had had a problem with alcohol and was a heavy drinker, he claimed at trial that he had only been a "heavier" drinker in the past. Under cross-examination, the accused shifted to some recognition of having been a problem-drinker. While accepting that alcohol consumption generally can affect memory, the accused purported to say that that was not so in his case – he recalled each visit by the complainant and his behaviour.

[51] Further, it was submitted that the accused was evasive with respect to touching his niece at all. The accused changed his position from describing uncle/niece physical contact ending when J.R. was 6 years of age to an acknowledgement of regular hugs beyond that time period. In addition, the accused's evidence changed from saying that he had not been downstairs with his niece to acknowledging that it was "possible" that he had watched TV with her there in the 1999 to 2000 time period.

[52] Ms. Puls submitted that the accused's evidence, to a degree, corroborated J.R.'s evidence – the children played downstairs, it was possible that the complainant could be the only child in the home, the accused had a bedroom downstairs, and no *animus* existed between J.R. and the accused at the relevant time.

[53] Crown counsel pointed to inconsistencies in the testimony of the defence witnesses on a number of subjects including whether J.R. was ever the only child present at B.M.'s home, the day of week of family visits/dinners, whether the accused was ever alone with J.R., and the frequency of the accused's return visits after he had moved out.

[54] It was said that B.M., in testifying about his son and attempting to recall events, did so through "rose-coloured glasses". S.M.2, wanting to be supportive of her spouse, was also prone under questioning to providing blanket or bald

assertions admitting of no exceptions. It was not reasonable that those witnesses could recall every family visit so many years later as to who was present and where persons were located within the residence.

[55] As to the complainant's evidence, Crown counsel submitted that it ought to be believed having regard to J.R.'s demeanour while testifying, her honest, logical and careful testimony with a lack of embellishment, her detailed recall of events, and reasonable concessions under cross-examination. J.R. described a distinction in the circumstances of the first rape relating to the removal of her clothes. J.R. described keeping her eyes closed. She never saw her uncle's penis. The circumstances suggest a truthful report by one who experienced the events not the advancement of a concocted story.

[56] It was submitted that J.R.'s credibility ought not to be negatively affected by her lack of contemporaneous disclosure or her incremental disclosure. J.R. explained her feelings and thought process during the alleged assaults as well as the reason for only partial reporting in 2006. Crown counsel submitted that the lack of any prior reference to blood prior to trial is understandable in light of J.R.'s reasonable explanation – the blood was the "bi-product of a particular event". While J.R. was incorrect in telling the police that the alleged abuse stopped when she was aged 10, she was simply mistaken as to her age as she correctly linked cessation of the assaults to when the family began to see less of one another.

[57] The prosecution further noted that there is no evidence of any motive on the part of J.R. to falsely accuse her uncle. To the contrary, the evidence supports that they had an otherwise normal relationship.

[58] It was submitted that D.R.2's evidence is supportive of the complainant's testimony on such matters as the lack of *animus,* the accused's alcohol consumption, J.R.'s presence in the basement including to eat her meals, the lack of checking on J.R. when she was downstairs, and, the infrequency of C.M.'s presence.

The Defence

[59] Mr. McCallum submitted that on a principled application of the *W.D.* analysis, it cannot be said that guilt has been established beyond a reasonable doubt.

[60] The defence submitted that the accused's evidence ought to be accepted. What the prosecution characterized as "distancing" behaviour either accords with the historical truth of events or, in some instances, is simply the product of imperfect memory so many years after the alleged acts.

[61] It was submitted that S.M.1 did not dispute that he may have watched TV in the basement with his niece. He accepted that there may have been occasions when J.R. was the only child present in his father's home. He drank alcohol at family dinners. He admitted the limited physical contact of uncle/niece

hugs. He described no argument or *animus* between himself and J.R. There was no exaggeration or evasive testimony.

[62] The accused's references in his 2006 statement to the police relating to an alcohol consumption problem must be understood in the context of his description that he considered four beers consumed at one occasion to be heavy drinking. B.M. and S.M.2 confirmed that the accused was not inebriated at family dinners. It is not sensible to think that the other adults present in the house, including D.R.2, would send or allow the accused downstairs, in a drunken state, when J.R. was there alone. This is also not logical given J.R.'s mother's evidence that she did not check on her.

[63] The defence submitted that, in any event, it is unreasonable to leap from the fact of alcohol consumption to absence of memory and inclination to sexually assault a child.

[64] Mr. McCallum pointed to other evidence of B.M. and S.M.2 corroborative of the accused's evidence including a general lack of opportunity to have engaged in the alleged abuse, the norm of meals being eaten only in the dining-room, the location of the TV in the basement, and, the consistent presence of C.M. at the home. These witnesses also testified to the infrequency of J.R.'s attendance as the only child attending for family dinners. In light of this evidence,

the accused's evidence cannot easily be rejected. Nor can the existence of reasonable doubt.

[65] It was submitted that even if the accused's evidence was disbelieved, or failed to raise a reasonable doubt, the complainant's evidence, having regard to its lack of credibility and/or reliability, must be rejected thus causing the prosecution case to fail.

[66] Mr. McCallum emphasized the history of disclosure of the abuse as telling, in the circumstances of this case, against the believability of J.R.'s allegations. In addition to not disclosing, at the time of the alleged abuse, to her parents who were only feet away, J.R. did not fully disclose to the police when she had multiple opportunities to do so during her 2006 police interview. She represented that no inappropriate touching occurred after age 10. She made no complaint of rape. With a rift in the family, J.R. waited five years after seeking therapy to make a more aggravated allegation. Apart from this suspicious post-therapy progression in targeting the accused, J.R. came to trial and for the first time, and with an unbelievable explanation for no prior disclosure, asserted that blood was observed on the occasion of the first rape she described.

[67] The defence submitted that on its face J.R.'s allegation of sexual abuse in the basement of the S.M.1 residence is most improbable. As of October 2008, when J.R. was aged 8 ½ years, C.M. was at the home most weekends. The only

TV was in the basement. The relevant staircase was an open stairwell. Not every family visit by J.R.'s family was limited to their presence only to the exclusion of other family, friends or neighbours. It was "a busy house". Dozens of sexual assaults on the floor of the recreation room proximate to the location of other adults without interruption or discovery is incredible. In addition, there was no observation of anything suspicious, in the conduct or demeanour J.R. or the accused, by the M. or J.R.'s mother suggesting ongoing serial sexual abuse.

[68] Mr. McCallum submitted that it would be unsafe to rely on the complainant's uncorroborated evidence. While it may even be the case that J.R. believes some or all of the events occurred, the proof beyond a reasonable doubt standard has not been achieved.

ANALYSIS

General Principles

[69] "Credibility is a central issue in many criminal cases": *R. v. Osolin*, [1993] 4 S.C.R. 595, at para. 55 *per* Lamer C.J. The court may believe all, none or some of a witness' evidence: *R. v. R.E.M.,* [2008] 3 S.C.R. 3, at para. 65; *R. v. Francois*, [1994] 2 S.C.R. 827, at para. 14; *D.R. et al. v. The Queen* (1996), 107 C.C.C. (3d) 289 (S.C.C.) *per* L'Heureux-Dubé J. (in dissent in the result), at p. 318; *R. v. M.R.*, 2010 ONCA 285, at para. 6; *R. v. Hunter*, [2000] O.J. No. 4089 (C.A.)(QL), at para. 5*; R. v. Abdallah*, [1997] O.J. No. 2055 (C.A.)(QL), at paras. 4, 5. Accordingly, a trier of fact is entitled to accept parts of a witness' evidence

and reject other parts, and similarly, the trier can accord different weight to different parts of the evidence that the trier of fact has accepted: *R. v. Howe*, [2005] O.J. No. 39 (C.A.)(QL), at para. 44.

[70] The vast majority of sexual assault prosecutions turn on the evidence of the two principals – the complainant and the accused: *R. v. M.(S.C.),* [2007] O.J. No. 1624 (C.A.), at para. 3. However, a verdict of guilty may, in appropriate cases, be safely founded on the evidence of a single witness, regardless of the offence or offences charged: *The Queen v. G.(A.),* [2001] 1 S.C.R. 439, at pp. 453-4; *Vetrovec v. The Queen* (1982), 67 C.C.C. (2d) 1 (S.C.C.), at p. 8.

[71] A determination of guilt or innocence must not, however, devolve into a mere credibility contest between two witnesses or a bipolar choice between competing prosecution and defence evidence. Such an approach erodes the operation of the presumption of innocence and the assigned standard of persuasion of proof beyond a reasonable doubt: *W.(D.) v. The Queen* (1991), 63 C.C.C. (3d) 397 (S.C.C.), at p. 409; *Avetsyan v. The Queen* (2000), 149 C.C.C. (3d) 77 (S.C.C.), at pp.85-87. However, as recognized in *R. v. Chittick,* [2004] N.S.J. No. 432 (C.A.)(QL), at paras. 23-25:

> It is not an error for a judge to make a finding of credibility as between the complainant and the accused, particularly where they provide the bulk of the evidence as to what happened. This is a necessary part of the judge's duty. While it is not the end of the journey of decision-making, it is a necessary intermediate step along the way. Indeed, the first two elements in a proper jury instruction on this issue as set out in *W.(D.)* assume that the jury should decide whether or not they believe the exculpatory evidence of the accused. Those first two steps are:

> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Accordingly, it was not an error for the trial judge here to assess the credibility of the accused in relation to that of the complainant.
>
> ...
>
> An error under the *W.(D.)* principle is committed where the judge treats the matter as concluded once this assessment of credibility has been completed. To do so misses the third and critical step in the application of the burden of proof. As described in *W.(D.),* that last crucial step is as follows:
>
> > Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[72] It must be emphasized that mere disbelief of the accused's evidence does not satisfy the burden of persuasion upon the Crown: see *W.(D.),* at p. 409. In other words, to use disbelief of the accused's evidence as positive proof of guilt by moving directly from disbelief to a finding of guilt constitutes error: *R. v. Dore* (2004), 189 C.C.C. (3d) 526 (Ont. C.A.), at p. 527 (leave to appeal refused, [2004] S.C.C.A. No. 517); *R. v. H.(S.),* [2001] O.J. No. 118 (C.A.)(QL), at paras. 4-6. The court must be satisfied on the totality of the evidence that there is no reasonable doubt as to the accused's guilt. The obligation of *W.(D.)* analysis was summarized in *R. v. Minuskin* (2004), 181 C.C.C. (3d) 542 (Ont. C.A.), at p. 550:

> It is important to stress that trial judges in a judge alone trial do not need to slavishly adhere to this formula. This suggested instruction was intended as assistance to a jury and a trial judge does not commit an error because he or she fails to use this precise form of words. Nor is the trial judge expected to approach the evidence in any particular chronology, for example, looking first at the accused's evidence and then at the rest of the evidence. It should,

> however, be clear from an examination of the reasons that at the end of the day the trial judge has had regard for the basic principles underlying the *W. (D.)* instruction. One of those principles is that it is not necessary for the trier of fact to believe or accept the defence evidence for there to be a reasonable doubt. Even if the trier of fact believes the prosecution witnesses, the evidence as a whole may leave the trier of fact with a reasonable doubt. As it was put by Cory J. in *W. (D.)* at p. 757, the trier of fact must acquit even if he or she does not believe the accused's evidence because they have a reasonable doubt as to the accused's guilt "after considering the accused's evidence in the context of the evidence as a whole".

See also *R. v. Turmel*, [2004] B.C.J. No. 2265 (C.A.)(QL), at paras. 9-17.

[73] The court must be satisfied beyond a reasonable doubt on the issue of credibility where the case turns on the evidence of two conflicting witnesses: *R. v. Selles* (1997), 101 O.A.C. 193 (C.A.), at pp. 207-8; *M.(N.) v. The Queen*, [1994] O.J. No. 1715 (C.A.)(QL), at para. 1 (affirmed [1995] 2 S.C.R. 415). Where there are significant inconsistencies or contradictions within a principal Crown witness' testimony, or when considered against conflicting evidence in the case, the trier-of-fact must carefully assess the evidence before concluding that guilt has been established: *R. v. S.W.* (1994), 18 O.R. (3d) 509 (C.A.), at p. 517 (leave to appeal to S.C.C. refused, [1994] 2 S.C.R. x); *R. v. Oziel*, [1997] O.J. No. 1185 (C.A.)(QL), at paras. 8, 9; *R. v. Norman* (1993), 87 C.C.C. (3d) 153 (Ont. C.A.), at pp. 172-4.

[74] Assessment of a witness' credibility includes evaluation of his or her demeanour as testimony is provided to the trier(s) of fact in the courtroom - this includes "non-verbal cues" as well as "body language, eyes, tone of voice, and the manner" of speaking: *R. v. N.S.* (2010), 102 O.R. (3d) 161 (C.A.), at paras.

55, 57 (under reserve judgment, [2010] S.C.C.A. No. 494). However, a trier's subjective perception of demeanour can be a notoriously unreliable predictor of the accuracy of the evidence given by a witness: *Law Society of Upper Canada v. Neinstein* (2010), 99 O.R. (3d) 1 (C.A.), at para. 66; *R. v. Smith,* 2010 ONCA 229, at para. 11; *R. v. G.G.* (1997), 115 C.C.C. (3d) 1 (Ont. C.A.), at pp. 6-8; *R. v. P.-P.(S.H.)* (2003), 176 C.C.C. (3d) 281 (N.S.C.A.), at paras. 28-30; *R. v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.), at pp. 80-2. Demeanour evidence alone cannot suffice to found a finding of guilt: *R. v. K.(A.)* (1999), 123 O.A.C. 161 (C.A.), at p. 172.

[75] The fact that a complainant pursues a complaint cannot of course be a piece of evidence bolstering his or her credibility -- otherwise it could have the effect of reversing the onus of proof: *R. v. A.(G.R.)* (1994), 35 C.R. (4th) 340 (Ont. C.A.), at para. 3; *R. v. Islam*, [1999] 1 Cr. App. R. 22 (C.A.), at p. 27.

[76] To the extent that credibility assessment demands a search for confirmatory evidence for the testimony of a principal Crown witness, such evidence need not directly implicate the accused or confirm the complainant's evidence in every respect - the evidence should, however, be capable of restoring the trier's faith in the complainant's account: *Kehler v. The Queen* (2004), 181 C.C.C. (3d) 1 (S.C.C.), at pp. 5-6; *R. v. Betker* (1997), 115 C.C.C. (3d) 421 (Ont. C.A.), at p. 429 (leave to appeal refused, [1998] 1 S.C.R. vi); *R. v.*

Michaud, [1996] 2 S.C.R. 458, at p. 459; *R. v. K.M.,* 2012 ONCA 319, at para. 38.

[77] It may be that in the circumstances of a particular case, the defence wishes to raise the issue of delayed complaint as counting against the veracity of the complainant's account of assault. The significance or evidentiary relevance, if any, of the complainant's failure to make such a complaint is contextual and will vary from case to case depending upon the trier of fact's assessment of the evidence relevant to the failure to make a contemporaneous complaint: *The Queen v. D.(D.)* (2000), 148 C.C.C. (3d) 41 (S.C.C.), at pp. 64-7; *R. v. M.(P.S.)* (1993), 77 C.C.C. (3d) 402 (Ont. C.A.), at pp. 408-409; see also, *R. v. H.,* [2011] EWCA Crim 2753, at para. 6.

[78] The existence or absence of a motive by the complainant to fabricate is a relevant factor to be considered: *The Queen v. K.G.B.* (1993), 79 C.C.C. (3d) 257 (S.C.C.), at p. 300 *per* Lamer C.J.C.; *R. v. Greer*, 2009 ONCA 505, at para. 5; *R. v. Prasad*, [2007] A.J. No. 139 (C.A.)(QL), at paras. 2-8; *K.(A.),* at p. 173; *R. v. Jackson*, [1995] O.J. No. 2471 (C.A.)(QL), at paras. 4, 5. I make this observation, sensitive to the fact that the burden of production and persuasion is upon the prosecution and that an accused need not prove a motive to fabricate on the part of a principal Crown witness. Evidence of a witness' motive to lie may

be relevant as well to the accused *qua* witness: *R. v. Laboucan*, 2010 SCC 12, at paras. 12, 15, 22; *R. v. Murray* (1997), 99 O.A.C. 103 (C.A.), at paras. 11-14.

[79] The testimony of a youthful witness cannot be said to be inherently unreliable. Otherwise, a negative stereotype improperly supplants abolition of the corroboration rule in the testimonial competence regime. The testimony of a young witness is to be understood with an eye to common sense as exactitude and detail may be missing from a child's recall as the world is experienced differently from an adult: *B.(G.) v. The Queen* (1990), 56 C.C.C. (3d) 200 (S.C.C.), at pp. 219-220 *per* Wilson J.; *Marquard v. The Queen* (1993), 85 C.C.C. (3d) 193 (S.C.C.), at p. 201 *per* McLachlin J. (as she then was); *R. v. H.C.* (2009), 241 C.C.C. (3d) 45 (Ont. C.A.), at para. 42. The same approach is warranted respecting a mature witness testifying to events experienced as a child.

[80] An historical sexual assault case can present particular proof problems in the forensic reconstruction of events for the criminal trial process. Because the quality of human memory tends to deteriorate over time (*R. v. Godin,* [2009] 2 S.C.R. 3, at para. 40; *R. v. Morin,* [1992] 1 S.C.R. 771, at paras. 61, 86; *R. v. Rahey,* [1987] 1 S.C.R. 588, at para. 121), the passage of time inevitably affects the reliability of evidence: *R. v. TBF,* [2011] EWCA Crim 726, at paras. 26, 43.

Fact-Finding in this Case

[81] On the totality of the evidentiary record in this trial, it cannot be said that the prosecution has established S.M.1's guilt beyond a reasonable doubt. This is not to state that the complainant should be disbelieved. The criminal standard of proof is not a choice as to which version of events is more likely true. Put differently, even a probability of guilt cannot support a guilty verdict – "proof to a near certainty … is required in criminal proceedings": *R. v. Starr,* [2000] 2 S.C.R. 144, at paras. 230, 242. Cases will arise, as here, where the court is unable to confidently conclude with the requisite degree of certainty that the Crown's case succeeds.

[82] As a witness, nothing in the accused's physical demeanour, attitude or manner of testifying was suggestive of deceit.

[83] While Mr. S.M.1 unequivocally denied any sexual misconduct with his niece, aspects of his evidence were of concern. Under persistent questioning, initial responses of "no" to Crown counsel's questions not infrequently resulted in revised answers of "possibly" or "it is possible". For example, the accused did not clearly acknowledge, until tied down with cross-examination questions, the possibility of J.R. being the only child in the house, the possibility that he had been alone with her in the basement watching TV, and that physical touching of a limited character occurred with his niece during 1999 to 2002. Ms. Puls very effectively cross-examined the accused on the subject of alcohol consumption. It

made little sense for the accused to tell the police in 2006, and to seek to advance at trial, that having a "problem" with alcohol and "heavy" drinking could be equated with the consumption of four beers. The accused's refuge in saying he had been a "heavier" drinker and his equivocation about the problem nature of his drinking adversely impacted on his credibility and reliability as a witness.

[84] Both the complainant and, to a greater extent her mother, described the accused as an alcohol drinker at family visit dinners. Consumption of alcohol by S.M.1 would, of course, be relevant to the issues of potentially reduced inhibitions and his ability to subsequently reliably recall events. It seems unlikely that a mother would allow her child to be alone in a basement with a drunkard, even if he was her uncle, or if so that she would not regularly check on her situation. More importantly, the testimony of B.M. and S.M.2 denying that the accused drank alcohol to any excess very much tends to neutralize the evidence pointing in the opposite direction. Having closely observed these two witnesses in their manner of testifying and the content of their evidence, there was no hint of argument, bias or agenda to assist the accused by not telling the truth. While there may be some, in the end inconsequential, reliability concerns about precision of memory due to the passage of time, they presented as credible and relatively reliable witnesses.

[85] In terms of the accused's denial of culpability, the evidence of his father and step-mother was generally supportive his position on location of the basement TV, the relative frequency of visits by the complainant including when she was the only child present, and the extent to which the accused would have occasion or opportunity to be downstairs alone with J.R. As well, I accept the M.' evidence that as of October 2008, C.M. was in their residence nearly every weekend.

[86] The trial record does not admit of the trier of fact believing the accused's account. However, having regard to the accused's evidence, in light of the substance of J.R.'s allegations, and the other defence evidence, reasonable doubt cannot be safely excluded. In any event, as more particularly described below, the Crown's case as a whole does not establish guilt.

[87] D.R.2 was unable to say one way or the other whether the accused spent time alone in the basement with J.R. The witness, at times, adopted an argumentative tone in cross-examination. Understandably, she believes her daughter's account. On the totality of the evidence, I am unable to accept the witness' evidence where it differs from the M. on the issue of where J.R. ate her meals, the extent of the accused's alcohol consumption, and the frequency of C.M.'s presence in the home.

[88] In this case, with the evidence unclear as to when in the 1999 to 2001 time period the accused gave up his basement bedroom to C.M., there nevertheless clearly was some opportunity for the accused and J.R. to have been alone together in the basement of the M. home. However, on the totality of the evidence, doubt exists as to whether the frequency, duration and circumstances of such opportunity could have been as testimonially expressed by the complainant. There is no corroboration of the complainant's version of events in the sense of confirmatory evidence of a nature sufficient to persuade the trier of fact that she is telling the truth about being sexually molested.

[89] With the passage of time between the alleged assaults and the trial proceedings, and considering J.R.'s age when she says she was abused, one would not reasonably expect that she could, years later, provide details on such matters as dates, what persons were wearing, whether the basement floor of her grandfather's house had carpet or flooring, how long an event took or exactly what may have been said on a particular occasion. Delayed and incremental disclosure we have come to accept are not an abnormal feature in circumstances of the sexual abuse of children. In addition, on the whole of the trial record there is no evidence that the complainant had any motive to falsely accuse her uncle of sexual assault.

[90] Be that as it may, there are features of the complainant's account which, considering logic and common sense probabilities in the context of other evidence accepted by the court, raise concerns including the following:

(1) D.R.2, B.M. and S.M.2 agreed in their testimony that nothing raised their suspicions in the 1999 to 2002 time period that J.R. was being sexually abused or that anything other than a normal uncle/niece relationship existed between J.R. and the accused.

(2) The weight of the credible evidence is that J.R. was not relegated to the residence basement alone for hours at a time as she described. That suggestion was not put to D.R.2. While certainly J.R. went there to play and watch TV, it is improbable that a child aged 9 to 12 years would simply be left on her own.

(3) J.R. did not eat all her meals in the basement as she claimed, in part supported by her mother's evidence. To the contrary, I find that the household did follow a custom of meals being eaten together in the dining-room.

(4) The complainant's evidence that she was put in the basement by her mother to avoid her contact with cigarette smoke, cursing and alcohol cannot be accepted. That evidence was not reviewed with her mother at trial. I accept that S.M.2's no-smoking-inside rule was in fact in force as of October 1998 when J.R. was about 8 ½ years of age. All other trial witnesses refuted the existence of swearing or bad language being used in the residence.

(5) It is not probable that if the complainant was alone in the basement, in the context of a family visit, that she would simply be ignored without anyone coming to see her. S.M.2 described her attendances to the recreation room.

(6) J.R. misdescribed the location, for some of the relevant time period, of the TV in the basement. I accept the M.' evidence in this regard.

(7) The S.M.1 residence was a busy location. On the evidence accepted by the court, weekend dinners at times involved the attendance of other family as well as friends or neighbours. C.M.

stayed at the residence most weekends as of October 1998. The basement TV was the only set in the home until 2001. With more persons in the home, there was less opportunity for sexual abuse to occur.

(8) On the subject of risk of detection, with the complainant's account, the probability would be significant. There was no door at the top of the open staircase to the basement. With the TV on, a person approaching down the stairs might not be easily heard. Others in the house were steps away. The rape of a nude child on the floor of the recreation room could result in a scream of pain being heard or instant discovery by someone descending the stairs. According to J.R., there was no threat or expressed inducement not to tell her parents.

(9) There is no evidence that at the end of the evening of a family visit, anyone observed the type of distress, unusual behaviour, or physical discomfort on the part of J.R. observable at times in cases of the rape of a child.

(10) With the complainant having described over time sexual assaults occurring in the basement of her grandfather's home 2 to 5 times a month for years, on J.R.'s evidence no one ever interrupted what was going on.

(11) In 2006, J.R. dealt with the police. She made an accusation against her uncle. She had the open opportunity, having taken this step, actually multiple opportunities during the interview, to relate the account she subsequently provided. She did not disclose the alleged rapes and erroneously claimed that the sexual abuse ended at 10 years of age. On the totality of the evidence, it cannot be said one way or the other whether the complainant's explanation of withholding information from the police, indeed misleading the police by denying that she had ever been touched beneath her clothing, is true.

(12) The first-time disclosure at trial of seeing blood on the occasion of the first alleged rape is problematic. In 2011, J.R. told the police she had not been injured. J.R. provided the explanation, that because it was so notorious that a female may bleed vaginally on the occasion of first having sexual intercourse, that talking about it in her police statements would, in effect, have amounted to unnecessary and irrelevant detail. The complainant became

> somewhat argumentative on this point in cross-examination. To so easily ascribe this as *the* cause, in the context of the alleged rape of a 10-year-old by an adult male, with the real prospect of injury contributing to the presence of blood, is not entirely understandable.

[91] On the entirety of the record, the prosecution has not established, beyond a reasonable doubt, the guilt of the accused.

CONCLUSION

[92] The accused is found Not Guilty.

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Hill J.

Released: August 16, 2012

CITATION: R. v. S.M.1, 2012 ONSC 4686
COURT FILE NO.: CRIMJ(P)1547/11
DATE: 2012 08 16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

– and –

S.M.1

Defendant

REASONS FOR JUDGMENT

Hill J.

Released: August 16, 2012