

Citation: *R. v. Z.G.*, 2024 YKTC 36

Date: 20241003  
Docket: 23-03511  
Registry: Whitehorse

**YOUTH JUSTICE COURT OF YUKON**  
Before His Honour Judge Phelps

REX

v.

Z.G.

**Publication of information identifying the young person(s) charged under the *Youth Criminal Justice Act* is prohibited by section 110(1) of that Act.**

**Publication of information that could identify the complainant or a witness is prohibited by s. 111(1) of the *Youth Criminal Justice Act*.**

Appearances:  
Neil Thomson  
Jennifer Cunningham

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] Z.G. is before the Court on a four-count Information alleging offences against two separate complainants. The first three counts, for offences contrary to ss. 151, 271 and 173(2) of the *Criminal Code* are alleged to have occurred on or between January 1, 2020 and December 31, 2021, on complainant M. The fourth offence, contrary to s. 173(2) of the *Criminal Code* is alleged to have occurred on or between January 1, 2020 and December 31, 2021, on complainant E. M. and E. are sisters.

[2] The Crown case included evidence from the complainants, M. and E., their father, and their mother.

[3] The defence presented Z.G., along with his sister and his brother.

[4] The allegations involving M. include two distinct incidents. The first occurred at the residence of M. in her bedroom which she shared with E. There was a bunk bed in the bedroom, and at the time M. was using the top bunk. The incident involved her and Z.G. sitting on the top bunk of the bunk bed in her room and Z.G. convincing her to play a game that involved blindfolding her and him presenting different stuffed animals for her to touch and to guess which one she was touching. During the game, he caused her to touch, and eventually rub, his exposed penis. On the second occasion, Z.G. approached M. in his family's travel trailer, where she was hanging out with E. and Z.G.'s sister, and in a bedroom of the trailer exposed his genitals to M. while urging her to touch him.

[5] The primary allegation involving E. is alleged to have occurred at Z.G.'s house. E. was in the house with Z.G.'s sister, in the sister's bedroom, after a group had been playing hide and seek outside. E. became upset because the older kids were ganging up on the younger kids, so they had gone inside the house. Z.G. approached E. and took her to his bedroom on the premise that he wanted to see how she was doing after being upset. In the bedroom, he pulled down his pants and exposed his genitals to E. He partially blocked her from exiting the room for a moment, but she ultimately moved past him and exited the room.

### **Evidence of the Complainants' Father**

[6] The complainants' father testified that he has three children including E., M., and their older brother, C. He described the initial disclosure made to him and to the complainants' mother in 2023 by E. and M. When the girls first disclosed what Z.G. did to them, he and the complainants' mother spoke to them about the duty to report such incidents and their options. The decision was made to connect E. and M. with Victim Services to help them better understand their options and to get them help with the process.

[7] The complainants' father was familiar with Z.G. as they were neighbours with his family for approximately four years and the families were close, spending time together as friends. After the disclosure by E. and M., they moved from their home and have not maintained contact.

[8] According to the complainants' father, M. reported an incident that took place in her bedroom in their home during which Z.G. placed her hand on his penis and told her to rub up and down. He recalls her saying it lasted about three minutes. They have not discussed the incident since the original disclosure.

[9] E. made her disclosure the same evening. The discussion with E. started with E. disclosing that Z.G.'s sister had been bullying her at school. She then told him that she knew what M. was upset about and that Z.G. had tried to get her to touch him on his exposed genitals, and that, on one occasion, she went to Z.G.'s sister and told her what had happened. Z.G. responded by calling E. a liar and that he would tell her parents she made it up.

**Evidence of the Complainants' Mother**

[10] The complainants' mother testified to the friendship between the families as neighbours for about four years, and the friendship between the families prior to that time that dates back to about 2012 or 2013. She also explained the layout of their home at the time of the allegations.

[11] The complainants' mother was present with the complainants' father when the disclosures were made. She added that M. disclosed an incident that occurred in her bedroom involving a blindfold and Z.G. getting her to touch him. According to M., the complainants' mother was in her own bedroom at the time. M. told her about other incidents, but that she was able to get away from him on those occasions without any touching.

**Evidence of M.**

[12] The evidence of M commenced in a *voir dire* to address an application by the Crown pursuant to s. 715.1 the *Criminal Code* to admit into evidence a video statement made by her to the RCMP. At the time of trial, M. was 12 years old. She had attended at the Victim Services offices in Whitehorse, Yukon on May 10, 2023, and provided a video recorded statement to Cst. Green. The defence counsel did not oppose the application, and the video statement was ruled admissible. In addition to the content of the video statement, M. testified in a brief direct examination, followed by cross-examination, via closed-circuit television ("CCTV").

*Video Statement of M.*

[13] In her statement to the RCMP, M. described incidents that happened “a couple of years ago” when she was 9 or 10 years old. Z.G. was “a lot older”, being 16 or 17 years old at the time. There were two distinct incidents that she disclosed to the RCMP. The first incident occurred in her home on an occasion when Z.G., his sister, his brother, E., and C., were all in the living room of the home with some playing video games on the TV. M. became bored with watching the video game and went to her bedroom, followed by Z.G. In the room, he told her to shut the door and they proceeded to play a game which began with him telling her to put on a blindfold. Once blindfolded, he put her hand on stuffed animals from her room and she had to guess which one she was touching. He then put her hand on his “private parts” instead of a stuffed animal. She took her blindfold off and he told her what she was touching.

[14] M. put the blindfold on again and Z.G. had her touch other stuffed animals, followed again by touching his penis and telling her to move her hand up and down on it, guiding her with his hand, which she did. According to M., the rubbing lasted about 10 seconds. She took the blindfold off and he had pulled up his pants. What followed was “normal” conversation on his part like nothing happened. He then pulled out two 20-dollar bills and started to show her a magic trick. She climbed down from the bunk bed to leave and E. and Z.G.’s sister were entering the room. She did not say anything to them about what happened.

[15] The second incident, in the same year as the first incident, occurred in the travel trailer owned by Z.G.’s family which was parked on their property. On this occasion, M.

was in the trailer with Z.G.'s sister and E. E. and Z.G.'s sister were sitting on the couch in the trailer watching TV, and she was laying on the bed in the bedroom next to the couch watching a program on her phone. Z.G. came into the trailer and into the bedroom, which had curtain doors, and once in the bedroom he pulled down his pants, said something in reference to his birthday, and repeated "touch it, touch it". M. responded by saying "no" repeatedly and was able to exit the room without further interaction with Z.G.

*Viva Voce Evidence of M.*

[16] In *viva voce* evidence, M. was asked in direct examination to describe the blindfold. M. could not recall if she used a handkerchief or her hands to cover her eyes.

[17] In cross-examination, M. testified:

1. She never told her sister about the incidents with Z.G. prior to the date of the disclosure to her parents.
2. E. had made "jokes" about Z.G. touching someone inappropriately, but did not provide specific details. This "joking" occurred a couple of times. She does not recall who E. was referring to that was touched by Z.G.
3. E. told her that on one occasion Z.G. tried to make E. touch him in the trailer. On that occasion what E. said was not a joke. All she recalls is that E. and Z.G. were in the trailer at the time and cannot recall her mentioning anyone else.

4. She does not recall playing hide and seek in Z.G.'s home on an occasion when everyone got upset with E. for hiding in Z.G.'s room and Z.G. coming out of the shower.
5. During the incident with Z.G. in her room she was sitting on the top bunk on the end next to the wall and Z.G. was sitting on the top bunk in the middle.
6. She is not certain if she covered her eyes with her hands or with a piece of clothing during the game but is "pretty sure" it was clothing.
7. After Z.G. told her what she was touching, she told Z.G. to "put it away" and there was no more touching.
8. The discussion with Z.G. and the magic trick lasted about one or two minutes before she got down from the bunk bed to leave the room and E. and Z.G.'s sister came to the door. E. and Z.G.'s sister came to hang out in the room.
9. When she looked at Z.G. and what she was touching, he had his pants down to his thighs. The touching of Z.G.'s penis was for about 10 seconds, and the entire interaction on the bunk bed lasted about five minutes.
10. During the trailer incident, E. and Z.G.'s sister could not hear her because their phones were on loud. Z.G. was in the bedroom for about one minute and was wearing baggy jeans.

11. When Z.G. pulled down his pants in the trailer, he still had his boxer shorts on.

12. E. told her things about what Z.G. had done to her after the incidents that happened to M. She did not tell E. about what happened to her, except possibly on one occasion when she was falling asleep. She is not certain what she said, if anything.

### **Evidence of E.**

[18] The evidence of E. also commenced in a *voir dire* to address an application by the Crown pursuant to s. 715.1 the *Criminal Code* to admit into evidence a video statement made by her to the RCMP. At the time of trial, E. was 14 years old. She also attended at the Victim Services offices in Whitehorse, Yukon on May 10, 2023, and she provided a video recorded statement to Cst. Gregorash. The defence counsel did not oppose the application and the video statement was ruled admissible. In addition to the content of the video statement, E. was cross-examined, appearing via CCTV.

### *Video Statement of E.*

[19] In her statement to the RCMP, E. described an incident that happened when she was 10 or 11 years old, about two years prior to giving the statement and before Z.G. moved out of his parent's house.

[20] E., M., C., Z.G.'s sister, Z.G.'s brother and Z.G. had been playing a game of tag outside Z.G.'s home. Z.G.'s sister and E. were getting upset, the reason being unclear to her at the time of the statement, but it had to do with people cheating in the game,



and the two of them went into the house to Z.G.'s sister's room. Z.G. came in after them to check on E. and asked her to go to his room and talk to him because he wanted to make sure she was okay. According to E., when she would get upset Z.G. would usually make sure that she was okay.

[21] In the room, Z.G. dropped his pants to his knees and exposed his genitals, saying something along the lines of "it's a dare from a friend". The friend was not at the house or part of the game. Z.G. was wearing baggy pajama pants that were on backwards with the tie string in the back. He was not wearing any underwear. She tried to move past him but he moved in front of her, preventing her from leaving. Z.G.'s sister then came in the room, after Z.G. pulled his pants back up, and E. went with her to his sister's room where she told her what happened. Z.G. came into his sister's room and his sister confronted him, followed by Z.G. getting mad at E. for "making stuff up" and threatening to tell her parents. After the confrontation, Z.G. left them alone.

[22] When E. would go to the house after that, the activity of Z.G. exposing himself to her kept happening, two or three times, and she no longer wanted to go there. When asked to go and pick things up at Z.G.'s house for the complainants' mother, she would avoid going to the door and instead wait outside so that she would not have to see him.

[23] The following occasions included one that involved her attending at Z.G.'s home to pick up a Pyrex dish for her mother. She went to the house and asked for the dish "from last night". Z.G. did not know what it looked like and asked her to come in and look. In the house he exposed himself again. He was wearing grey sweatpants.

[24] She does not remember details about the third incident, but it was a similar situation of going over to the house to grab something and him exposing himself to her by the front door of the house.

[25] E. stated that she had not seen Z.G. for about one year.

[26] M. told her what Z.G. did to her in their bedroom about two months after it occurred, and asked E. not to tell anyone about it. She told her about the game and the blindfold, and about touching his penis. E. and Z.G.'s sister went into the room on this occasion because M. and Z.G. had gone in the bedroom to play the Nintendo. This was confusing to E. and Z.G.'s sister, and they wanted to see what was going on. They went in and saw M. and Z.G. on the top bunk playing the Nintendo.

[27] M. told her it happened a second time at Z.G.'s house and that it was "kind of the same thing", but did not provide details.

*Viva Voce Evidence of E.*

[28] E. was not asked any questions by the Crown after the conclusion of the *voir dire*.

[29] In cross-examination, E. testified:

1. M. disclosed to her two or three incidents with Z.G. in total. One or two times were inside Z.G.'s house, but she does not remember the details. The only details she remembers are in relation to the incident in her shared bedroom with M. with the Nintendo.

2. E. testified that the disclosure by M. was usually about incidents at E.'s house, but she does not know how many times it happened.
3. She recalls the Nintendo incident because Z.G. and M. went into the bedroom to play Nintendo while E. and Z.G.'s sister were in the living room. Nobody else was in the house at the time. M. had been asking to play the portable Nintendo video game and Z.G. finally agreed and they went into the bedroom.
4. E. and Z.G.'s sister went to the bedroom and opened the door. M. and Z.G. were sitting on the top bed of the bunk bed and M. was playing the Nintendo. According to E., M. looked "scarred or worried". After seeing them playing the Nintendo, they shut the door and went back to the living room.
5. It was not normal for Z.G. to be in the bedroom without the parents being there. She thought it was "weird" on this occasion, but once she saw M. playing the Nintendo she just left.
6. M. never told her about an incident with Z.G. that happened in the neighbour's travel trailer.
7. E. described the incident in Z.G.'s bedroom, explaining that prior to the incident all the kids were playing hide and seek outside, and the boys were teaming up and cheating, which upset her and Z.G.'s sister. M. did not get upset and stayed outside.

8. Inside, they went to Z.G.'s sister's room and played Minecraft.
9. Although Z.G. always wanted to make sure she was okay when she got upset, they were not close. She would barely see Z.G. when they were neighbours and did not have much of a relationship with him.
10. E. was scared of Z.G. telling her parents about the incident and hoped he would not because she did not want her parents to know.
11. E. never played hide and seek inside Z.G.'s house. She denied ever hiding in his room during a game of hide and seek or being in his room hiding when he came in after a shower and removed his towel before seeing her. She was only in the room twice, once to get his PS-4 with Z.G.'s sister, and once when he exposed himself.
12. E. was asked if her mother would text Z.G.'s mother before sending her over to pick items up from the house. E. denied that there would be a text exchange first.

### **Evidence of Z.G.**

[30] Z.G. was the first witness for the defence. He was 20 years old at trial.

[31] Z.G. testified to the relationship between the families as neighbours and that they would socialize together regularly, about once a month. C. and Z.G.'s brother were friends as they were closer in age, and Z.G.'s sister would hang out with M. and E. He was the oldest child and was not friends with E. and M. He was never in their bedroom but had been in C.'s bedroom.

[32] Z.G. would not hang out in the trailer when it was parked in the yard, but the younger kids did.

[33] E. was never in his bedroom, with one exception. There was one occasion when the kids were playing hide and seek in the house and Z.G. was having a shower. Z.G.'s bedroom was off limits in the game, and when he exited the bathroom and entered his bedroom, he closed the door and dropped his towel. It was then that he saw E. in his bedroom hiding and he quickly covered up and yelled at her to get out. All the other kids were playing hide and seek and both families' parents were upstairs in the house.

[34] Z.G. denied the allegations made against him by E. and M., describing them as "soul crushing".

[35] In cross-examination Z.G. testified:

1. The kids would play games like tag or man tracker outside sometimes, but he did not participate often.
2. E. and Z.G.'s sister would get upset a lot, as teenagers. He does not recall a time when he was participating in a game outside, and they both got upset.
3. He did have a portable Nintendo and does not think he ever took it to E.'s house.

4. He would hang out at E.'s house with his brother and C. and they would watch TV or play video games together. He testified that at no time would any of them get up and leave the room on these occasions.

5. He was never at the house with his brother and C. at the same time as Z.G.'s sister.

### **Evidence of Z.G.'s Sister**

[36] Z.G.'s sister was 16 years old at the time of trial. She described the relationship she had with E. and M., and that they would hang out together sometimes. She denied that Z.G. ever played with them unless the families were all together, which only happened on special occasions.

[37] They would play certain games outside but they would play hide and seek mostly inside her house.

[38] Z.G.'s sister would hang out in the trailer at times with E. and M., and occasionally with C., but never with Z.G. She denied there was ever a time that Z.G. came into the trailer and interacted with M. while she was in the trailer.

[39] She denied there was a time that she ever saw Z.G. in M.'s bedroom.

[40] She has never seen Z.G. do a magic trick.

[41] The families would rarely get together, with such activity being limited to special occasions.

[42] She denied ever seeing C., Z.G.'s brother, and Z.G. together over at E.'s house.

[43] She denied ever bullying E.

[44] Z.G.'s sister testified to the same game of tag in her home that Z.G. testified to. She explained that there were rules set out that Z.G.'s room was off limits because he was not playing and was having a shower. She was hiding and saw E. go into Z.G.'s room so she went to get her out, entering the room immediately behind Z.G., and she yelled at E. to get out. She testified that she yelled at E. before Z.G. said anything, and never saw him drop his towel.

[45] Z.G.'s sister denied that there was ever an occasion when she and E. went into the house after being upset about a game and Z.G. coming in to get E. She further denied that E. ever told her about an incident in Z.G.'s room, or that there was an argument where Z.G. threatened to tell E.'s parents that she was making up stories about him.

### **Evidence of the Z.G.'s Brother**

[46] Z.G.'s brother is the middle child, being older than his sister and younger than Z.G. He was friends with C. when the families were neighbours, and he maintains that friendship.

[47] He testified that he would go to C.'s house and play video games with C. and the complainants' father. Z.G. would not play video games at C.'s house, apparently because he is very competitive. Z.G. was not comfortable going to C.'s house and he was not there when his brother and C. were playing video games.

[48] Z.G.'s brother participated in a hide and seek game in his home with his siblings and the neighbours during which there was an incident where Z.G. got mad at E. Z.G.'s brother did not see the incident from where he was hiding, but somewhat curiously recalls hearing the click of a door followed by the raised voice of Z.G. There was no explanation regarding the click of the door.

[49] Z.G.'s brother never saw Z.G. go into M.'s bedroom. That would be unusual because Z.G. avoided E. and M. "at all cost".

[50] Z.G.'s brother never saw Z.G. in the trailer with E. and M. That would be unusual because Z.G. would get annoyed with his sister and her friends.

### **Legal Principles**

[51] In any *Criminal Code* trial, the crown is required to prove the offences against an accused person beyond a reasonable doubt. The principle of innocent until proven guilty and the standard of proof beyond a reasonable doubt is set out in *R. v. Nyznik*, 2017 ONSC 4392, at paras. 5 to 7:

5 The presumption of innocence, and along with it the standard of proof beyond a reasonable doubt, are important safeguards to ensure that no innocent person is convicted of an offence and deprived of his liberty. Without these protections, there would be a serious risk of wrongful convictions -- an outcome that cannot be accepted in a free and democratic society.

6 The concept of proof beyond a reasonable doubt is not an easy one to define. It is clearly more rigorous than the balance of probabilities standard applied in civil cases. The balance of probabilities requires the party bearing the onus to establish that the proposition they advance is "more likely than not" -- *i.e.* better than 50/50. In its landmark 1997 decision in *R. v. Lifchus*, the Supreme Court of Canada held that the following definition would be an appropriate instruction for a criminal jury:



[...]

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

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

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

7 This instruction, with very little modification, is now the standard instruction on reasonable doubt given to criminal juries throughout Canada. The same standard is applied by judges sitting without a jury on criminal trials. The bottom line is that probable or likely guilt is insufficient. If all I can say is that the defendants in this case are likely guilty, I must acquit. It would not be safe to convict someone of a criminal offence with only that degree of confidence. Before I can find the defendants guilty, I must be sure that they committed the offence charged.

[52] In order to apply these legal principles, an assessment of the evidence before the Court is required. That is, I must determine what evidence, if any, from each witness presented by both the Crown and defence, I accept. This requires an assessment of the credibility and reliability of the witnesses, being mindful of the approach to be taken when assessing the evidence of children.

[53] The assessment of credibility and reliability was addressed in detail in the context of a sexual assault allegation in *Nyznik* at para. 15:

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

[54] The majority of the evidence in the case before this Court is provided by children and youth. I am mindful of the Supreme Court of Canada direction that I must take a common sense approach to assessing their evidence and that with regard to 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 (see *R. v. W.(R.) [R.W.]*, [1992] 2 S.C.R. 122).

### **Assessment of the Witness Evidence**

#### *Evidence of the Complainants' Mother and the Complainants' Father*

[55] The evidence of the complainants' mother and the complainants' father was presented in a forthright and honest manner, speaking to the background relationship they had with Z.G.'s family and the nature of the relationship. As set out in these reasons, they also testified to the initial disclosure made to them by M., followed by the disclosure from E.

[56] There was nothing in the testimony of either the complainants' mother or the complainants' father that led to concerns regarding either the credibility or the reliability of their evidence. They were not witness to the allegations against Z.G. and their evidence is accepted for the context it provides.

*Evidence of M.*

[57] M. is the youngest of the witnesses that testified, and she was only "9 or 10" years old at the time of the allegations. Regarding credibility, I found that M. presented as credible and that she was sincere and honest in her belief of what she was recalling. Despite being credible, there were concerns with her reliability, which include:

1. She denied disclosing what Z.G. did to her prior to the disclosure to her parents, which was directly contradicted by the evidence of E. E. testified that M. disclosed the bedroom incident to her within months of it occurring, and of other incidents after they occurred as well. E. relayed to the Court in significant detail what was disclosed to her.
2. According to E., the disclosure by M. was in relation to a time that M. and Z.G. went to M.'s bedroom to play Nintendo. The Nintendo game directly contradicts the evidence of M. that Z.G. was showing her a magic trick.
3. E. also testified that when she went into the bedroom to check on what was going on, Z.G. and M. were on the top bunk of the bed, M. was playing the Nintendo, and E. decided to leave them alone. This directly

contradicts M.'s version that E. came in the bedroom as she was getting off the bed after the magic trick and that E. and Z.G.'s sister stayed in the bedroom.

4. The sequence of events during the incident in her bedroom that she testified to in court had inconsistencies with the statement provided to the RCMP, including in relation to whether or not she put a blindfold on a second time to continue playing the game after Z.G. showed her that she was touching his genitals.
5. Despite the ongoing disclosure referenced by E., there was never disclosure about an incident in the trailer with Z.G. The incident in the trailer, as described by M., describes a scenario including the proximity of E. and Z.G.'s sister to where Z.G. exposed himself that was implausible given the confined space.
6. M. testified that Z.G. did not expose himself in the trailer as he still had his boxer shorts on during the incident. The Crown conceded that it would be unsafe to convict on the trailer incident.

#### *Evidence of E.*

[58] E. was older than M. at the time of the allegations and her allegations against Z.G., while plausible, require an assessment of her evidence as a whole. On review, I am left with some concerns regarding the evidence of E., namely:

1. When testifying to the incident disclosed to her by M., where she recalls going to the bedroom and seeing M. and Z.G. while M. was playing the Nintendo, she added that M. looked “scared or worried”. Despite her observation, made after noting the unusual circumstances of M. and Z.G. going to the bedroom in the first place, she says that she closed the door and left.
2. E. asserted that there were more disclosures from M. about incidents with Z.G., despite M. referencing the trailer incident as the only other incident in her own evidence. E. denied ever hearing about the trailer incident and I find her assertions of the other disclosures by M. to be exaggerated.
3. There were concerns with the description of what was referred to as the “Pyrex dish” incident by E., to the extent that the Crown conceded that it would be unsafe to convict on that allegation.

#### *Evidence of Z.G.*

[59] The first witness for the defence was Z.G. He made a general denial of the core of the allegations and the opportunity to commit the offences. A general denial often lacks the detail and substance necessary to address believability.

[60] However, Z.G. did present an alternative explanation, regarding the allegations of E., for a time he accidentally exposed himself to her when she was hiding in his bedroom. This explanation was directly contradicted by his sister on the key element of

the accidental exposure. According to his sister's version of events, the accidental exposure did not occur.

[61] Z.G. also testified to the time he spent with the family of E. and M., specifically testifying to being at their house with his brother and C. playing video games, but at no time would any of them leave the room. This is a difficult statement to reconcile with human nature and the likelihood that at times, if for no reason other than to use the washroom, one of the three would temporarily leave the room. Additionally, Z.G. was directly contradicted by his brother who testified that Z.G. never played video games at the residence of E. and M.

[62] I find that there were significant credibility concerns with the evidence of Z.G.

#### *Evidence of Z.G.'s Sister*

[63] Z.G.'s sister also testified making a general denial that Z.G. had the opportunity to commit the offences alleged. As noted, she testified to the incident of the accidental exposure asserted by Z.G., contradicting Z.G. and denying the opportunity for the exposure.

[64] Defence counsel raised the issue of bullying by Z.G.'s sister towards E. during the time period of the disclosure of the allegations to the complainants' mother and the complainants' father. There was an affirmative response by E. to the existence of the bullying at the time. However, in direct examination, Z.G.'s sister adamantly denied any bullying.

[65] Z.G.'s sister minimized the friendship that she had with E., and minimized the relationship between the families noting that they would rarely all get together. This contradicted the evidence of the other witnesses, including Z.G. who indicated they would get together as families monthly.

[66] I find that Z.G.'s sister exaggerated her evidence to protect her brother and that there were significant credibility concerns with her evidence.

#### *Evidence of Z.G.'s Brother*

[67] Z.G.'s brother also testified making a general denial that Z.G. had the opportunity to commit the offences alleged. He testified that he would play video games at the neighbour's residence with C. and the complainants' father, but never with Z.G. His explanation being that Z.G. was "too competitive". What that meant was not well explained in his evidence.

[68] His testimony regarding the hide and seek game that allegedly led to the accidental exposure was not believable. The testimony that he heard the click of the door followed by Z.G.'s raised voice, in such detail, after the significant passage of time is implausible. It also directly contradicts the evidence of his sister.

[69] I find that Z.G.'s brother exaggerated his evidence to protect his brother and that there were significant credibility concerns with his evidence.

#### **Application of *R. v. W.(D.)*, [1991] 1 S.C.R. 742**

[70] I am mindful that this case is not a credibility contest between Z.G. and the complainants. Z.G. testified on his own behalf before the Court and that requires me to

apply the three-step procedure as set out by the Supreme Court of Canada in *W.(D.)*, at para. 28, which states:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[71] Given my credibility concerns with the evidence of Z.G. and his siblings, I am not left with a reasonable doubt by the evidence of the defence.

[72] This takes me to the third step in *W.(D.)*. In rejecting the evidence of Z.G., can I be sure on the remaining evidence that he committed the offences before the Court?

[73] E. and M. provided evidence that the Crown conceded was problematic as it relates to one allegation each regarding incidents involving Z.G. In assessing their respective reliability, the direct contradictions in their versions of events raises concern.

[74] The Court in *Nyznik*, at para. 16, addressed the significance of the high standard that the Crown must meet in criminal cases:

It is sometimes said that the application of these principles is unfair to complainants in sexual assault cases, that judges are improperly dubious of the testimony of complainants, and that the system is tilted in favour of the accused. In my opinion, those critics fail to understand the purpose of a sexual assault trial, which is to determine whether or not a criminal offence has been committed. It is essential that the rights of the complainant be respected in that process and that decisions not be based on outmoded or stereotypical ideas about how victims of assault will or will not behave. However, the focus of a criminal trial is not the vindication of



the complainant. The focus must always be on whether or not the alleged offence has been proven beyond a reasonable doubt. In many cases, the only evidence implicating a person accused of sexual assault will be the testimony of the complainant. There will usually be no other eye-witnesses. There will often be no physical or other corroborative evidence. For that reason, a judge is frequently required to scrutinize the testimony of a complainant to determine whether, based on that evidence alone, the guilt of an accused has been proven beyond a reasonable doubt. That is a heavy burden, and one that is hard to discharge on the word of one person. However, the presumption of innocence, placing the burden of proof on the Crown, and the reasonable doubt standard are necessary protections to avoid wrongful convictions. While this may mean that sometimes a guilty person will be acquitted, that is the unavoidable consequence of ensuring that innocent people are never convicted.

[75] There are significant reliability concerns with the evidence of M. as I have set out. There are also significant credibility concerns with the evidence of E. Additionally, there are numerous contradictions between their respective versions of events.

[76] Despite rejecting the evidence of Z.G., I cannot be sure that he committed the acts alleged.

[77] I find Z.G. not guilty on all counts.

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PHELPS T.C.J.