

# SUPREME COURT OF YUKON

Citation: *R. v. B.J.M.*, 2013 YKSC 12

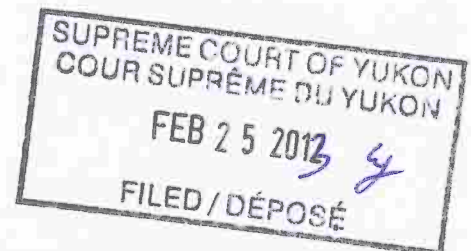
Date: 20130208  
S.C. No. 12-01501  
Registry: Whitehorse

Between:

**HER MAJESTY THE QUEEN**

And

**B.J.M.**



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

Before: Mr. Justice L.F. Gower

Appearances:

Terri Nguyen  
André Roothman

Counsel for the Crown  
Counsel for the accused

## **REASONS FOR JUDGMENT DELIVERED FROM THE BENCH**

### **INTRODUCTION**

[1] GOWER J. (Oral) In this matter, the accused is alleged to have sexually abused his son, A.K., when he was between the ages of five and seven. The son alleges that the sexual abuse occurred in the context of other physical abuse, threats of bodily harm, and mental cruelty. If the sexual abuse is proven beyond a reasonable doubt, then it would constitute a sexual assault under s. 271 of the *Criminal Code*, as charged in count one of the indictment. Counts two and three on the indictment are additional charges of sexual

touching contrary to ss.151 and 153(a) of the *Criminal Code* over the same time period. However, if there is a verdict of guilty on count one, then they would become duplicious.

[2] The issue in this trial is the reliability of A.K.'s testimony.

## **THE EVIDENCE**

### **1. A.K.'s Evidence**

[3] A.K. is now 13. He testified that his mother and father separated when he was only a few months old. While he initially lived primarily with his mother, he recalled that when he was approximately five years old he began living with his father. This coincided with the time when his mother moved to Kamloops, British Columbia. A.K. recalled living with his father for a few months, then moving to Kamloops to live with his mother for a period of time, and then returning to Whitehorse to live with his father. He said that he thought he started kindergarten at the age of five while he was in Kamloops and that he returned to Whitehorse halfway through his kindergarten year. A.K. testified that he did not live with his father after he turned eight, which would have been on January 1, 2008.

[4] A.K. recalled living with his father in two different homes. The first was a brown and white duplex (later confirmed to be a four-plex by other adult witnesses), which he described as the "downtown" home. A.K. described the second home as a "trailer", which was located in the Arkell subdivision of Whitehorse.

[5] A.K. testified that when he lived with his father at the downtown home, two other persons also resided there, M.S., his father's then wife, and F.S., his father's friend. He drew a sketch of the downtown home, showing the general location of the living room in

relation to the kitchen, a hallway, and three other rooms. One of these he identified as his father's bedroom, another the identified as his bedroom, and the room in between was marked with a question mark.

[6] A.K. said that M.S. also lived with his father when A.K. lived at the trailer home, and that she continued to do so until after A.K. turned eight (on January 1, 2008). When asked to describe his relationship with M.S., A.K. said that "I think it was good at times, and not good at other times." He then went on to state that because she was "bipolar", she was "nice one minute and screaming at me the next."

[7] A.K. also recalled attending two daycares after his return to Whitehorse from Kamloops.

[8] When asked to describe generally what it was like living with his father, A.K. said that his father was "angry a lot", "was not nice", and "was not a father to me". He said that his father threatened to "scalp" him daily, and also to "kill" him.

[9] A.K. testified that his father punished him by hitting him, kicking him, grounding him for "months on end", locking him in his bedroom, and not feeding him or only providing him with meals of bread, butter and water. A.K. also testified that he was locked up in a bathroom for two days.

[10] A.K. also recalled one time when his father put lighter fluid on one of A.K.'s hands, and lit it on fire. He said that the flame burned for 15 to 30 seconds and that, although he was not injured by this, it "scared the hell" out of him.

[11] A.K. said that he was forced to stand in a corner in the kitchen of the downtown home. A.K. also testified that he was made to stand with his arms outstretched for 10 to 20 minutes at a time, and that this happened primarily at the trailer home.

[12] A.K. testified that his father sexually abused him 13 or 14 times, by touching his penis and having A.K. touch his father's penis. He said that there were about five incidents of sexual abuse at the downtown home and about nine incidents at the trailer home. A.K. provided the following particulars about certain of these incidents.

### ***The Downtown Home***

[13] A.K. described two incidents involving a cap gun. One involved him shooting off the gun outside in the early morning around 8 or 9 AM. He said his father got angry with him and made him stand in a corner of the kitchen for about an hour. A.K. then testified that when he tried to walk away, his father pushed him back into the corner, pulled down his pants, and started stroking his penis.

[14] The other cap gun incident involved A.K. shooting the gun inside the house. He said that his father took the gun, stomped on it and broke it. A.K. then testified that his father took him into the room he marked with a question mark on his sketch. He described this room as having no furniture inside and a bare cement floor. He thought there might have been some type of a "tank" standing up in the room. A.K. said that his father told him to take his pants off and then started stroking his penis. He said that his father told him it was his "fault" and that what his father was doing was his "punishment". In his direct testimony, he said that nothing else happened to him on that occasion.

[15] A.K. also testified that there were two or three occasions when his father took him into this same room and told him that he had to jerk his father off until he ejaculated.

[16] A.K. also recalled that there was one occasion when he was made to give his father a blow job and was forced to swallow the semen. He said that this occurred in the question mark room.

[17] On another occasion, A.K. said that his father made him lie down on his side, while his father was on his knees jerking himself off. He said that his father ejaculated into his right ear and that this is the reason why he cannot hear properly in his right ear to this day. Initially, in his direct testimony he did not recall which room this occurred in, but later recalled that it might have been the question mark room.

### ***The Trailer Home***

[18] A.K. recalled one specific occasion when he was brought in from outside by his father, at a time when there was snow on the ground. He said his father grabbed him by the arm, yelled at him, took him into the living room and pulled down his pants. A.K. then testified that his father pulled his own pants down and touched A.K.'s penis with his penis. He said that his father was commanding him to "grab his penis and rub mine against his". He specifically recalled that M.S. was not present on that occasion, as she was out with A.K.'s mother at a clothing sale. He said that it happened about "oneish" in the afternoon and lasted about 10 minutes. A.K. testified that the incident came to an end when his father slapped him and sent him to his bedroom. He said that he was not fed that night and that his father told him that if he told anybody, he would "scalp me". A.K. said that the next day, after his mother picked him up, she fed him pizza. A.K. also

said that, the following day, when his father came to pick him up, his father learned that his mother had fed him pizza the previous evening and got mad at his mother because she fed him pizza and not bread and water.

[19] On another occasion, A.K. testified that he woke up to find his pyjama pants had been pulled down and his father was standing over him touching his penis by stroking it. A.K. said that his father was naked at the time. He was not sure if his father was doing anything to himself. Initially, A.K. said that he thought he might have been dreaming about this, but realized that he was not when, the next morning, his father offered him money to keep his mouth shut about the incident.

[20] A.K. testified about another occasion when he was deprived of food by his father. He said that he got up in the middle of the night and went to the kitchen to eat some ice cream. A.K. recalled that his father was woken up by this, got mad and started yelling and swearing at him. He said that his father made him pull down his pyjama pants and place his balls in the bowl of ice cream until it melted. A.K. said this happened in the kitchen and he could not remember if anyone else was around at that time. He said the incident ended when his father screamed at him and told him to go to bed or he would “kill me”.

### ***The Non-Sexual Abuse***

[21] I have already referred to A.K.’s evidence about:

- a) the lighter fluid incident;
- b) the incident where he claimed he was locked in a bathroom for two days;

- c) being made to stand with this arms outstretched for 10 to 20 minutes at a time;
- d) being made to stand in a corner kitchen in the downtown house;
- e) his father's threats of violence; and
- f) his father hitting and kicking him.

[22] In addition, A.K. testified about the following particulars of abuse.

[23] A.K. described being kicked by his father in the shins hard enough to bruise him badly. He said that he showed these bruises to his mother, as well as bruises on his arms from being yanked around by his father. He also said that he received a black eye from his father, but had to lie about it to his mother, because his father told him to.

[24] A.K. said that he was forced to clean the bathroom and the toilet with a toothbrush.

[25] A.K. also recalled being forced to perform cleaning chores in general for two to three hours at a time.

[26] A.K. testified that he was kicked in his private parts by his father several times, and that on one occasion in particular he recalled that he was on the ground for a few minutes afterwards and his stomach hurt him for the next hour or two.

[27] A.K. said that his father would regularly steal money from him, including \$50 which he received for his eighth birthday. In total, he recalled his father stealing approximately \$300 from him.

[28] A.K. also recalled that, when he was six or seven, he tried to kill himself while on a

school bus by strangling himself with a backpack strap. He said that he was kept in hospital for about a week or so, but that afterwards, he was punished by his father by having to stay in his bedroom for two weeks.

[29] A.K. testified that he was grounded on two different occasions for two months at a time. On other occasions, he said that he would be grounded for a day or two and would either be denied food altogether or provided with bread, butter and water. He said that once he was fed bread and butter every day for a week. He said that he lost a lot of weight during that time and had to see his family doctor about it.

[30] When he was grounded in his bedroom, A.K. stated that he would be locked in the room for 24 hours a day and only allowed to use the bathroom for “one minute a day”. As a result, he said that sometimes he would have to beg to use the bathroom. On one occasion, A.K. said that he was so desperate he had to pee out his bedroom window.

## **2. C.K.’s Evidence**

[31] C.K. is A.K.’s 29-year-old mother. She testified that A.K. has been diagnosed by a local psychologist with three disorders:

- a) Attention Deficit Hyperactivity Disorder;
- b) Asperger’s Syndrome; and
- c) Oppositional Defiance Disorder.

[32] C.K. said that A.K. is currently in grade 7 at school. At times she said that he has struggles with focusing and difficulties with his social interactions with his peers. She also said that A.K. has been a “difficult child to handle” since he was about two years old.



[33] C.K. confirmed that she and the accused separated when A.K. was about six months old.

[34] C.K. also confirmed that she moved to Kamloops in January 2005 to attend university. For the next four to six weeks, A.K. lived with the father in the downtown home. C.K.'s said that, to the best of her knowledge, M.S. lived with the father at that time. A.K. then moved to Kamloops to be with his mother until the two of them returned to Whitehorse in May 2005. She and A.K. lived briefly with the father and M.S. in the downtown home until C.K. returned to Kamloops in June 2005, leaving A.K. in the care of the father and M.S. In August 2005, C.K. said that A.K. returned to Kamloops to live with her and started kindergarten at the beginning of September when he was 5 ½ years old. Therefore, A.K. resided with the father and M.S. on his own from June through August 2005. This was later described by C.K. and the other witnesses as the "first summer". C.K. said she had no concerns about the father's ability to care for A.K. at that time.

[35] In May 2006, C.K. and A.K. returned to Whitehorse. C.K. stayed for about a month, returning to Kamloops in June 2006. She again arranged for A.K. to stay with the father and M.S. from June to August 2006. C.K. said that the father and M.S. lived in the trailer home at that time. This was referred to by C.K. and the other witnesses as the "second summer".

[36] At the end of August 2006, C.K. returned to Whitehorse permanently. Shortly after that, she said that she and the father attempted to put into place a roughly equal residential schedule for A.K., on a week on/week off basis, between her residence and the father's residence. However, C.K. said that she frequently had A.K. the majority of

the time, due to issues arising with the father's work schedule and issues relating to M.S.'s mental health problems.

[37] C.K. testified that she thought some of the grounding punishments at the father's home were excessive. However, she also acknowledged that for certain school behaviour issues, she and the father agreed that punishment would be carried out in both their homes.

[38] C.K. confirmed that A.K. was hospitalized while he was in grade two, during the 2007 – 2008 school year. She also confirmed that this was because he tried to hang himself while on a school bus. C.K. testified that A.K. told her that he had been grounded by the father for one month for "attention seeking behaviour" after the suicide attempt. He said he was confined to his room during this grounding.

[39] C.K. testified that Family and Children's Services ("FCS") became involved in an investigation of A.K. in 2002, because C.K. had concerns about A.K. being spanked while in the father's care.

[40] C.K. said there was a further investigation by FCS in 2003, because A.K. had been bathing with the six-year-old daughter of C.K.'s then partner, B.B. She said that no child protection concerns were identified at that time and, in any event, she terminated her relationship with B.B. in February 2003.

[41] C.K. further testified that FCS did another investigation in late 2007 and early 2008, regarding allegations of abuse and neglect by the father and M.S. She said this investigation came about because of certain disclosures made by A.K. to his then

counsellor, including being grounded in his room for extended periods and not being fed, as forms of punishment. She said that A.K. also disclosed that he had a scratch on his chest at that time. C.K. testified that she was told by FCS not to allow the father access to A.K. She further said that she could not remember A.K. ever having disclosed such abuse to her prior to December 2007.

[42] In 2009, C.K. testified that she was granted an order for the sole custody of A.K., that A.K. was aware of this order, and that the father had no visitation rights, because he refused to address FCS's child protection concerns.

[43] Around the end of August 2011, C.K. said that A.K. made further disclosures to her of sexual abuse by the father. She consulted with a lawyer and counselling agencies about this and ultimately FCS again got involved. Soon after that, A.K. was interviewed by the police and the current charges were laid.

[44] C.K. testified that she recalled A.K. telling her that he had been sent to bed without his dinner at times, but she did not remember if he told her for how long this went on. She did not recall him ever telling her that he was deprived of food for two to three days at a time. C.K. did recall A.K. telling her that he had been locked in his room, but did not remember if he told her for how long this occurred.

[45] C.K. did not recall A.K. appearing to be underfed after returning from time spent with the father, and she said nothing about A.K. seeing the family doctor for that reason.

[46] When asked about whether A.K. has any hearing issues, C.K. only made reference to him having ear infections when he was an infant, but said nothing about any

current problems.

[47] C.K. said that she did not recall A.K. ever complaining of problems with his testicles.

[48] When asked whether she ever noticed excessive bruising on A.K., C.K. responded that “once” she noticed some bruising on his arms, but did not remember if she inquired of A.K. about that. She said nothing about a black eye or bruising to his shins.

[49] When asked whether she had ever had an argument with the father about feeding A.K. pizza at her house, at first C.K. said “I believe so”, but then said she could not remember if she had such a discussion.

[50] C.K. testified that her former partner, B.B., was arrested and charged with possession and trafficking of child pornography in 2009. She said she spoke with A.K. about this, but satisfied herself that nothing untoward had happened between him and B.B. B.B.’s criminal record was subsequently filed as an exhibit and confirms that in 2010 he was convicted of three offences relating to child pornography, one of sexual interference and to offences regarding sexual touching.

### **3. The Father’s Evidence**

[51] The father denied all of A.K.’s allegations of sexually abusive behaviour, as well as the allegations of threats and inappropriate punishment.

[52] The father is now 31 years old. He said that he and C.K. met when they were teenagers, and that when A.K. was born, he was 18 years old and C.K. was 15 or 16. He also confirmed that he and C.K. separated within the first year after A.K.’s birth.

[53] The father testified that he met M.S. in 2004, and the two were later married. He confirmed that he and M.S. moved into the downtown home in 2004, where they had a roommate named Frank ("F.S.").

[54] The father also confirmed that C.K. moved to Kamloops in early 2005 and that A.K. lived with him and M.S. for a brief period early that year, and then again for about two months over the summer. The father denied that there was any room in the downtown home which had an unfinished floor or a tank in it. He filed his own sketch of the home which showed that, besides the kitchen, living room and bathroom, there were only three bedrooms: one was occupied by him and M.S., another by F.S., and the one in between by A.K.

[55] The father also recalled A.K. living with him and M.S. in the summer of 2006, however he thought he was still living in the downtown home at that time. In particular, he believed that he and M.S. did not move into the trailer home until February 2007. However, the father later testified in cross-examination that he believed he was living in the trailer home in the fall of 2006 when he and C.K. began sharing roughly equal time with A.K.

[56] The father also recalled C.K. returning permanently to Whitehorse in the fall of 2006. Shortly after that, the father said that his access to A.K. increased from a couple of overnights here and there to approximately a week on/week off schedule.

[57] The father testified that for the entire time A.K. lived with him, M.S. was the primary caregiver. He said that she was the one who dropped him off and picked him up from school and daycare most of the time.

[58] The father said that for most of the time that A.K. lived with him and M.S., he was working for a stereo and TV shop in Whitehorse, generally from 9 AM to 6 PM on weekdays. In particular, he provided a document confirming that he had this full-time employment from October 2004 until mid-August 2007. After that he worked full-time for a muffler shop, until he was prevented from seeing A.K. in late 2007 or early 2008. The father also testified that, while A.K. lived with him and M.S., he had a stereo installation business on the side, which he operated on evenings and weekends, as well as occasional pizza delivery work.

[59] The father testified that M.S. was primarily responsible for A.K.'s discipline. He said that around the age of four or five, A.K. started becoming more defiant and difficult to reason with. He described A.K. as being hard to settle down and having trouble concentrating. He also described A.K. as having difficulties at school, being disruptive in class and being rude with peers. The father said that, from time to time, issues arising at school would result in A.K. being disciplined at home. The father said that the severity of the discipline would depend on the situation. He gave examples of depriving A.K. of toys, television privileges or movie privileges. He also said that at times, A.K. would be sent to his room with books to read. He said that normally this would be for 10 to 20 minutes at a time, or up to half an hour. On one occasion, he remembered sending A.K. to his bedroom for the entire evening after a spitting incident at A.K.'s school. At other times, the father said that A.K. would receive "timeouts" by being required to sit in a chair or stand in the corner, generally in the kitchen, for five to 10 minutes. He acknowledged that, while he and M.S. lived in the trailer home, the punishments included having A.K. stand with his arms up for two to five minutes. He explained that the two of them had

progressed to this form of punishment when other methods did not seem to be working.

[60] The father denied ever depriving A.K. of food, although on one or more occasions he acknowledged that A.K. was sent to his room with his supper, which was the same food as was prepared for him and M.S.

[61] The father testified that there were likely times when he would have arranged with C.K. to continue a form of grounding punishment at her home. He said that this would sometimes occur following an incident at the school.

[62] The father said that there were no locks on A.K.'s bedroom doors in either the downtown home or the trailer home. He also said that during bedroom groundings, A.K.'s door was left open.

[63] The father acknowledged that there would have to have been times when he was alone with A.K. However, he said that M.S. was almost always at home, stating, "I was generally attached to the hip with her."

[64] The father described M.S. and A.K. getting along "really well" together. However, the father also acknowledged that M.S. suffered from chronic depression and anxiety, and that there were times when she did not do well in A.K.'s presence. He said that M.S. sometimes got "a little rowdy", and that there were times when A.K. was encouraged to go to his bedroom to play in order to shelter him from M.S.'s depressive episodes. He said these occasions could range from a couple of hours to an entire evening, depending on the severity of the episode.

[65] The father acknowledged that he did not feel A.K.'s suicide attempt was

“wholehearted”, but rather that A.K. was seeking attention on that occasion. On the other hand, he denied imposing any form of discipline as a result.

#### **4. M.S.’s Evidence**

[66] M.S. is presently 28 years old. She confirmed meeting the father in late 2003 or early 2004. She also confirmed moving into the downtown home with the father and F.S. She said that the father’s sketch of the layout of the home was “fairly accurate” and that all rooms had finished floors, as far as she could remember. M.S. testified that there were no empty rooms in the home at any time. She also said there was no tank in any of the rooms, and that the building had a central boiler in the basement outside of their particular unit.

[67] While at the downtown home in 2005, M.S. recalled A.K. moving back and forth from Kamloops. While she was a little unsure of her dates at times, M.S. did recall that A.K. returned to live with her in the father for a two to three month period “consistently, until he started school” at the end of the summer of 2006. She also said that C.K. returned to Whitehorse from Kamloops at that time, and that the father and C.K. started their week on/week off schedule with A.K. shortly after that.

[68] M.S. said that she and the father moved to the trailer home in 2006.

[69] M.S. testified that it was primarily her responsibility for dropping off and picking up A.K. from school and from daycare. She also said that during the summer months, A.K. was regularly in daycare because she and the father both worked during the day.

[70] M.S. said that “the majority of the time” she was responsible for A.K.’s discipline,



although there were times when she and the father would discuss it and agree upon the need for discipline beforehand.

[71] Generally, M.S. said that A.K. would be sent to his bedroom to read books, and that this was spoken of as “grounding”. She said that this might happen once a week, but that it was commonly not for more than 15 minutes at a time, unless A.K. was continuing to misbehave. She gave one example of A.K. being sent to his room after supper until bedtime. However, she said that the door was never closed.

[72] When asked about timeouts, M.S. replied that A.K. would sometimes be required to “face his food and eat”, but denied that he was ever made to face the wall or stand in the corner. She said that “occasionally”, when other methods of punishment did not work and A.K. continued to refuse to cooperate, he would be required to raise his arms for increments of 10 seconds.

[73] M.S. testified that she and the father never used extended punishments on A.K., although she did give an example of depriving him of his video games for a week.

[74] M.S. denied ever refusing to feed A.K. as a form of punishment. M.S. said that occasionally, A.K. refused to eat his meal, but that it was always there waiting for him later. She denied that there was ever a time when A.K. was fed only bread and butter as a form of punishment.

[75] M.S. denied that A.K. ever had to clean the bathroom with a brush as a form of punishment.

[76] M.S. explained that the type of conduct which resulted in discipline was commonly

A.K. being very defiant, arguing, screaming and yelling, being violent with people at school, and being destructive of property. When asked to describe A.K.'s response to discipline, she said that he would generally throw a fit, scream, cry and complain that it was not fair, but that this was "a pretty standard kid fit when they are not getting their way."

[77] M.S. described her relationship with A.K. as "very close", and that they openly told each other that they loved one another. She said they often sat on the couch together, watching television shows or movies, or doing crafts together. She said she made of very big effort to spend a lot of time with A.K. and that she enjoyed their time together.

[78] M.S. testified that she did not think that any of A.K.'s bedroom doors had locks on them and, in any event, she said they usually kept his door open, because A.K. liked to have the light coming in from the hallway, and also because they could hear him if something was wrong.

[79] M.S. denied that she or the father disciplined A.K. for his suicide attempt on the school bus.

[80] M.S. testified that she never observed any inappropriate sexual behaviour between the father and A.K. She also said that she never observed father exposing himself in any sexual way to A.K. M.S. further testified that she never saw the father being violent with A.K. or noticing that A.K. was scared or fearful of the father, or was avoiding him.

[81] M.S. denied ever observing any bruising on A.K., beyond the normal bumps and

bruises that one would expect on a 5- to 7-year-old.

[82] M.S. denied A.K. ever complaining of hearing problems with his ears.

[83] M.S. described her mental health issue as being “depression”, and that if she had a severe depressive episode while A.K. was in their home, she and the father would generally arrange to call C.K. and drop him off at her home. Later, in cross-examination, M.S. only recalled one such occasion. She explained that occasionally during these episodes she would become erratic and out of control and that the father would try to restrain her if she was attempting to push her way through him or was suicidal. She said there were five or six times during her relationship with the father when she ran away from their home for about a half an hour or so, but that the father would usually come with their car to pick her up once she had calmed down. Generally, M.S. said that she felt her depression was largely under control while A.K. was living with them and that it did not adversely affect him.

[84] M.S. testified that the father has a very bad memory and that she used to joke with him about it during their relationship, because he was regularly forgetting to pick things up, and forgetting appointments, meetings and anniversaries.

[85] M.S. said that she was not a particularly social person and that, generally speaking, she preferred to spend her evenings at home. She also testified that the father worked very hard to provide for the family and that she did not recall the father spending time alone with A.K.

[86] M.S. testified that she and the father are still good friends. She explained that their separation on January 1, 2010 was largely due to the stress and anxiety resulting from the complaints A.K. made to FCS in late 2007. She said that, as a result, FCS “took A.K. from us” and that she and the father are still dealing with these issues today. M.S. explained that, from her perspective, FCS wanted both her and the father to admit to being abusive with A.K., and that when they refused, they were denied contact with him. She further explained that she and the father had a difficult time finding a lawyer they were able to afford and that they were not eligible for legal aid. M.S. stated that she and the father were trying to “clean up things” with FCS, when the most recent allegations of sexual abuse were made by A.K.

## **THE LAW**

[87] *R. v. W.(R.)*, [1992] 2 S.C.R. 122, is one of the leading cases dealing with the evidence of witnesses testifying about matters which happened when they were children. The case recognizes that the law affecting the evidence of children has undergone two major changes in recent years. The first is the removal of the notion that childrens’ evidence was inherently unreliable and that therefore corroboration was often required. The second is a change in how courts are to assess the credibility of witnesses speaking about events which occurred when they were children. The Supreme Court observed that, since children may experience the world differently from adults, it is not surprising the details like time and place may be missing from their recollection and that they may not be able to recount precise details about the “when and where of an event” (para.24).

[88] In *R. v. B.(G.)(No.2)*, [1990] 2 S.C.R. 30, Wilson J. cautioned that the standard of proof beyond a reasonable doubt still applies in criminal cases in which young children have been victimized. However, while judges must continue to carefully assess the credibility of child witnesses, they should take a “common sense approach” to that analysis and not impose the “same exacting standard” that they might impose upon adults (para.48).

[89] On the other hand, I must not lose sight of the distinction between a witness’ credibility and their reliability. Often, a seemingly honest complainant may appear to have testified sincerely and can be very convincing. However, a trier of fact must also consider any evidence which contradicts the complainant’s evidence, as this can have a bearing on the complainant’s reliability. The importance of this distinction was addressed by Moldaver J.A. in *R. v. Joudrie*, [1997] O.J. No. 1619, 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."

[90] Further, as I noted in *R. v. J.B.*, 2011 YKYC 3, at para. 88, in the context of allegations of historic sexual offences, while corroborative evidence is not strictly required, it is often sought in assessing the credibility and reliability of 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."

[91] Where the evidence consists primarily of the complainant's allegations and a denial by the accused, the issue is not simply one of deciding whom to believe, since that can create a danger of subtly shifting the burden of proof to the accused: *R. v. K.(V.)*, (1991), 4 C.R. (4<sup>th</sup>) 338 (BCCA). A similar danger was alluded to by Galligan J.A. in *R. v. J.(F.E.)*, (1990), 53 C.C.C. (3 d) 64, at pp.67-68:

"While there is no scale upon which conflicting evils can be weighed, it should be remembered that revolting as child sexual abuse is, it would be horrible for an innocent person to be convicted of it. For that reason I think the courts must be vigilant to ensure that the zeal to punish child sexual abusers does not erode the rules which the courts have developed over the centuries to prevent the conviction of the innocent."

[92] Finally, in commenting upon the two Supreme Court decisions I referred to earlier, *R. v. B.(G.)* and *R. v. W.(R.)*, Finlayson J.A. in *R. v. Stewart*, 70 O.A.C. 370, at para. 21, again addressed the level of scrutiny to be applied to children's evidence in assessing their reliability:

"As I understand these two judgments, we must assess witnesses of tender years for what they are, children, and not adults. We should not expect them as witnesses to perform in the same manner as adults. This does not mean, however, that we should subject the testimony of children to a lower level of scrutiny for reliability than we would do adults. My concern is that some trial judges may be inadvertently relaxing the proper level of scrutiny to which the evidence of children should be subjected. The changes to the evidentiary rules were intended to make child evidence more readily available to the court by removing the restraints on its use that existed previously but were never intended to encourage an indiscriminating acceptance of the evidence of children while holding adults to higher standards...."

## **ANALYSIS**

[93] I will begin my analysis by stating straightaway that I found A.K. to be an impressive witness. He testified in a relatively straightforward manner, given his apparent psychological difficulties, and was tearful at appropriate times. He did not appear to be outwardly vindictive. Nor did he appear to have any apparent motive to fabricate his evidence. In short, he struck me as being a sincere, convincing and credible witness. However, the case authorities require me to go further than a simple assessment of credibility.

[94] In assessing the reliability of A.K.'s testimony, I have a number of concerns. In many respects it was internally inconsistent and in other respects it was externally

inconsistent with the evidence of the father and M.S. In many respects, the father's evidence was corroborated by both C.K. and M.S., who the Crown fairly conceded were "more or less reliable". The Crown also fairly conceded that M.S. had the hallmarks of an "independent and disinterested" witness who gave "good and clear" evidence. While I also agree with the Crown's submission that the one weakness with M.S.'s evidence was her tendency to minimize the extent to which her depression impacted the relationship between her, A.K. and father, I otherwise found M.S. to be a careful, straightforward and generally consistent witness. While her evidence was not flawless, I found it to be generally credible and reliable.

[95] Returning to A.K., in his direct testimony he explained that the reason he did not disclose the allegations of sexual abuse to his mother until the end of August 2011 is because his father had threatened him, had a bad temper and "would probably do it", apparently referring to some form of physical harm. However, while I expressly want to avoid making any stereotypical assumptions about his delay in this disclosure, the explanation is difficult to understand. As I understood the evidence, the last time the father had any contact with A.K. was during a supervised visit in early 2008 and the father has been prohibited from having any contact since then. Further, according to his mother, A.K. was aware that she obtained an order for his sole custody in 2009, which included a term prohibiting the father from having any contact with A.K.

[96] There were also several inconsistencies between A.K.'s trial testimony, his testimony at the preliminary inquiry, the statement that he gave to the police on October 27, 2011, and the testimony of the father, C.K. and M.S. I note here that A.K. testified at



the trial that everything he told the court at the preliminary inquiry and everything that he told the police was the truth.

[97] First, there is A.K.'s trial testimony about his father exposing his penis to A.K. and forcing A.K. to touch it. In his statement to the police, A.K. provided the following:

“Q: K. Would he ever do anything? Did he ever expose himself or anything like that?  
A: No.”

In his trial testimony, A.K. said that this answer was not correct, and his explanation was that “I did not think it was going to court.” Obviously, that answer is quite troubling. One would reasonably expect A.K. to have wanted to tell the truth to the police, regardless of whether he expected that the matter would end up in court or not.

[98] Second, there is the issue of the room which A.K. marked with a question mark on his sketch of the downtown home, in which he testified he was sexually abused by the father on more than one occasion. In his trial testimony, A.K. described this room as having no furniture, a bare cement floor, and possibly containing a tank of some sort. That contradicts with the evidence of the father and M.S., which is mutually corroborative, that such a room did not exist in the downtown home. Further, A.K. testified at the preliminary inquiry that he thought his father's friend, F.S., slept in the room marked with the question mark.

[99] Third, there is A.K.'s inconsistent recollection of whether M.S. was living with his father at the downtown home and what she might have witnessed. In his statement to the police, A.K. said that he was “pretty sure” that M.S. was living with his father at that time, and later stated that he thought M.S. was present “once or twice” when the abuse

happened. At trial he said that answer was true. However, A.K. also testified at the trial that his father never did anything in front of M.S. At the preliminary inquiry, A.K. testified “I forget if M. lived there at the time”, and later “M. was not there usually.” At the trial, A.K. once again recalled M.S. living in that home at that time, “for all the times I was there”. He gave similar evidence about M.S. being present the entire time he lived in the trailer home. Finally, the father’s evidence that M.S. was A.K.’s primary caregiver for all the times A.K. lived with them was clearly corroborated by M.S. herself.

[100] Fourth, there is A.K.’s inconsistent recollection of whether his father was the only person taking care of him during the first summer. At the preliminary inquiry, he testified that he did not think that there was anybody else taking care of him during that summer, which clearly contradicted his trial testimony.

[101] Fifth, A.K. testified at the preliminary inquiry that the punishment of holding his arms out for extended periods only happened in the trailer home. At trial, he acknowledged that answer was incorrect, because the punishment was imposed once or twice at the downtown home.

[102] Sixth, A.K. gave inconsistent evidence about the number of times he was sexually assaulted in each of the two homes. In his statement to the police, he stated that he was sexually abused about eight times at the downtown home. However, at the trial, he acknowledged that that answer was incorrect and that it happened about five times at the downtown home at about nine times at the trailer home. He gave similar evidence at preliminary inquiry. This in itself is not a significant inconsistency. However, what I find strange about this evidence is A.K.’s apparent insistency on these numbers, when his

actual recollection of specific incidents falls far short of either number in either location. There is therefore no apparent reason for him to remember these particular numbers of incidents.

[103] Seventh, A.K. was inconsistent about whether or not he had to touch his father's penis during the early morning cap gun incident. In his statement to the police about that, he said that his father pulled his pants down and started jerking him, but said nothing about touching his father's penis. Remarkably, when asked about this statement at the trial, A.K. said it was "correct". At the preliminary inquiry, A.K. again testified about his father touching A.K.'s penis, but responded negatively to the suggestion that his father did anything else. At the trial, A.K. clearly testified that he had to touch his father's penis on that occasion.

[104] Eighth, A.K.'s evidence about having shown his mother a black eye and bruises to his shins from being hit and kicked by the father was contradicted by C.K., who had no memory of any such injuries. Similarly, A.K.'s evidence that he lost weight while living with his father, to an extent that he had to consult with his family doctor, was also contradicted by C.K.

[105] I will next turn to another series of inconsistencies which are of a slightly different nature. These involve incidents testified to by A.K. at the trial which were never previously disclosed to the police or at the preliminary inquiry. While I appreciate that Constable Daniels testified that he felt A.K. had more to say by the conclusion of the police statement, he also clearly left open the invitation to A.K. to return to provide further information in the future. A.K. never did so. Further, the preliminary inquiry was entirely

focused on the allegations of sexual touching. Therefore, it is difficult to understand how the serious and significant sexually-related events which A.K. testified to at the trial, which would have been expected to stand out in his memory, were overlooked by him at the preliminary inquiry. I can appreciate A.K.'s partial explanation that he found it embarrassing to testify about such matters at the preliminary inquiry in the presence of friends and family, but I have difficulty accepting that as a full explanation.

[106] To summarize, the matters which A.K. disclosed for the first time at the trial included the following:

- a) being sexually abused on more than one occasion in the room with the bare cement floor and the tank;
- b) his father ejaculating into his right ear;
- c) his father forcing him to give a blow job;
- d) his father forcing him to have penis to penis contact;
- e) his father forcing him to jerk him off;
- f) the bread, butter and water punishment;
- g) the lighter fluid incident;
- h) his father forcing him to clean the bathroom with a toothbrush;
- i) his father causing bruises to his arms and shins; and
- j) his father denying him bathroom privileges, which forced A.K. to pee out his bedroom window on one occasion.

[107] Turning next to the defence evidence, the father's evidence was also relatively straightforward and unchallenged. In many significant respects it was corroborated by

C.K. and M.S. Although the father had a poor memory about some instances, M.S explained that she had a similar experience with him during their relationship.

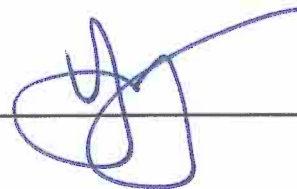
[108] There was a significant difference between the father's evidence and that of M.S. as to when they moved into the trailer home. At one point the father said that occurred in February 2007, which would have meant that A.K.'s second summer was spent in the downtown home. However, both C.K. and M.S. recalled the father living in the trailer home during the second summer and it was at the end of that summer when the father and C.K. began to arrange for more equal time with A.K. Thus, where the father's evidence conflicts with that of C.K. in M.S. on this point, I prefer the latter.

[109] Finally, the evidence of M.S., whom I found to be generally credible, largely contradicts A.K.'s allegations of repeated sexual abuse, physical abuse, threats, cruelty and emotional abuse. I wish to be clear that I do not rest my decision on the assumption that the father never had an opportunity to sexually abuse A.K., as he clearly did by his own admission. However, the picture painted by A.K. of the father's personality and the extent to which A.K. was abused in the father's household, is so directly contradicted by M.S. that I am left with a considerable reasonable doubt about whether A.K.'s allegations are true.

## **CONCLUSION**

[110] I find the father not guilty of all three counts on the indictment.

\_\_\_\_\_  
GOWER J.

A handwritten signature in blue ink, consisting of a large, stylized 'G' followed by a checkmark-like flourish.