

SUPREME COURT OF YUKON

Citation: *R. v. D.B.S.*, 2017 YKSC 56

Date: 20171013
S.C. No. 16-01508
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

AND

D.B.S.

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

Before Mr. Justice R.S. Veale

Appearances:
Noel Sinclair
Lynn McDiarmid

Counsel for the Crown
Counsel for the defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] The accused, D.S., is charged with six counts of sexual interference with respect to the complainant, a person under 16 years of age, by touching her body for a sexual purpose contrary to s. 151 of the *Criminal Code*. He is charged with an additional six counts of sexual assault under s. 271 for the same incidents.

[2] The accused is the step-grandfather of the complainant. He and his wife, the complainant's biological grandmother, cared for the complainant and her brother from 2006, when the complainant was one year old and her brother was six. The accused

and his wife separated in February 2016, after the police began their investigation into these allegations.

[3] The allegations of sexual assault initially spanned the timeframe between 2009 and 2015. Although the indictment specifies that the sexual touching was over the complainant's clothes, at trial, she testified that she was, in fact, touched under her clothes as well. At the conclusion of the trial, the Crown applied to amend the indictment, both with respect to this particular and also to better conform to the evidence about the timing (2009-2016) and nature of some of the other incidents. The defence did not oppose these amendments. I will discuss them in more detail later in these reasons.

BACKGROUND

[4] The complainant, her grandmother and her brother testified as part of the Crown's case, and D.S. testified in his own defence. Although there are areas of discrepancy with the evidence of these witnesses, which will be discussed below, the following background is not contentious.

[5] The complainant, C., and her brother, K., began living with the accused and his wife, A.S., in 2006, as a result of child protection concerns. Although the son did not live with D.S. and A.S., he would periodically stay there for a week or so at a time when he was not working, and the children would also occasionally visit him when he was working outside of the Territory.

[6] The house owned by the accused and A.S. has three bedrooms. The accused and A.S. slept in the master bedroom. C. and K. initially shared a room, but as K. grew

up, he chose to move into the third room, which was also the room occasionally used by his father.

[7] During the time the children lived with them, A.S. was working full-time and often taking night classes at Yukon College. D.S. was seasonally employed for approximately six months a year spanning the summer. Both C. and K. attended school or, when they were younger, daycare during the day.

[8] The incidents of sexual touching are mostly alleged to have occurred while A.S. was out of the home and D.S. was at home, for example on PD (professional development) days or when C. stayed home sick from school. However, one incident of touching is alleged to have occurred in the evening after C.'s bath, and D.S. is also alleged to have kissed her on the lips as he was tucking her in.

[9] The evidence from all the witnesses painted a picture of a home in which C. was treated differently than her brother, K. The Crown witnesses testified that C. was showered with gifts and treated preferentially to K. as well as to A.S.' other grandchildren. D.S. disagreed that C. received preferential treatment with respect to gifts and attention, although he did testify that he and K. had a complicated relationship that included arguments over marijuana use.

[10] As noted above, the sexual touching of C. is alleged to have started when she was about five years old. In June 2013, she disclosed it to A.S. and K., and A.S. confronted D.S. shortly afterwards. After the confrontation, A.S. and D.S. took a trip to Juneau, Alaska, together and C. and K. left the Yukon to spend time with their father. Afterwards, D.S. continued to live in the house, but A.S. and K. worked to ensure that D.S. and C. were never alone together. A.S.' son was not told about the allegations.

[11] In February 2016, K. disclosed the sexual touching to a school counsellor, triggering a police investigation. Once the police became involved, D.S. and A.S. separated, and he has had no further contact with C.

EVIDENCE FOR THE CROWN

The complainant

[12] The complainant was offered the opportunity of testifying through a closed-circuit video from a separate courtroom. However, she chose to testify in open court in front of the accused.

[13] It was clear from her evidence that she is an intelligent child. Although emotional and tearful or angry at times, she generally gave clear and responsive answers to the questions put to her.

[14] At the time of trial, C. was 12 years old and had just completed grade 6 in school.

[15] She testified that she was favoured a lot by D.S., and that he would buy her gifts, including cell phones and iPads, but pick on her brother. She always had better Christmas and birthday presents and got more attention than her brother and cousins. C. also said that D.S. did not like her going out to play at the park or at a friend's house.

[16] With respect to the sexual assaults, she said "there were a lot" and that she did not have a clear memory of all of them. She did say that there was a routine or schedule though. She would be at home from school on a PD day or a sick day, and her grandmother would either be at work or out at the store. When this opportunity presented itself, her grandfather would take her into his bedroom and give her "unwanted attention". A lot of her clear memories were from when she was 9 or 10.

[17] On one occasion in particular she testified that she was home sick and watching *Three's Company* when she began to get “weird feelings” and knew that something bad was going to happen. She was nine or ten at the time. Her grandfather turned off the television and persuaded her to go into his bedroom. She forgot how she was persuaded, but she ended up sitting on her grandparents' bed. Her grandfather picked her up so her legs were wrapped around his waist, and he put his hands down her pants and touched her in her vaginal area. His hands were under her underwear.

[18] Later in her evidence C. indicated that on the same day, her grandfather had put her on his lap while they were both on the couch and asked her if she was staying home to be with him. This happened before he took her into the bedroom.

[19] C. indicated that when she was younger, her grandfather would ask her into the bedroom, but as she got older, he started grabbing her wrist and pulling her.

[20] She testified that there were a lot of similar instances of ‘unwanted attention’ both before and after this particular incident. It was “the same thing”, and always in the bedroom D.S. shared with A.S. At various times she indicated that “a lot” was once a week, but other times she said it was when there was a PD day. In cross-examination she said it happened weekly before her grandmother found out, and less frequently after that.

[21] C. said that apart from touching her in her vaginal area, there was no other sexual contact by D.S. Although D.S. touched her under her clothing, he did not penetrate her vagina with his fingers or hand. As the assaults were taking place, D.S. would tell her he loved her and ‘talk her up’. The actual time spent in the bedroom in each case was five to ten minutes.

[22] C. remembered a specific similar incident that happened when she was six or seven. She said this was the first time it happened. She was supposed to go to daycare but got mad at one of the workers and ran away. She went home and started watching TV with D.S. He asked her to go to the bedroom, where he picked her up and put his hands down her pants and touched her under her clothes.

[23] There was a further similar incident when her brother was home, but C. did not know how old she was or what time of year it was, although it was before she had told her grandmother about the touching. Her grandfather had told her brother to go into his bedroom, before taking C. into his bedroom, picking her up and touching her under her clothes. She testified that he was moving his body and rubbing himself up against her.

[24] C. testified that she did not often resist D.S. when he tried to take her to the bedroom, and said she only did so “maybe twice”. Those times, when he grabbed her hand, she would yank away and either lock herself in the bathroom or hide under her bed. The time when she locked herself in the bathroom happened before D.S. took her grandmother to Juneau. Another time, after the time she locked herself in the bathroom, C. hid under her bed. She had been in the kitchen and had just washed a plate when her grandfather came in and tried to get her to go to the bedroom, so she went and hid.

[25] Another specific event C. recounted was a memory from when she was five years old. In this memory, she had asked for help in the bath. Her grandfather came in and dried her off. He locked the door behind him. As he dried her, he touched her vaginal area.

[26] C. also testified that her grandfather would come and kiss her good night. When she did not want him to kiss her, he would force her to kiss him by grabbing the back of

her head and pulling her towards him. These kisses would be on her lips. She testified that this was a nightly routine that started after she had told her grandmother about the touching in the bedroom.

[27] C. testified that she did not know that what was happening was wrong. She said that she did not have a dad and did not know what 'right' or 'wrong' attention was, and just thought the accused's behaviour towards her was normal. C. also said that although she had been mad at her grandmother, father, brother and mother, she was not mad at D.S. because he was just "trying to show [her] love that [she] never had". Before she told her grandmother about the touching, D.S. had said that it was their secret and not to tell anyone. After her grandmother found out, D.S. told her that, if anyone else found out, he and her dad would go to jail and she and her brother would get taken away from her grandmother.

[28] In 2013, C. finally told her grandmother. It was in the living room of the house and her brother was there. She did not recall how the conversation came up, but her grandmother sat her down and talked to her about it. She was told not to tell her dad, because her grandmother was afraid he would go after D.S.

[29] After C. told her grandmother about the touching, her grandmother began taking C. to her college classes and stopped leaving C. at home when she was sick or when she had a PD day. C. would either go to work with A.S. or A.S. would take the day off. C. testified that she also got a lock on her bedroom door and started locking both that door and the bathroom door. She thinks she was left alone with D.S. after telling her grandmother about the touching but she testified that she was not completely sure.

Although she remembered her brother was home when she hid under the bed to avoid D.S., she said that he was out the time she locked herself in the bathroom.

[30] One point made in cross-examination was that the trial was the first time that C. had ever said that D.S. had touched her under her clothing. In two statements to the police and in her evidence at the preliminary inquiry, C. had said that the touching was over her clothes. When pressed, C. agreed that she had lied about the nature of the touching in the first police statement but said:

... If someone came to your house while your life was basically crumbling down in the palm of your hands and you couldn't do anything about it, and they asked you to go talk to a stranger and tell them your entire life story, would you openly do that? Would you openly tell them, Yeah, this happened to me and I'm going to tell you in great detail, so you can just go and tell a bunch of other people? ... Of course I was lying. I was scared. I still am scared.

[31] C. had also initially told the police that the touching happened when she was between the ages of four and six or seven, but in a second statement to a different police officer said that she remembered another incident after she was seven. In the second statement, she again said that the touching was over her clothes, although she testified in cross-examination that she had intended to tell the officer that she had been touched under her clothing, but "a bunch of stuff happened and I got really nervous" and she "didn't tell him everything that I was planning on telling him". C. agreed that her father had encouraged her to give further information to the RCMP.

[32] She never told her grandmother or her brother that she had been touched under her clothing.

[33] C. testified to the impact that D.S.' conduct has had on her. She can't wear shorts because she is afraid that older men will try to check her out and do stuff to her,

or that people will look at her the wrong way or think of her the wrong way. She can't be in a room alone with a man. She also can't sleep unless her friend is by her side, as she gets really bad nightmares. She's not allowed to hang out with certain kids because their parents are concerned she will molest them.

The complainant's grandmother

[34] A.S. married the accused in September 2006, shortly before C. and K. came to live with them. She described how the father of the complainant (her son) requested that she and the accused look after the children to address child protection concerns. They effectively became parents to the grandchildren.

[35] They resided in a one-floor house. She and the accused occupied the master bedroom, there was a common bathroom and two smaller bedrooms occupied by the grandchildren and occasionally their father when he visited. When they first moved in, C. and K. shared a room, but as they got older they each had their own rooms. C. slept in the same room as K. sometimes when she was scared or felt it was not safe to sleep alone.

[36] The grandmother has always been employed and she works between 8:30 a.m. and 5 p.m. She usually stays at work for lunch. During the time C. and K. were living with her, she was completing a diploma through Yukon College and would attend night classes anywhere from two to four or five nights a week, depending on her course load. When she was attending evening courses, the accused looked after the grandchildren.

[37] In June 2013, the grandmother had a feeling that something was not right with her granddaughter. Her son had previously told her about an intuition he had that D.S. was sexually abusing C. As well, D.S. was openly favouring C. over their other

grandchildren and constantly giving her gifts. D.S. would criticize the grandmother if she was critical of C. and he constantly picked on the grandson. He also would not let C. see her friends or sleep over at their houses. C. at one point had told A.S. that she was scared of the accused. As well, C. seemed isolated and depressed and would often shut herself up in her bedroom.

[38] In June 2013, in the presence of K., the grandmother asked C. whether D.S. had been touching her. It is not entirely clear what words were used, but there was no lead-up to this conversation. In cross-examination she agreed she may have started it by asking C. "Has D. ever touched you?" At first, C. denied that there was any touching but when she was asked again, she admitted that he was touching her. C. said she was scared and did not want anyone to know, and said that D.S. had told her not to tell anyone. The conversation lasted about twenty minutes.

[39] A.S. decided not to tell her son about the disclosure, as she was afraid that he would do something to D.S. and that social workers would take the grandchildren away from her.

[40] Later in June 2013, after C. and K. had left to visit their father, she confronted D.S. with what C. had said. She was swearing at him, throwing things around and breaking things. She testified that her husband said "I knew I was going to get caught, I knew it would come out someday."

[41] The grandmother called her best friend, the accused's sister, to ask her advice about what to do. Her sister-in-law expressed doubts about the truth of the allegations and advised her not to disclose the sexual abuse.

[42] The accused proposed that he and the grandmother take a holiday to Juneau to get away from it all. The trip did not erase her pain and A.S. felt that she was being bought things so that she would keep quiet.

[43] A.S. testified that after C. told her what had been happening, she became very protective. She would take C. to her night classes with her and told D.S. that he would not be alone with her. At night, D.S. would sometimes get up and walk around the house. When that happened she would stay up in case he went into C.'s room.

[44] In cross-examination, she was asked about whether the accused had ever dressed or bathed C. and she said not on his own. Sometimes D.S. would offer to help her bathe C. and a few times he did help at bath time. When he did, she made sure the bathroom door was open and she would sit on the couch and watch him. This was when C. was between 3 and 5 years old.

[45] She said that her son and husband did not like each other as her son had an intuition that her husband was sexually abusing his daughter. She was afraid that her son would go to jail, her husband would go to jail and the grandchildren would be taken away.

[46] The grandmother kept the sexual abuse secret for three years, while she continued to live with her husband. In February 2016, her grandson disclosed the sexual abuse to his counsellor and the whole matter was reported to the police.

The complainant's brother, K.

[47] K. is five years older than C. and the two children moved to their grandparents' house together. He confirmed the description of the residence and living arrangements given by C. and A.S.

[48] K. did not get along with his step-grandfather who he described as having an overly affectionate relationship with his sister, including giving her lots of presents. He also said D.S. called C. “baby” and “sweetie” and would ask her to do things like sit on his lap and give him a kiss. The physical contact between C. and D.S. became less after June 2013 and the relationship became less affectionate. He said that C. was nervous around D.S.

[49] K. testified that C. does not sleep at night and that this has been the case since she was three or four years old. She is often scared and he can hear her on the phone until late at night. He testified that C. began to lash out at school when she was six. K. has also seen C. lash out at the accused, for example once when she was between 8 and 10 years old she got mad at him for telling her what to wear.

[50] K. said that C. often locked herself in her room when D.S. was home. He remembered one occasion in late 2012 when he was home and C. locked herself in the bathroom. D.S. had told K. to go to his room but he refused because he was afraid for C. D.S. then slapped and grabbed him and pinned him on the floor, at which point C. fled into the washroom. She did not come out until K. coaxed her out knowing that their grandmother would be home from work soon.

[51] K. testified that he was present when C. disclosed the sexual touching to A.S. He remembered that the disclosure happened in a car one night after A.S. and C. had come to pick him up. He had been out smoking marijuana and was complaining about how his life was shitty, when C. said from the back seat that “D. has been touching me”. This was in late summer, after he and C. had returned from visiting their father. That

was the first time he'd heard anything about it. He has never heard the details that C. has now testified to in court.

[52] K. felt that he could not talk to his father about what was happening. He did not discuss it again with his sister. In 2016 he told his school counsellor, who reported it to the police. At one point K. told his sister that he may also have been sexually abused by D.S., but he testified that this was not the case.

[53] K. testified that after C.'s disclosure, he had no knowledge of C. and D.S. being alone together in the house.

DEFENCE WITNESSES

The accused, D.S.

[54] The accused testified that he and A.S. met at a course in 1988 or 1989. They married in 2005. In 2006, C. and K. began living with them. D.S. initially understood the children would only be there for six months or so.

[55] In his direct examination, D.S. gave lengthy evidence about positions of trust and responsibility that he held within his community. The Crown characterized this as good character evidence and relied on it to argue that D.S. had brought his character into issue. While I allowed the Crown to adduce evidence of bad character in the course of his cross-examination, it consisted of questions about one position D.S. was fired from and allegations that he had been involved in extra-marital affairs. Ultimately, I conclude that nothing turns on any of the character evidence, either good or bad, and I will not refer to it in any detail in these reasons.

[56] D.S. said that he had been working seasonally between 1997 or 1998 and May 2015, when he started to work in a job that employed him year-round.

[57] D.S. testified that his relationship with A.S.' son was rocky, although there were periods where they got along well. It was difficult when the son would stay with them as he would get into trouble with the police and bring alcohol to the house. At one point in 2009, A.S.' son accused D.S. of having an affair and threatened D.S. and D.S.' family. Other times, he would threaten D.S. because of problems between D.S. and K. Sometimes D.S. would leave the family home and stay with other relatives because of the conflict with A.S.' son. He testified that the relationship with A.S.' son affected his marriage with A.S. and agreed that their relationship was "stormy".

[58] D.S. also gave evidence about his relationship with K. He said they had screaming matches at times but also that they would try to do things together, and an example was D.S. teaching K. to play guitar. He testified that in 2012 the relationship between K. and him worsened, because of suspicions that K. was doing drugs.

[59] In terms of preferential treatment of C., he disagreed that he treated her better than his other grandchildren or his nieces and nephews. He said that he tried to make sure the value of gifts balanced out between all the grandchildren and that A.S. was involved in all the larger gift decisions. He agreed in cross-examination that he and A.S. had specifically argued about the gifts he had bought for C., but later said that the argument was about the money he had spent on gifts for all of the kids not just C.

[60] D.S. testified that the only time he disagreed with C. doing chores was when she was four or five and A.S. and her son wanted her to start doing dishes and D.S. thought that she was too young as she might cut herself with a knife.

[61] D.S. also disagreed with the suggestion that he was overly strict with C. and K. He said that K. was very involved in sports and C. was too young to play outside by

herself because of the risk of encountering an animal or a drunk driver, but she was allowed to have friends over. Later as C. grew up, she spent a lot of time at the swimming pool and got involved in after-school activities.

[62] He remembered being confronted by A.S. about these allegations. He said that she woke him up at 5:30 in the morning and said that she needed to talk to him about something. She disclosed that he did something sexually to C. D.S. testified that he was shocked and upset and shaking. He told A.S. he had never done anything to C.

[63] After the conversation, A.S. phoned D.S.' sister, who came over and advised D.S. to get a lawyer and suggested the complainant get "checked", presumably medically.

[64] D.S. subsequently talked to his boss and said he was going to report the allegations, but his boss said he needed a lawyer and told him not to report it.

[65] He and his wife went for a drive. He did not know how to deal with this. He remembered his wife saying they should separate for a while, but he thought that was kind of odd and he wanted to deal with the situation.

[66] He testified they finally decided to go to Juneau for a trip to get away from everything and try to sort things out. In Juneau they talked about it a couple of times and decided to wait until the children got back from their summer holidays to see how things would go.

[67] When C. and K. returned at the end of the summer, D.S. said he was less affectionate with C. in that he still hugged her but did not kiss her. There was no way he wanted to be alone with her. D.S. indicated that prior to this time he would have kissed C. on the cheek sometimes, but he denied ever kissing her on the lips.

[68] The allegations came up between D.S. and A.S., but he never discussed anything with either of the children.

[69] In response to a number of question posed by his counsel, D.S. denied that he ever touched C. in an inappropriate sexual way or under her clothes. He said he had never taken her clothes off. He denied having any sexual feelings for C. He testified that he loved his family and tried to show them affection in a way that is now being portrayed as something terrible when it wasn't. Now he keeps his distance from his nieces and nephews and does not hug them anymore.

[70] In cross-examination, the accused agreed that he called C. "Baby" once in a while, but not "my baby".

[71] He agreed that he would sometimes look after C. and K. while A.S. was at work. He would never dress C. because A.S. always took care of that. Similarly, he did not change her in the evenings. He agreed that he may have changed C.'s diaper and clothing a few times when she was much younger, but not after she stopped wearing diapers. Similarly, D.S. testified that he never had to bathe C. and that A.S. would take care of all the baths.

[72] When asked about bedtime habits, D.S. testified that C. and K. would get ready for bed and come out to hug him and A.S. Although he initially said they would go to their own bedrooms and put themselves into bed, he later agreed that he would sometimes tuck them in, although not often.

[73] D.S. initially denied standing in a parental role to C. and K. but then admitted that he had a caregiver role since C. was an infant but said he enforced rules set by the

father rather than imposing his own. He admitted that he and his wife imposed some rules of their own.

[74] D.S. agreed it was possible that A.S.' son had told him he did not want D.S. kissing his daughter in 2006, but that he didn't remember. He denied having other conversations with the son about his treatment of C., although the son did get upset about D.S.' discipline of K.

Cst. Emmie Clements

[75] Cst. Clements did the first police interview of C. in June 2016, after the RCMP had been made aware of the sexual abuse allegations. She testified that she was trained in the Step-Wise interview model. She agreed that she did not discuss the importance of telling the truth with C. prior to eliciting evidence about the offences.

[76] Cst. Clements also had a discussion with C.'s father in October 2016, in which he told her he was pressuring his children to give a more detailed statement to the police. She agreed he was angry and upset, although she did not feel that he was unusually so, given his relationship to C. and the nature of the allegations.

ANALYSIS

[77] This, at its heart, is a she-said/he-said case. Fundamentally, the accused's evidence is that he never touched C. in a sexual manner, while she says he did. There are no witnesses to the actual instances of sexual touching enumerated in the indictment. There are two witnesses who can speak to the broader context in which the conduct occurred, i.e. the relationship between the accused and C. and the opportunity the accused would have had to commit the offences.

Defence submission

[78] The submission of defence counsel essentially has three prongs.

[79] Firstly, she says that I should approach the complainant's allegations with caution because the disclosure of the sexual touching was not unsolicited, but rather came about as a result of direct questioning from her grandmother, who specifically asked C. about 'unwanted attention' or touching by D.S. Defence says it is significant that C.'s response was initially a denial of any inappropriate conduct by D.S., and that it was only after repeated prompting that C. eventually disclosed the abuse. Defence suggests that A.S. was primed to believe that there was something inappropriate going on because her son had told her about an intuition he had that D.S. was sexually abusing C. and because she herself had suffered sexual abuse. Counsel also submits that this was the first time the grandmother disclosed to C. that the accused was not her real grandfather and that this was meant to encourage her to disclose the conduct.

[80] Secondly, defence points to the relatively few number of incidents that C. can remember despite her evidence that the sexual touching was happening "a lot" and perhaps even on a weekly basis. In her submission, it is also concerning that, even though C. testified that the sexual touching occurred frequently until the time C. was 11, the most recent incident she can remember happened when she was 9.

[81] Thirdly, defence counsel observes that there are a number of significant inconsistencies between C.'s statements to the police, her evidence at the preliminary inquiry and her evidence at trial. The first is C. telling the police at the time of her first statement that everything happened pre-2013, while later, including at trial, she gave evidence about incidents that occurred as recently as 2014 or 2015. As well, defence points to the fact that the trial was the first time C. disclosed D.S. had touched under her

clothing and underwear, whereas in two statements to the RCMP and at the preliminary inquiry, her evidence was clearly that he had touched her over her clothing. In this respect, defence counsel points to the pressure that C.'s father was putting on her to provide more details about the abuse.

[82] There are other aspects of C.'s evidence that defence counsel points to as relevant to her credibility or reliability. Specifically, C. and the other witnesses all said that after the disclosure to A.S. in June 2013, C. was not left alone in the house with D.S. Yet, it is clear that the incident she remembers best took place in 2014 or 2015 and her evidence was that the touching continued to happen a lot, even though it was less frequent.

[83] Defence says that the accused was consistent in his evidence and should be believed. Although she acknowledges that he became defensive at times while being cross-examined, she said that this is to be expected. Defence points out that this is not a credibility contest.

Crown submission

[84] The Crown submits that C.'s evidence about the sexual touching by her grandfather should be accepted. He says that there is nothing about her memory or past statements that should cause concern about her credibility or reliability given her age, both at the time of the events and the time of her testimony. To the extent that she did not disclose the under-the-clothes touching until she gave evidence at this trial, she gave a credible rationale for that reluctance.

[85] The Crown also points to the evidence given by the other witnesses as corroborative of C. on some of the main points, including: the perceived favouritism

towards her and the extravagant gifts she received from the accused; the amount of physical affection she received from him; that the accused had been involved in bathing her; that the accused would visit her bedroom at bedtime; that there were times when she was alone with D.S. after June 2013; that she suffered from nightmares; and that she had locked herself in the bathroom on one occasion and secluded herself in her bedroom often.

[86] With respect to the evidence given by D.S., the Crown relied on the character evidence to submit he was careless, evasive and manipulative with respect to his extra-marital flirtation and the loss of his job. He submits that he misleadingly minimized his role in C.'s life in his testimony about whether or not he stood in a parental role to C. and the extent to which he was involved in dressing and bathing her as a child.

Assessment of the evidence

[87] As both counsel have submitted, I must consider the evidence given in this trial in accordance with the rule set out in *R. v. W.(D.)*, [1991] 1 S.C.R 742, and re-stated in *R. v. Ay* (1994), 93 C.C.C. (3d) 456 (B.C.C.A.). Summarized, this means that if I believe the evidence of the accused, I must acquit. If I cannot reject the evidence of the accused or if it raises a reasonable doubt, I must acquit. If I disbelieve the evidence of the accused and it does not raise a reasonable doubt, I must consider whether, on the basis of the evidence I do accept, the allegations against D.S. have been proven beyond a reasonable doubt.

[88] As noted by Cozens J. in *R. v Abdullahi*, 2010 YKTC 44, para. 8, I cannot approach my determination as a credibility contest between D.S. and C. If I find C. credible, it does not mean I can automatically reject the evidence given by D.S. Rather,

I must consider the testimony of each of them in the context of the entirety of the evidence presented, including the evidence of other witnesses, their prior statements, their physical, mental or emotional state at the time of the events, and, to some extent, their demeanour in court. In this case, I also must consider the age of C., both at the time she testified and at the time of the allegations, and how that may have affected her recollection of events and the presentation of her evidence.

[89] There is, as well, a distinction between the credibility of a witness and the reliability of their evidence. Even if I accept a witness is being truthful, there may be inaccuracies in his or her recollection of events.

The evidence of C.

[90] As I indicated at the outset, C. gave her evidence in a clear and responsive way. While there were instances in which she conveyed impatience or frustration with repeated or obvious questions, overall I found her responses were thorough and thoughtful.

[91] C. gave clear evidence about two discrete incidents of sexual touching, which she said were part of a much longer pattern of similar conduct. These are the instances in which D.S. persuaded her into his bedroom, picked her up so that her legs were around his waist, and proceeded to touch her vaginal area under her clothing and underwear. One of these incidents took place when she was nine or 10, while she was at home sick and watching *Three's Company*, and the other when she was six or seven and had run away from daycare. There was a third similar incident she said she remembered although she could not remember what time of year it was or how old she was.

[92] As I understand the evidence, this type of conduct by D.S. is generally what was described to the police in C.'s two statements and presented at the preliminary inquiry, although as defence pointed out, on all of those earlier occasions, C. indicated that the touching had been over her clothes, rather than under them. Defence counsel suggested that C.'s evidence could have changed as a result of pressure from her father. She also pointed out that C.'s disclosures were prompted by adults and, although not taking the position that C. was lying, raised concerns about the extent to which the memories may be unreliable due to C.'s suggestibility as a child. In support of this, she also points to the relatively few separate events C. remembers, despite what she says is a persistent and frequent pattern of conduct.

[93] On a full consideration of the evidence, I do not share defence counsel's concerns about the credibility or reliability of C.'s evidence.

[94] Firstly, while I accept that children have the potential for suggestibility, as was described by Skilnick J. in *R. v. C.J.C.A.*, 2017 BCPC 152, there is nothing in the evidence that leads me to a conclusion that C. was subject to the "repeated, suggestive questioning" the court in that case was concerned with. Nor does C. come to court with the history of untruthfulness of the complainant in that case. While I accept that A.S. did confront C. with a question about whether D.S. specifically had given her unwanted attention, that was the extent of any suggestion. The evidence from the Crown's witnesses, including C., is that the allegations were discussed just one time with her grandmother and brother, and without any details. Although there were two interviews with the police, the evidence is that C. was approached by officers aware of the potential for suggestibility, and no transcripts were provided that would allow me to find

that C. was faced with unduly leading or suggestive questions. Similarly, although I accept that the father encouraged, or even possibly, pressured, C. to return to the police to give a follow-up statement, I have nothing before me to indicate he was in some manner influencing what she should say.

[95] With respect to the change in her evidence about the nature of the alleged conduct between the preliminary inquiry and this trial, in my view C. gave a believable explanation for this in her evidence. She said that she initially had told the police the touching was over the clothes because she was scared and grappling with what the disclosures could mean for her family, and because, as is captured in the excerpt of her testimony included above, she was uncomfortable disclosing details to a stranger that she knew would tell a lot of other people. At other points in her evidence she said that she was afraid people would “look at me differently, knowing that part”, and talked about how already there was a perception by some parents that she was going to molest their children if she hung out with them. I accept C.’s reasons for not disclosing the detail about this contact before the trial, and do not find it adversely affects her overall credibility.

[96] In terms of C.’s memory of relatively few specific events despite her evidence that the sexual touching was happening “a lot” or “weekly”, I find that this can be explained by her age, both at the time of trial and at the time the offences were occurring. As noted by McLachlin J. (as she then was) in *R. v. R.W.*, [1992] 2 S.C.R. 122, “... since children may experience the world differently than adults, it is hardly surprising that details important to adults, like time and place, may be missing from their

recollection". In terms of how such recollection impacts on a court's credibility assessment, Wilson J. wrote in *R. v. B.(G.)*, [1990] 2 S.C.R. 30, at para. 48:

... While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

[97] I am not suggesting that it would be appropriate to unreservedly accept the evidence that C. was subjected to unwanted touching on a weekly basis. However, to the extent that she is able to describe two such specific instances of touching in some detail, her recollection of the experience should not be discounted because of her lack of precision about the timing and frequency of other occurrences.

[98] On balance, I do not have any over-arching concerns about C.'s credibility and reliability and I accept C. as a truthful witness who was providing her evidence to the best of her recollection. Of course, it remains for her evidence to be considered in the context of the case as a whole, and particularly in light of the denial given by the accused and the specific counts set out in the indictment.

The evidence of D.S.

[99] Although Crown counsel characterized D.S.' evidence overall as careless, evasive and manipulative, he was referring mainly to D.S.' evidence with respect to the very collateral issues of marital fidelity and past employment. While evidence in these areas was elicited pursuant to my ruling that D.S. had put his character in issue, I do not

find that anything presented is capable of adding much to my assessment of his credibility and reliability.

[100] It is true too that the first part of D.S.' evidence in-chief was largely self-serving in terms of his employment and volunteer activities and that he became defensive at times during cross-examination. However, in the context of this trial and the alleged offences I am concerned with, I also hesitate to draw conclusions about his overall credibility and reliability on the basis of these observations.

[101] Essentially D.S. denied the offences he is alleged to have committed, as well as some of the Crown's characterizations about his relationship with C. and her brother K. While he conceded that his relationship with K. could be volatile and that occasionally there were screaming matches between the two of them, he also painted a picture of an involved guardian, who encouraged and facilitated K.'s involvement in extra-curricular activities. He also resisted the suggestion that he showed C. any kind of favouritism.

[102] There were a few instances in D.S.' testimony where I agree with the Crown that his evidence seemed at odds with the role he had evidently assumed with respect to the children and, to some extent, in this more important context, evasive or disingenuous.

[103] One example is with respect to whether D.S. had assumed a parental role with respect to C. and K. D.S. went to some lengths to resist the suggestion that he was acting in a parental role, calling himself a "caregiver" or a "guardian" and denying that he made or enforced rules within his house, despite the age of the children and the permanence with which they lived with him and A.S. He also initially denied ever having any direct physical involvement in changing C.'s clothes or diapers or assisting her in getting ready for bed, but was forced to admit that he had done all of these things when

it became apparent that he would have had to have participated in such activities given the routines of the household.

[104] These responses are troubling and, while I do not find they provide me with a basis for rejecting his evidence outright, they do, in my view, detract from his credibility.

Totality of the evidence

[105] C. and D.S. were not the only two witnesses to testify at this trial. While not able to speak directly to the events underlying the twelve counts on the indictment, C.'s grandmother, A.S., and her brother, K., provided evidence that is helpful in evaluating whether D.S.' evidence should be believed or is capable of raising a reasonable doubt.

[106] Although K. and A.S. believe that C. has been sexually abused by the accused, and while A.S. was very obviously angry at what she views as a profound betrayal of her trust in D.S., much of their evidence was about household routines and dynamics over the seven years that they lived together and was mutually corroborative and also corroborative of C.'s evidence. They both asserted that they had not talked to C. about the allegations since the disclosure. I have no hesitation in accepting these aspects of their evidence more or less at face value. This is especially so because, while there were areas of consistency, the evidence of A.S. and K., and to some extent C., was not so uniform that I would suspect it had been discussed between them or rehearsed in some manner.

[107] For example, both A.S. and K. testified to the fact that D.S. worked seasonally and would often be at home, particularly during the school year, to look after the kids while A.S. was working or at school. They both testified about D.S.' treatment of C. and were consistent with respect to the relatively extravagant electronic gifts she received

from him. They also gave similar evidence about how D.S. preferred C. to other grandchildren, not only with respect to expensive presents, but also regarding lower expectations about household chores and leniency when it came to discipline. Another two points on which their evidence converged was with respect to D.S.' harsh treatment of K., which sometimes got physically rough, and D.S.' seeming possessiveness of C. in restricting her ability to visit her friends' houses. K. also testified that D.S. would call C. "baby" and ask her to sit on his lap. This was not included in the evidence of A.S., although it is consistent with how C. described her treatment and D.S. confirmed that he called C. 'baby' at times.

[108] There are two additional aspects of the evidence of K. that require further consideration.

[109] The first is the fact that K. recalls C.'s disclosure of sexual abuse in markedly different circumstances than what A.S. and C. testified to. On K.'s version of events, the disclosure happened unsolicited by any questions from the grandmother, while the three of them were in a car, and it happened after C. and K. had returned from their summer with their father. While I am not certain about the reliability of this memory, to some extent its divergence from the evidence of C. and A.S. makes it seem less likely that the other consistent evidence is the result of collusion between the three of them and is therefore more likely independent recollection.

[110] The second is K.'s memory of a time in which C. locked herself in the bathroom in circumstances that generally match evidence C. gave about a time in which she felt she had to flee from D.S. as she was afraid she was going to be persuaded into the

bedroom. I find that this overlap in memory of a specific event bolsters my confidence in C.'s version of events.

[111] As well, I find it significant that A.S. testified when she confronted D.S., he said "I knew I was going to get caught, I knew it would come out someday." I have no reason to disbelieve her on this point.

[112] Ultimately the question is not whether the accused's evidence, standing alone, is credible or not credible. I must consider it as a whole and in particular with respect to evidence other than that given by the complainant. In my view, the entirety of the evidence tends to support the testimony of C. and detract from that of the accused.

[113] Put another way, when I consider the case as a whole, where the evidence of C. and D.S. conflict, I accept the evidence of C.

[114] I am supported in rejecting the evidence of D.S. on the basis of *R. v. D.R.*, 2016 ONCA 574, and *R. v. D.(J.J.R.)* (2006), 218 O.A.C. 37. In *D.(J.J.R.)*, Doherty J.A. supported a trial judge's rejection of an accused's denial because:

... stacked beside [the complainant's] evidence and the evidence concerning the diary, the appellant's evidence, despite the absence of any obvious flaws in it, did not leave the trial judge with a reasonable doubt. An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence. (at para. 53)

[115] Or, as observed by Laskin J.A. in *D.R.*, "a trial judge can still reject an accused's evidence because either the complainant's evidence or other evidence establishes the accused's guilt beyond a reasonable doubt".

[116] I adopt the reasoning of Laskin and Doherty JJ.A. in the above-noted cases on finding that the accused's evidence does not raise a reasonable doubt. Accordingly, on a consideration of the evidence as a whole, I am satisfied beyond a reasonable doubt that there was sexual touching of C. by the accused.

[117] That is not quite the end of the inquiry, however, as, although I accept C.'s evidence, I must also consider whether it is sufficient to satisfy me beyond a reasonable doubt with respect to each of the counts alleged by the Crown.

The specific charges

[118] The Crown particularized six different events over twelve counts within the indictment. At the conclusion of the trial, he sought to amend each of the counts in the indictment to reflect the evidence. Defence took no issue with the amendments, and accordingly I granted the application. I will consider each of the six events.

The touching when the complainant was nine or ten

[119] C. testified that she was at home sick watching *Three's Company* when the accused turned off the television and persuaded her to go into the bedroom. He picked her up and, with her legs wrapped around his waist, proceeded to touch her under her clothes. The complainant has a clear recollection of these events and was not shaken on cross-examination.

[120] C. testified that she was nine or ten at the time. While defence counsel suggested that this timing was not possible because of the increased vigilance of A.S. and K. about not leaving C. and D.S. alone, the balance of the evidence suggests there were times that, despite their best efforts, this was unavoidable. C. testified that she was less frequently left alone with the accused after her grandmother was told about the

abuse, but she said that it still happened. A.S. testified that she would take C. to work with her or take days off, but it was clear from her evidence that she was being questioned by co-workers and it was onerous. As well, the duration of these incidents was relatively short; C. said 5-10 minutes.

[121] I am satisfied beyond a reasonable doubt that D.S. touched C.'s vaginal area under her clothes and for a sexual purpose between her ninth and 11th birthdays. I convict him of the s. 151 offence set out in count 10 on the indictment. In light of *R. v. S.J.M.*, 2009 ONCA 244, I am entering a judicial stay on the s. 271 charge in count 9 pursuant to the *Kienapple* principle (*Kienapple v. The Queen*, [1975] 1 S.C.R. 729).

The touching when the complainant was six or seven

[122] C. testified about what she remembers as the first time the accused took her into the bedroom and touched her under her clothes. This was when she was six or seven and had run away from daycare. C.'s recollection of this incident was also reasonably detailed, especially given her age at the time of the events, and I find that the charges relating to this incident have also been proven beyond a reasonable doubt.

[123] Accordingly, I convict the accused of count 4 on the indictment, which alleges a s. 151 offence between C.'s sixth and eighth birthdays. I enter a judicial stay on the s. 271 charge in count 3 pursuant to the *Kienapple* principle.

The third incident of touching

[124] C. had one other memory where her grandfather had taken her into his bedroom. This one was when her brother was home. She did not remember how old she was or what time of year it was, but it was before she told her grandmother about the abuse. Her grandfather had told her brother to go into the bedroom and he took her into his

bedroom and did the same thing to her. He touched her under his clothes and was rubbing himself up against her.

[125] The Crown has particularized this event in counts 5 and 6 as happening while C. was nine and after the disclosure to her grandmother. While I recognize that children should not be held to the same standard as adults with respect to times and dates, there are also very few details about this incident. I believe C. when she says she was persistently touched in a sexual manner by her grandfather, and I have found him guilty of two such offences. In my view, however, the details given about this instance are vague and out of keeping with the time frame alleged. I am not satisfied that counts 5 and 6 are made out beyond a reasonable doubt and I acquit on those counts.

The touching after a bath

[126] This allegation is now reflected in counts 1 and 2, which the Crown applied to amend to remove their references to over-the-clothes touching, in order for it to conform to C.'s evidence about being touched by D.S. while being dried off after a bath.

[127] As amended, they allege sexual assault and sexual interference between C.'s fourth and sixth birthday.

[128] C.'s evidence with respect to this count was that she didn't remember it very clearly because she was five. One day, the accused had come in to help her take a bath, and while he was drying her off, he "touched her in places". When asked whether the touching was part of him drying her off with the towel, she responded "I don't think so. I'm not sure. I don't remember". C. testified that D.S. was "rubbing me and grabbing me and stuff", and that this was in her vaginal area as well as "all over [her] body".

[129] A.S. also gave evidence about occasions on which D.S. assisted in bathing C. and said that it was always with the door open and while she was watching.

[130] On the basis of the evidence about this event, I think there is a reasonable doubt about whether the touching had a sexual purpose or was sexual in nature. While I accept the truthfulness of C.'s current belief that it was sexual, and given the overall circumstances I believe it could well have been, from an objective standpoint the rubbing and grabbing C. described could also be consistent with her being towelled dry. I am unable to find the sexual nature of this contact is made out beyond a reasonable doubt. Accordingly, I find D.S. not guilty of counts 1 and 2 on the indictment.

Kissing

[131] These counts were amended to refer to a time period between June 1, 2013, and February 14, 2016, to coincide with the time period between C.'s disclosure of the abuse to her grandmother and the police investigation. They were also amended to particularize that the grandfather touched her body with his lips.

[132] C.'s evidence was that there were a lot of times that her grandfather would come and kiss her good night, and she didn't want him to. He would force her by grabbing the back of her head and pulling her towards him to kiss her on the lips. She would push him away and he would keep kissing her. Nothing else bad happened and there was no other sexual contact. This was a nightly routine after her she had told her grandmother about the abuse.

[133] While I accept that, in the context of the evidence overall, these kisses could have been sexual in nature, I have no information about the length of the kisses or whether D.S.'s mouth was open or closed. D.S. was not trying to touch C.'s vagina or

another part of her body while he was kissing her. C.'s evidence was also that her grandfather never kissed her while he was touching her in his bedroom.

[134] I acquit D.S. on counts 7 and 8 as I am not satisfied beyond a reasonable doubt that the kissing was sexual in nature.

The attempted sexual assault

[135] The defence also consented to a Crown amendment to counts 11 and 12 to address what the Crown framed as two attempted sexual assaults between the disclosure to her grandmother and the police investigation. In these cases, D.S. would “try and do the same thing” but “when he grabbed [C.'s] hand, [she] would yank away”. On one occasion she locked herself in the bathroom until her brother came home. On another occasion she hid under her bed.

[136] Again, while I accept that, given the evidence I have accepted, it is possible or even likely that D.S. was trying to take C. into the bedroom to sexually assault her as he had on other occasions, it is difficult to make such a finding beyond a reasonable doubt. C. was fortunately able to pull away before she was taken anywhere. There is no evidence that any words were spoken or an intention made known, other than what could be inferred through past conduct. While I accept that equivocal conduct can be found to be an attempt through evidence of the accused's intention, I am not sure that sufficient evidence exists here.

[137] I acquit D.S. on counts 11 and 12.

DISPOSITION

[138] I have convicted D.S. on two counts of sexual interference, which are counts 4 and 10 of the amended Indictment. I am entering a judicial stay on counts 3

and 9 pursuant to the *Kienapple* principle. I acquit D.S. on the remaining counts of the Indictment.

[139] I order that a Gladue report be prepared for the sentencing hearing.

VEALE J.