
Citation: *R. v. K.S.*, 2015 YKTC 23

Date: 20150722
Docket: 14-03538
Registry: Whitehorse

YOUTH JUSTICE COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

K.S.

Publication of identifying information is prohibited by sections 110(1) and 111(1) of the *Youth Criminal Justice Act*.

Appearances:
David McWhinnie
Gordon Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] K.S. has been charged with having committed the following offences:

- (1) that K.S. a young person within the meaning of the *Youth Criminal Justice Act* on or between January 2011 and October 2014, at or near [redacted], Yukon Territory, did in committing a sexual assault on S.S. threaten to use a weapon, to wit a knife, contrary to Section 272(2)(b) of the *Criminal Code*.
- (2) that K.S. a young person within the meaning of the *Youth Criminal Justice Act* on or between January 2010 and October 2014, at or near [redacted], Yukon Territory, did in committing a sexual assault on Z.S. threaten to use a weapon, to wit a knife, contrary to Section 272(2)(b) of the *Criminal Code*.
- (3) that K.S. a young person within the meaning of the *Youth Criminal Justice Act* on or between January 2010 and October 2014, at or near

- [redacted], Yukon Territory, did commit a sexual assault on Z.S. contrary to Section 271 of the *Criminal Code*.
- (4) that K.S. a young person within the meaning of the *Youth Criminal Justice Act* on or between January 2011 and October 2014, at or near [redacted], Yukon Territory, did commit a sexual assault on S.S. contrary to Section 271 of the *Criminal Code*.
- (5) that K.S. a young person within the meaning of the *Youth Criminal Justice Act* on or between January 2010 and October 2014, at or near [redacted], Yukon Territory, did for a sexual purpose touch Z.S., a person under the age of sixteen years directly with a part of his body, to wit; his penis, contrary to Section 151 of the *Criminal Code*.
- (6) that K.S. a young person within the meaning of the *Youth Criminal Justice Act* on or between January 2011 and October 2014, at or near [redacted], Yukon Territory, did for a sexual purpose touch S.S., a person under the age of sixteen years directly with a part of his body, to wit; his penis, contrary to Section 151 of the *Criminal Code*.
- (7) that K.S. a young person within the meaning of the *Youth Criminal Justice Act* on or between January 2010 and October 2014, at or near [redacted], Yukon Territory, did in person knowingly utter a threat to Z.S to cause death to Z.S. contrary to Section 264.1(1)(a) of the *Criminal Code*.
- (8) that K.S. a young person within the meaning of the *Youth Criminal Justice Act* on or between January 2011 and October 2014, at or near [redacted], Yukon Territory, did in person knowingly utter a threat to S.S to cause death to Z.S. contrary to Section 264.1(1)(a) of the *Criminal Code*.

[2] The trial of this matter took place on July 14 and 15, 2015.

[3] T.S., the father of the accused K.S. ("K."), and of the complainants, Z.S. ("Z.") and S.S. ("S."), testified as did the complainants and the accused.

[4] At the conclusion of the Crown's case, Crown counsel asked me to dismiss Count #2 (s. 272(2)(b)) on the basis that there was no evidence to support this charge. I agreed with Crown counsel's position and this charge was dismissed.

[5] At the commencement of submissions, counsel for the accused noted that Count #8 alleges that the accused made a threat to S. to cause death to Z. There was no evidence that any such threat was made. However, Crown counsel submits that this Count should have read S. in both instances and that the reference to Z. was an error. Counsel points to the wording in Counts #1 through #7 to support the Crown position that the reference to Z. was an error and that I should allow an amendment to Count #8 to replace the reference to Z. by a reference to S.

[6] While the charge as it currently reads is not so inherently flawed so as not to present as a charge that could have been contemplated, I agree with Crown counsel that the reference to Z. was likely simply an error. Counsel for the accused, while not consenting to the amendment, does not strenuously argue against the Crown submission and concedes that there is likely no prejudice to the accused's right to make full answer and defence should the amendment be made. I find that it is appropriate to amend Count #8 so that it conforms to the evidence such that it reads, in part, "...a threat to S.S. to cause death to S.S."

[7] While an issue was also raised with respect to Count #1 and whether the right section of the *Criminal Code* had been referenced, I find that the reference to the punishment section as set out in s. 272(2)(b) rather than the offence section of 272(1)(a) is not improper and the charge is valid.

Background

[8] There are seven children in the S. family, made up of five girls and two boys. The oldest boy, K., is the accused, who is now 18. The youngest boy is now four. Z. and S. are now 13 and 11. They are the third and fourth oldest daughters respectively.

[9] At the time of the alleged offences, the family, which also included T.S.'s wife F., lived on a four acre property [Redacted].

[10] There were a number of buildings on the property where the residence was located. These buildings were as follows:

- The Red Shed;
- The Boathouse;
- The Goat Shed;
- The Rabbit Shed;
- Chicken Coops (x2);
- Storage Sheds (x2);
- Horse corral; and
- Tree fort in front yard.

[11] There were a number of animals on the property, including chickens, goats, rabbits, horses, cows, cats and dogs.

[12] The property on which the residence was situated [redacted].

[13] The family is religious and Z. and S. were at times, in the past, home-schooled as were the rest of the children.

[14] The accused attended public school in [Redacted] for Grades 7 and 8 between the years of 2009 – 2011.

[15] Z. attended public school in [Redacted] for Grades three and four between the years of 2010 through 2012.

[16] S. attended public school in [Redacted] for Grade 2 in 2011/12.

[17] All of the children currently at home are now being home-schooled.

[18] All the children, other than the accused, shared bedrooms in arrangements that differed at times. None of them, however, shared a bedroom with the accused, at least during the time frame within which the charges arose.

[19] In fall of 2014, the second-oldest sister, R., told her mother that the accused had had sexual contact with Z. and S., and provided details of the sexual contact. The mother then told the father.

[20] At the time the accused was not living with the family as he was working as a wrangler for D.D. [Redacted]. This was the accused's second season working for D.D. T.S. testified that the work was generally between August to early October, although the accused testified to the work being somewhat longer in duration.

[21] After being informed of the incidents of sexual contact, the parents were initially unsure about how to handle the situation. The father wanted to hear about what happened from one of the girls only so he and his wife talked to S. (Why they chose her, the younger child, rather than Z. was not a matter he testified to).

[22] The parent's initial response was to let the accused know that he was not welcome in the home. They initially chose not to involve the authorities, as they were a

private family and the parents were concerned about Z. and S.'s friends finding out. However, after a couple of weeks they went to the RCMP to report what they had been told.

Alleged incidents of sexual contact

[23] The complainants both testified to a number of acts of the accused touching their bums, and of being required to perform oral sex on the accused, to the point where he ejaculated. There was conflicting testimony as to whether the accused ejaculated in Z.'s mouth. S. testified that he ejaculated in both their mouths while Z. testified that he did not ejaculate in hers. S. testified that the accused also touched her vagina.

[24] Both complainants testified that the accused threatened, on several occasions, to kill them. S. testified that the accused threatened to use a knife. Z. did not testify that the use of a knife was involved in the threats to her.

Testimony of S.

[25] S. testified that the first incident of sexual touching occurred on the bed in her bedroom. She thinks she was seven years old at the time. She states that the accused was reading her stories when he touched her "butt" over her clothes with his hands. She believes she and Z. were sharing the bedroom at that time but could not recall whether Z. was in the room at the time of the sexual touching.

[26] S. testified that the accused also touched her "butt" in the boat shop. He touched her under her clothing. She believes that the accused touched her butt maybe 10 times.

[27] She testified that the accused touched her vagina under her clothes with his hands while they were in the rabbit pen. She believes she was still seven at the time. She says that she told the accused that she didn't want to do it. She said he responded by stating words to the effect that "S., we are going to do it again". S. stated that only she and the accused were around at this time.

[28] She testified that this also happened in the red shed when she thinks she was seven. She says she told the accused that she didn't want to do it but that he responded by saying "S., we are going to do it again tomorrow". She thinks that it happened again the next day. She says that this was in the summertime. S. thinks that the accused touched her vagina maybe 20 times in the red shed.

[29] S. testified that the accused also touched her vagina with his penis, but that he never tried to push inside her vagina with either his hand or his penis.

[30] S. stated that the incidents of sexual touching occurred in the rabbit pen, the cow shed (also known as the goat shed) and the boat shop. She stated that she told the accused that she didn't want to have these things happen to her and that when she threatened to tell her mom what was happening, the accused said to her "I'm going to kill you". He stated this to her in the rabbit pen and the cow shed. Further, in the cow shed, he told her that he had a knife. S. stated that she didn't tell her mom because the accused said he had a knife and that he was going to kill her. S. never saw a knife at the times that the accused made these threats and told her he had a knife. She knew that he had lots of knives in his bedroom. She stated that he made these threats to kill

her maybe 15 times and that these threats were made in the rabbit pen, the boat shop, the cow shed and the red shed.

[31] S. stated that the first time the accused put his penis in her mouth was when she was maybe eight and that this occurred in the red shed. He told her on this occasion that they were going to go do “the secret”. She stated that she was not sure when the accused first used the phrase “the secret” but that she understood that it meant “the thing that they were going to do”.

[32] S. thinks that this incident occurred in the fall and she was outside picking up garbage before it happened. The accused was wearing jeans and a belt but she didn’t know what he was wearing for a shirt. The accused’s pants were up and he was standing. He told her to kneel and she did. He told her to touch his penis with her hand so she did. She stated that accused’s penis was in her mouth for maybe two minutes. She stated that “white stuff” came out and she spat it on the ground. She stated that she told the accused that she didn’t want to do that and he responded by saying “S. we have to do it”. He told her that they had to do it because it felt good.

[33] S. stated that she told the accused she was going to tell her mom “because it felt sinful” but that she didn’t tell because the accused was going to kill her. She stated that there were maybe 20 such incidents of oral sex. These happened in the red shed, the “other” shed, the rabbit pen, the boat shop, the cow pen and at the chair by the river.

[34] S. stated that Z. was present for maybe five of these incidents, including at the red shed, the boat shop and the river, although she wasn’t sure.

[35] S. stated that she saw the accused's penis in Z.'s mouth. She stated that she saw this happen about six times and that, on every occasion, white stuff came out and Z. spit it on the ground. She said this happened in the red shed, the boat shop, the cow shed, the rabbit pen, and by the river. She said she told K. to stop by saying it wasn't nice and that she was going to tell mom. She states that the accused said to her "S., stop saying that".

[36] S. stated that the last time the accused tried to have sexual contact with her happened when she was making cookies. She believes that she was eight or nine and that this incident occurred pretty far from the time R. told her parents.

[37] She stated that the accused came into where she was and asked where a horse-related item was. S. told him where it was and he said it wasn't there. She went to show him and, once there, the accused told her they were going to do the secret. She said "no" and ran out. The accused tried to grab her but he couldn't. She said it never happened again after this.

[38] S. stated that the incidents of sexual touching occurred in the summer when the accused came back after working for D.D., or when he was back on visits while working for D.D.

[39] S. stated that these incidents happened before, during and after the year she attended public school in Grade 2.

[40] S. stated that she disclosed what had happened to her to R. in the goat shed. She had gone out to the shed where Z. was milking goats to see what was taking so

long. She said that she saw Z. crying and she asked R. what was going on. S. stated that she told R. what the accused had been doing to her when R. asked her what the worst thing she had ever done was.

[41] When it was put to her in cross-examination that she told R. these things because she wanted these things to be the worst thing that had ever happened to her, S. denied this. S. testified that she did not think R. would tell her parents.

[42] She said that she had talked to Z. before about the sexual things that the accused was doing to them.

[43] S. stated that she felt like she had to tell her parents the same thing that she had told R. She said she felt that she had to tell her parents the same things because she didn't want to lie.

[44] S. testified that she had a cousin, H., who watched porn. She stated that she had never watched porn herself, but that she saw what H. was watching on her phone. This happened before she talked to R. She stated that she had never seen anyone else watching porn.

Testimony of Z.

[45] Z. testified that she first disclosed the incidents of sexual contact that had happened when she was milking goats wither sister R. This was just before the winter last year. In direct examination she testified that she did not recall how the conversation started. In cross-examination she stated that it started when R. asked her what the worst thing she had ever done was. She denied that the reason she told R. about what

had happened with K. was because she wanted to tell R. something pretty horrible. Z. testified that she told R. because she knew she needed to tell someone. Therefore when she was asked, she told R. the sexual things that the accused had been doing to her. She stated that she had not told anyone else. Z. stated that she expected R. to tell her parents.

[46] Z. thinks that she was 10 when the sexual abuse started. She testified that the first time was when she was playing tag in the boat shop with the accused. They had not played tag before. She said that every time the accused tagged her he would dig in her bum with his hand under her clothes. She didn't want him to do that. She asked him to stop but he didn't.

[47] Z. testified that the accused placed his hand on her bum maybe 12 or 13 more times. These incidents also occurred in the wood shop, the goat pen, by the river and underneath the old trailer.

[48] She stated that at times the accused would tell her to go out. When she asked why, he would say because they were going to do the secret. The secret was the accused's idea. She understood that the secret wasn't a good thing. She understood it to be a sexual thing. She said that she knew what was going to happen when she went out there.

[49] Z. testified that the accused wanted her to lick his "pee-pee" which she confirmed meant his penis. She thinks this may have happened as many as five to 10 times. She is not sure when the first time was. She stated that the accused would ask her to do this in the red shed, the goat pen and down by the river.

[50] Z. stated that she didn't want to do this but that she didn't say so to the accused. She stated that she never told anyone else.

[51] Z. stated that when she was licking his penis white stuff came out. The accused's penis was not in her mouth when this happened and the white stuff went on the ground.

[52] Z. stated that she touched the accused's penis with her hand. She said she did this because the accused was going to kill her if she didn't. She said that the accused threatened to kill her maybe five to seven times. The threats were never made in a physical way. She stated that these threats made her scared and, because she was scared, she didn't tell her mother what was happening. She said that the accused told her that if she told her parents she would be spanked. She thought that the accused was right when he said this. Z. testified that she is still scared of the accused.

[53] Z. stated that she would sometimes try to get away from the accused but he would catch her. She stated that she was able to get away once but he caught her and tied her up with a blue rope in the red shed.

[54] She stated that the accused's penis never touched her anywhere else.

[55] Z. testified that she was there when S. performed oral sex on the accused. She stated that she did not know how many times this happened. She said that she didn't know what happened as she closed her eyes because she didn't want to see. Z. stated that she never talked to S. about what was being done to them.

[56] Z. said that the incidents of sexual touching stopped last year, maybe in the winter but she doesn't remember when.

[57] Z. testified that she did not participate in non-sexual activities with the accused unless her dad or others were present. She denied waking the accused up and asking him to go feed the animals with her.

[58] When asked whether she knew about her cousin H. watching pornography, Z. replied "What's that". When told by counsel it meant sexual things, Z. said "No".

[59] She testified that when these things were happening to her she was praying for herself and the accused because she wanted God to forgive her as she thought she was doing something wrong.

Testimony of the Accused

[60] The accused, stating that he couldn't say very much, denied that any of these incidents of sexual contact that his sisters had testified to had occurred. He also denied making any threats to kill them.

[61] He testified that he did not get along very well with his second sister, who I understand to be R.

[62] He testified that he spent a lot of time on his property with his brothers and sisters. He stated that he would take Z. and S. horseback riding, snowmobiling, into the garden, to milk or feed the goats and chickens, to build stuff and to cut firewood.

[63] He testified that he was aware of the automobile seat/chair by the river but that he never used it. He said that he used to go fishing at that location with his father and his sisters but the last time was three years previous and the chair had only been there since then.

[64] He stated that he was in his third year of working as a wrangler for D.D. and that in 2014 he worked almost six months for him from May 25 – October 15. He stated that he was at camp for all but 15 days last year, 10 of which he spent hunting with his dad. There may have been the odd night or day or few hours at home. He stated that in 2013 he was at guide school from June 22 to July 12 and then headed out to work with D.D. on August 9 until October 13. He stated that in 2013 he spent only one night at home when D.D. dropped him off on his way through town and picked him up the next day.

[65] The accused testified that the family was a conservative Christian one in which the children were primarily home-schooled. He agreed that sex was not a topic that was discussed in the home. He stated that he picked up sexual information when he attended public school at the age of 12. He speculated that maybe Z. and S. learned about male ejaculation from seeing their cousin watch porn. He had not heard from Z. or S. that their cousin watched porn, but from their older sisters. He states that they told him the cousin was crazy about porn.

[66] In cross-examination, when the accused was asked whether he had ever possessed a knife with a cross on it as S. had testified to, the accused stated that he

had received a knife that matched the one described by S. for his 13th or 14th birthday but that he had lost it after a year.

Analysis

[67] As the accused has testified, this case falls squarely within the principles stated by the Supreme Court of Canada in **R. v. W.(D.)**, [1991] 1 S.C.R. 742 at p. 758:

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

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

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

[68] In **R. v. Ay** (1994), 59 B.C.A.C. 161 at para. 64, the Court elaborated on the test as articulated in **W.(D.)** by stating that if you do not know whether you believe the evidence of the accused or the complainant or if you do not reject the evidence of the accused, you must acquit.

[69] The **W.(D.)** analysis is not a precise formulation to be rigidly applied. It is to be remembered, as **W.(D.)** reinforced, that the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt, and a lack of credibility on the part of an accused does not therefore lead to a conclusion that the accused is guilty beyond a reasonable doubt. (See **R. v. Y.C.B.**, 2014 ONSC 3570 at para. 167)

[70] A trial is not a credibility contest between one witness or the other, where the finder of fact chooses between one version or the other in order to reach a finding of

guilty or not guilty. (*R. v. Hull*, [2006] O.J. No. 3177 (C.A.) at para. 5; *R. v. J.H.S.*, 2008 SCC 30, at paras. 9 and 13; *Y.C.B.* at para. 166)

[71] In *R. v. Jaura*, 2006 ONCJ 385 at para. 10, Duncan J. framed the credibility issue as between the complainant and the accused in a sexual assault trial as follows:

The issue in this case, as I see it, is this: Can I reject the defendant's evidence and convict solely on the basis of my acceptance of the complainant's evidence?

[72] Duncan J. answered this question in the affirmative and convicted the accused, stating why in paragraph 22:

...While I cannot find fault in the defendant's evidence when considered in itself, when I consider it in the context of and in contrast to the complainant's evidence, I find that I have no reasonable doubt about where the truth lies. I am absolutely convinced of the truth of the complainant's evidence and reject the defendant's evidence solely because it is inconsistent with the complainant's evidence.

[73] In *R. v. J.J.R.D.* (2006), 218 O.A.C. 37, leave to appeal dismissed, [2007] S.C.C.A. No. 69, Doherty J.A. stated at para. 53 that:

...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.

[74] This reasoning in *J.J.R.D.* was adopted in *R. v. O.M.* 2014 ONCA 503 at para. 45. where the Court, citing the above passage, stated that:

This court has held that an accused's evidence may be rejected based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of the conflicting credible evidence of the prosecution's witnesses....

[75] In *R. v. Vuradin*, 2013 SCC 38, the Court considered an argument from the appellant that the trial judge erred by first finding the complainant credible and then used that finding to reject the evidence of the accused. The Court rejected that argument, stating in para. 25 that:

...the trial judge was merely articulating general principles of law that *may* be used in assessing the evidence of the accused. Further, in assessing the Crown's case, the trial judge referred explicitly to the appellant's denial:

...notwithstanding [the appellant's] denial. I have no reasonable doubt that the [appellant] did commit the acts which [the complainant] described.

[76] The Court held in paras. 26-28 that notwithstanding the denial of the appellant, the trial judge simply found, as he was entitled to do, that this denial did not raise a reasonable doubt.

[77] In *O.M.* at para. 42, the Court stated that:

It is elementary that a complainant's credibility cannot be established by assuming the accused's guilt. Nor can an accused's evidence be rejected simply because the evidence of a complainant is accepted. *W.(D.)* precludes the "either/or" approach to the assessment of credibility. Instead, under the third step of *W.(D.)*, the trial judge must ask whether, although she may not believe the accused's evidence, a reasonable doubt arises on the whole of the evidence that she does accept.

[78] The critical factor in assessing credibility in cases such as this is that there be a careful consideration of the entirety of the evidence, and that a finding of credibility in regard to the prosecution's witnesses or the complainant does not lead to a finding of incredibility or a rejection of the evidence of the accused. Even if a complainant is found to be credible and the complainant's evidence believable, it is still incumbent on

the trier of fact to give careful consideration to the evidence of the accused and any other evidence, in other words the whole of the evidence that has been adduced, in order to see whether a reasonable doubt has been raised.

[79] At no time does the burden of proof shift to the accused; the Crown bears the burden throughout to prove every element of the offence beyond a reasonable doubt.

Demeanour

[80] Prior to considering the testimony of the complainants and the accused, I will state the following with respect to demeanour.

[81] The demeanour of a witness is one factor among many in assessing the credibility of a witness. While it remains a proper consideration (**O.M.**), care must be taken not to overemphasize demeanour when assessing a witness' credibility. A self-conscious and nervous witness may appear hesitant and uncertain while testifying yet still be telling the truth. Another witness may be clear, confident and forthright yet nonetheless tell an untruth. There are cultural, mental health and age factors which may also affect demeanour, amongst other considerations. All of this is to say that the assessment of a witness' demeanour, while potentially probative in the context of a credibility assessment, must be considered carefully in the context of the whole of the evidence and not given more emphasis than is due.

[82] In this case the complainants and the accused are all young. Z. is now 13 years of age and was testifying to events that are alleged to have occurred when she was between seven and 12 years of age.

[83] S. is now 11 and was testifying to events that are alleged to have occurred when she was between six to 10 years of age. Prior to providing their testimony, S. and Z. promised to tell the truth. No issue was raised with respect to their capacity or competence to provide testimony.

[84] The accused is now 18. He was between 12 and 17 years of age in the time-frame over which these offences are alleged to have occurred.

[85] When assessing the credibility and reliability of child witnesses, in **R. v. W.(R.)**, [1992] 2 S.C.R. 122, the Court stated in para. 26 that:

...Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. ...

[86] The Court, in upholding the trial judge's decision and noting that the trial judge had referred to **W.(R.)** in his decision, stated in para. 52 that:

...it is clear that he understood that contradictions in a child's testimony should not be accorded the same effect as similar contradictions in an adult's testimony. Rather, the evidence of child witnesses must be approached with common sense. The trial judge stated, at pp. 39-40:

The evidence of children is not to be treated as evidence that is inherently unreliable or to be treated with special caution. It may be incorrect to apply to them the same standards one would expect of an adult in similar circumstances.

[87] The Court also noted the trial judge's reference to passages from **W.(R.)** and included the following at para. 53 of its judgment

...

As Wilson J. emphasized in **B.(G.)** [[1990] 2 S.C.R. 30], these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a “common sense” basis, taking into account the strengths and weaknesses which characterize the evidence offered in a particular case.

[88] There was considerable evidence adduced about the layout of the various buildings on the property in relation to each other and to the house, as well as the location of the automobile seat by the river. The evidence of all the witnesses was essentially consistent on this point.

[89] I find that there was opportunity for the sexual encounters to have occurred as described by the complainants in the places and at the times testified to by the complainants. Counsel for the accused concedes that opportunity existed but points to the vagueness in dates and times of the alleged sexual contact and threats in the testimony of the complainants as being a factor that cannot be ignored in assessing the credibility of the complainants and the reliability of their testimony.

[90] I accept that, had anyone been paying particular attention with respect to certain buildings, noting the red barn in particular, it would have been quite possible to have observed the accused and either or both of the complainants enter into these buildings. This does not, however, lead me to conclude that anyone from another location, in particular the house, would have been able to see entirely inside any of these buildings.

[91] Further, it would not have been difficult for anyone else to approach and to enter into any of these buildings or to go to any of these places and observe or interrupt anything that may have been happening. However, the fact that there was some risk of potential exposure does not mean that this risk is one that would have precluded the incidents from occurring.

[92] With respect to the issue of vagueness, while I agree that this is certainly a factor to be considered, it is only one of many factors. It is not at all surprising that young children would have some difficulty in their testimony in providing a great deal of specificity to dates and times that incidents occurred, in particular when they are trying to recall numerous incidents. In fact, I am struck by the detail with which the complainants were able to describe some of the incidents, such as S. and Z.'s description of the circumstances of the first time they had sexual contact with the accused.

[93] I am aware that there are some inconsistencies in the evidence of S. when compared to the evidence of Z. S. testified that she was present on a number of occasions when the accused had sexual contact with Z. and that she saw Z. spit white stuff out of her mouth after the accused's penis was in it. Z. testified that there was no one else present when the accused had this sexual contact with her. She also stated that the accused's penis was not in her mouth when the white stuff came out of it.

[94] S. also testified that she had spoken with Z. about what the accused was doing with them sexually, while Z. denied having ever spoken to S. about this. I agree somewhat with counsel for the accused that it may seem inconceivable that the two

complainants would not have talked to each other, given the evidence of S. that they were each present at times when the other was having sexual contact with the accused. As such, in this regard there is a shadow cast on the credibility of one of the two complainants, most likely Z.

[95] I am not persuaded, however, that these inconsistencies are such that they cause me any significant concern about the evidence of the complainants as to the incidents of sexual contact with the accused that they have testified to. These are relatively young children testifying in circumstances that are no doubt difficult and about events that are also likely very difficult to recount. They are testifying about a number of events, not one event only. It is not surprising that there would be some inconsistencies. I say this, not lowering the threshold test for reliability and credibility in order to make undue allowances for the youth and circumstances of these complainants. As Wilson J. stated in **B.(G.)** in para. 48:

...I do not read [Wakelin J.A.'s] reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. 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.

[96] I find that S. was the more reliable and credible of the two complainants. She was very forthright and composed while providing her testimony. While upset at times and struggling, composure-wise, to answer certain questions directly relating to the incidents and nature of her sexual contact with the accused, she nonetheless provided a very clear and cogent response to all questions asked of her, both in direct and in cross-examination. In saying this, while I am aware that I am assessing S.'s testimony in the context of her age now and at the time of the alleged events, I am not lowering the threshold to make improper allowances for her youth. By any standards, she was a convincing and compelling witness.

[97] It was apparent that Z. struggled more when providing her testimony. There was nothing that I observed, however, in the manner in which she provided her evidence and in the content of this evidence, that gives me any great concern about whether or not she was being truthful in her testimony, or at least doing her best to be truthful. There is really only one area in which Z.'s truthfulness is in question, albeit comprised of three different aspects.

- Z. denies the accused ejaculated in her mouth;
- Z. denies that S. saw the accused engaged in sexual contact with her; and
- Z. denies talking about it with S.

Given what I observed about Z. in the witness stand, I am not surprised that this common theme of inconsistencies exists, based on what I would consider to be a sense of shame that she has done something wrong.

[98] I have no salient information about the respective personalities of Z. and S. that would provide a possible explanation for the different manner in which either testified.

[99] I also do not have any expert opinion evidence about how the age difference between Z. and S. may contribute to any impact that the incidents of sexual contact they testified to could have had on either of them and/or the manner in which they are able to speak about these incidents in Court.

[100] It is interesting that the parents chose to approach the younger S. instead of Z. when deciding to ask the girls directly about the events that R. had informed them of. While there is likely some reason for this, I was not provided with one and therefore I am not prepared to engage, neither in this area nor those noted just above, in speculation.

[101] I am entitled to accept some of the evidence of either or both of the complainants while still able to reject other portions of their evidence. (*R. v. A.W.B.*, 2015 ONCA 185 at paras. 22 and 23).

[102] On those occasions when the testimony of Z. differed from the testimony of S., I prefer the evidence of S.

[103] As stated earlier, I also find that the inconsistencies in the evidence of the complainants are inconsequential. I say this having considered each inconsistency individually and then viewing them collectively in the context of the evidence as a whole.

[104] The actual nature of the incidents of sexual contact testified to by S. and Z. is essentially not contradictory between the complainants, other than Z. stating that the accused did not ejaculate into her mouth.

[105] I find that Z.'s testimony that S. was not present when she had sexual contact with the accused is not entirely true. While there may have been some occasions when S. was not present during Z.'s sexual contact with the accused, I find that, on the testimony of S. which I accept, there were several occasions when she was in fact present.

[106] I note the testimony of Z. that she did not see the accused have sexual contact with S., not because she wasn't there, but because she closed her eyes as she did not want to see what the accused and S. were doing. Not that this consideration in any meaningful way affects my findings of credibility or my decision in this case, but I would not be surprised if Z. also shut her eyes when the accused was having sexual contact with her and thus did not 'see' S. This would be consistent with my observations of Z. when she was providing her testimony. Again, this is to some extent embarking into the field of speculation and I will not go there.

Motive

[107] With respect to the issue of motive, as stated in **Y.C.B.** at para. 176 (citations omitted):

The existence or absence of a motive by the complainant to fabricate evidence is a relevant factor to be considered...I make this observation, sensitive to the fact that the burden of production and persuasion is upon

the prosecution and that an accused need not prove a motive to fabricate on the part of a principal Crown witness.

[108] I will add that I find that there is an absence of apparent motive on the part of the complainants to fabricate their evidence. This does not mean that I should therefore be persuaded that the complainants are telling the truth. There is a difference between an absence of an apparent motive to fabricate evidence and evidence that there was no motive to fabricate evidence. It is clear that there is no burden on the accused to demonstrate that the complainants had a motive to fabricate their evidence. While I cannot say in this case that the Crown has proven an absence of a motive to fabricate the alleged incidents of sexual contact, I find that there is an absence of any evidence of motive that would call into question the credibility of the complainants. To be fair counsel for the accused has not raised the issue of motive in his submissions and any examination or cross-examination that may have tended to lead towards the existence of a possible motive to fabricate was not pursued.

Assessment of the credibility of the accused

[109] I have carefully considered the testimony of the accused. His testimony essentially contradicts that of Z. in two areas and of S. in one:

[110] Firstly, he states that he used to take both complainants for horseback and snowmobile rides. Z. states that he did not. I do not recall that S. was asked any questions or that she provided any evidence in this regard. There was no other independent evidence that would support one version of events more than another. It is certainly not at all inconceivable that the accused, as the oldest child in the family,

would at times take his younger siblings for such rides. I find, in the circumstances of this case and the evidence proffered, that I cannot make a determination as to whether the accused or the complainants are telling the truth. However, I find that this is an issue that I do not consider necessary to resolve as I do not find it to be particularly probative on the issue of credibility in the circumstances.

[111] Secondly, the accused states that the incidents of sexual contact or threatening behaviour described by the complainants never occurred at all. His testimony amounted to a flat denial of the occurrence of these incidents.

[112] There was nothing in the accused's demeanour or manner of testifying that particularly causes me to have any concerns about his credibility.

[113] In many regards, I view his testimony as being very similar to that noted by Duncan J. in *Jaura* at para. 9 when considering the testimony of the accused:

The defendant's evidence was neither impressive nor unimpressive. In a qualitative sense, it was rather neutral. It seemed neither patently true nor patently false. Being a general denial of the core of the allegations, it necessarily lacked detail, substance and the flavour that can sometimes alternatively either support or undermine believability. His demeanour while testifying was unremarkable. He did not contradict himself; no central or peripheral falsity was exposed by cross-examination. I am unable to identify or articulate any shortcoming or flaw within the defendant's evidence. Viewed in isolation it cannot be rejected as untrue.

[114] I consider that this is an 18-year-old accused who is testifying to events that occurred when he was between 12 and 17 years of age. He is an adult now, barely.

[115] The accused's testimony amounted to essentially a description of matters that were uncontested, a description of involvement in the complainant's lives in positive

activities that was not agreed to by Z. and not otherwise supported or contradicted by the evidence, and a flat denial of any sexual or threatening behaviour on his part involving the complainants. He wasn't shaken or caught giving contradictory evidence. His demeanour was unremarkable. I cannot point to anything in the accused's evidence, or in his manner of giving it, that, standing alone, undermines his credibility. Certainly it can be argued that it is hard for an accused to deny that certain events happened by finding numerous creative and compelling ways to say this. This said, the denials of the accused did not have the ring of truth to them. These denials were not compelling and persuasive in the circumstances.

[116] When I consider the whole of the evidence, I find that the evidence of the accused with respect to the non-occurrence of the sexual contact and threats testified to by the complainants as having occurred, is not credible and compelling and it does not raise a reasonable doubt. I reject the evidence of the accused with respect to his denials of making threats to the complainants and of having had incidents of sexual contact with the complainants.

[117] I am not going to engage in the exercise of trying to justify my finding on the accused's credibility by trying to take small things and make them larger than what they are.

[118] For example, the accused may well have lost the knife with the cross on it exactly as he said. I am loath to take this testimony and find in it an attempt by the accused to distance himself from possession of this knife, thus impacting his credibility.

[119] I will say that I find that the likelihood of the complainants fabricating these incidents due to having seen their cousin watch porn as suggested by the accused is highly speculative and not supported by the evidence. Both complainants testified that they did not watch porn, Z. even querying first what porn was. I am aware that S. stated that she saw porn on her cousin's phone, but I find her credible when she states that she did not watch it. To the extent that the accused offers this up as an explanation for why the complainants described the incidents of sexual contact with the accused as they did, I find this explanation rather suspect and devoid of substance.

[120] In the end, I find that the testimony of S. in particular, but that of Z. as well, with respect to the incidents of sexual contact with the accused and the threats made by him to the complainants to be credible and true. Their testimony was persuasive and compelling and, in my opinion entirely consistent with what I would have expected to see from witnesses of their ages testifying to the events that they stated occurred to them at the hands of the accused. The answers that they provided, both in direct and in cross-examination and the manner in which they provided these answers, as set against the background of the surroundings and the environment in which they lived were, in my opinion, genuine and generally truthful.

[121] I cannot, of course, move from this directly to a rejection of the evidence of the accused on the basis of the complainant's evidence. The Crown's case is not proven beyond a reasonable doubt based solely on the evidence of the complainants, without a careful consideration of the evidence of the accused and the other witness, T.S., and determining whether any of this evidence raises a reasonable doubt as to the guilt of the accused.

[122] I have considered the whole of the evidence before me and, in my opinion, it does not raise a reasonable doubt as to the guilt of the accused. I have observed the complainants, the accused and T.S. providing evidence. I have considered this evidence as a whole. I find that I am satisfied beyond a reasonable doubt that the accused participated in incidents of sexual contact with S. and Z. as they have described and that he made threats to both of them to kill them.

[123] As such, I turn to the charges as set out in the Information.

[124] I agree with the submission of the Crown that there is difficulty in Count #1. The threats that were made to S. by the accused to kill her with a knife were in the context of preventing her from telling anyone what had occurred. They were not made in the context of the accused using these threats to commit a sexual assault at the time. I agree with Crown counsel that it would be unsound of me to view these threats as making out the offence on the basis that the threats are intended to allow the accused to get away with the sexual assault he has just committed or to allow him the opportunity to commit a sexual assault in the future. I have no evidence that the threats involving the knife were made prior to or in the act of committing a sexual assault on S. in order to facilitate the sexual assault. As such, the accused is acquitted on Count #1.

[125] I find however, that the Crown has proven beyond a reasonable doubt that the accused is guilty of Counts three to eight of the Information in that he committed the offences of sexual assault against S. and Z., the offences of touching S. and Z. with his penis for a sexual purpose and the offences of uttering threats to kill Z. and S.

[126] In particular I find that the accused touched S.'s bum and vagina on numerous occasions and that, on numerous occasions he forced her to perform oral sex on him to the point that he ejaculated in her mouth. I find that he touched S.'s vagina with his penis and that he uttered threats to S. to kill her if she told anyone what was happening.

[127] I also find that he touched Z.'s bum on numerous occasions, and that he forced her to perform oral sex on him to the point of ejaculation on a number of occasions. I accept the evidence of S. and find that the accused ejaculated in Z.'s mouth. I find that the accused touched Z.'s hand with his penis and that he uttered threats to cause death to Z.

[128] Pursuant to the principle in *R. v Kienapple*, [1975] 1. S.C.R. 729 at p. 745 – 747, the s. 271 charges will be stayed.

COZENS T.C.J.