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IN THE YOUTH JUSTICE COURT OF YUKON
Before: His Honour Judge L.F. Gower

REGINA

v.

J.B.

Publication ban pursuant to ss. 110 and 111 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1.

Appearances:

Ludovic Gouaillier — Counsel for the Crown
André Roothman — Counsel for the Defence

RULING
(Admissibility of Similar Fact Evidence)

A. INTRODUCTION

[1] The Crown entered into a *voir dire* on January 13, 2011 for the purposes of seeking to adduce certain similar fact evidence from one P.J. The *voir dire* commenced with the direct evidence of P.J., but then had to be adjourned because of some concerns about the possibility of incomplete Crown disclosure having been made with respect to certain statements given by P.J. to the police. The trial was adjourned until October 24, 2011.

[2] P.J. alleges that he was sexually assaulted by the accused on two occasions when he was about six years old. In particular, he said that he was fondled by the accused until his penis was erect and that she then placed him on top of her and had sexual intercourse with him. P.J. said the same thing happen on both of the occasions.

[3] During the period of the adjournment, P.J.'s older brother, C.J., provided a statement to the police alleging that he was also fondled by the accused when he was a child.

[4] When the trial recommenced, the *voir dire* continued with the cross-examination of P.J. The Crown then chose to also call C.J. as a potential similar fact witness. The final witness for the Crown on the *voir dire* was the complainant's sister, M.D. She was not put forward as a potential similar fact witness, but rather to provide some contextual evidence. Defence counsel called no evidence on the *voir dire*.

[5] The accused had traveled to Whitehorse from British Columbia for the trial. Thus, after hearing submissions from counsel and taking some time to consider the matter, to avoid further delay, I issued a short ruling that the similar fact evidence was not admissible and my reasons for the ruling would follow. These are those reasons.

B. LAW

[6] One of the leading cases on similar fact evidence is *R. v. Handy*, 2002 SCC 56. That was a unanimous decision of the Supreme Court of Canada authored by Binnie J. In the text *Watt's Manual of Criminal Evidence*, (Toronto: Carswell, 2011), Justice David Watt helpfully summarized in the principles regarding evidence of similar acts, at pages 507-508. Near the beginning of that summary he states:

> "The *admissibility* of evidence of similar acts is determined by:

> (i) the *relevance* of the evidence to an *issue* in the case, *otherwise* than by demonstrating the *propensity* of [the accused] to commit crimes or other disreputable or repugnant acts;
> (ii) the *probative value* of the evidence;
> (iii) the *prejudicial effect* of the evidence; and
> (iv) a *balancing* of the *probative* value against the *prejudicial* effect of the evidence." (emphasis in text)

[7] The analysis in *Handy* starts with the recognition that evidence of misconduct, beyond what is alleged in the charges before the court and which blackens the character of the accused, is inadmissible. This is because of the danger that a trier of fact might infer from prior misconduct that the accused has the propensity or disposition to do the type of acts with which he or she is charged, and is therefore guilty of the offence before the Court. This is referred to as the prohibited chain of reasoning. However, the court went on to recognize the "narrow exception" of admissibility where the evidence of the previous misconduct "may be so highly relevant and cogent that its probative value in the search for truth outweighs any potential for misuse" (para. 41). Thus, similar fact evidence is *presumptively inadmissible*, and the onus is on the Crown to satisfy the trial judge on a balance of probabilities that, in the context of the particular case, the probative value of the evidence in relation to a particular issue outweighs its potential prejudice (para. 55).

[8] The degree of similarity required for admissibility will depend upon the issues in the particular case and the purpose for which the evidence is sought to be introduced (para. 78). At para. 82 of *Handy*, Binnie J. identified a number of potential factors which might connect the similar fact evidence to the facts alleged in the charge:

> (1) the proximity in time of the similar acts;
> (2) the extent to which the other acts are similar in detail to the charged conduct;

(3) the number of occurrences of the similar acts;
(4) the circumstances surrounding or relating to the similar acts;
(5) any distinctive feature(s) unifying the incidents;
(6) any intervening events; and
(7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[9] The probative value of the similar fact evidence need not be so great as to be virtually conclusive of guilt (paras. 94-97).

[10] An assessment of the probative value of the similar fact evidence requires an examination of the strength of the evidence that the similar acts actually occurred. Although the Crown's onus is not proof beyond a reasonable doubt at the admissibility stage, the proposed similar fact evidence must meet the threshold of being “reasonably capable of belief”. At para. 134 of *Handy*, Binnie J. said as follows:

> “In the usual course, frailties in the evidence would be left to the trier of fact, in this case the jury. However, where admissibility is bound up with, and dependent upon, probative value, the credibility of the similar fact evidence is a factor that the trial judge, exercising his or her gatekeeper function is, in my view, entitled to take into consideration. Where the ultimate assessment of credibility was for the jury and not the judge to make, this evidence was potentially too prejudicial to be admitted unless the judge was of the view that it met the threshold of being reasonably capable of belief.” (my emphasis)

[11] In *R. v. Moore*, (1994), 73 O.A.C. 277 at para. 8, the Ontario Court of Appeal recognized the difficulty inherent in deciding the whether the potential probative value of a given piece of similar fact evidence outweighs the prejudice which might arise from its admission:

> “The determination of whether similar fact evidence is so prejudicial as to outweigh any probative value it might have is not an easy one. As Widgery L.J. noted in *R. v. Morris* (1969), 54 Cr. App. R. 69 (C.A.), at p. 83, (approved in substance by Mclaughlin J. in R. v. B. (C.R.) (1990), 55 C.C.C. (3d) 1):

> This is a difficult question for any trial judge to determine, and it is not one which is susceptible of being answered by formula or rule of thumb. The relative weight of proof and prejudice vary infinitely from one case to another, and the opinion of a particular judge must depend on the impression the evidence makes upon him in the light of his experience and his own sense of what is fair. It is inevitable that some cases are so close to the borderline that different judges will take different views upon them, and it is, therefore, the type of question in which this Court will hesitate long to disturb a ruling of the trial judge."

[12] The next general consideration in this analysis is how to treat the evidence of adults who are testifying about matters which happened when they were children. One of the leading cases in this area is *R. v. W.(R.)*, [1992] 2 S.C.R. 122, where McLachlin J., as she then was, delivered the judgment of the Court. At paras. 24 and 26, she made the following comments:

> "… Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection.
>
> …
>
> …In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying."

[13] I must also be mindful of the distinction between a witness' credibility and their reliability. This was addressed by Moldaver J.A., delivering judgment of the Ontario Court of Appeal in *R. v Joudrie*, (1997), 100 O.A.C. 25, at para. 28:

> "…The importance of the distinction between credibility and reliability was canvassed by this Court in R. v. S.(W.) (1994), 90 C.C.C. (3d) 242. Like the case under appeal, S.(W.) involved allegations of a dated sexual assault where the complainant's evidence, although sincerely given, was contradicted in a number of significant ways. On behalf of the court, Finlayson J.A. wrote as follows at p. 250:
>
> > It is evident from his reasons that the trial judge was impressed with the demeanour of the complainant in the witness-box and the fact that she was not shaken in cross-examination. I am not satisfied, however, that a positive finding of credibility on the part of the complainant is sufficient to support a conviction in a case of this nature where there is significant evidence which contradicts the complainant's allegations. We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not the sincerity of the witness but the reliability of the witness's testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record: see R. v. Norman (1993), 87 C.C.C. (3d) 153 at pp. 170-4, 26 C.R. (4th) 256, 16 O.R. (3d) 295 (Ont. C.A.), for a discussion on this subject." (my emphasis)

[14] In the context of historic sexual offence cases, where witnesses are expected to testify about events in the distant past, greater emphasis must be focused on the witness' ability to accurately observe, recall and recount the historic events at issue. In practice, corroborative evidence, while not strictly required, is often sought in determining the credibility and reliability of a complainant. As was stated in the text "The Trial of Sexual Offence Cases", by Justice M.K. Fuerst, Mona Duckett Q.C. and Judge F. P. Hoskins, (Carswell: 2010), at p. 59:

> "Given the nature of sexual assault, which is usually committed in the absence of other witnesses, it is extremely important to closely examine all the evidence, including extrinsic evidence, to ensure

> that any evidence that tends to corroborate or confirm the evidence of the complainant is reviewed."

[15] Finally, I must be cognizant that the apparent absence of motive to fabricate can be considered in assessing a witness' credibility; however its relative importance must not be misused. The presence or absence of a motive to fabricate is only one factor to be considered in assessing credibility; see *R. v. Brown*, 2006 BCCA 100. at para. 14.

C. ANALYSIS

1. *The Relevant Issue*

[16] In the case at bar, counsel agreed that, given the blanket denial of any wrongdoing by the accused, the specific issue to which the similar fact evidence would be relevant would be the *actus reus* of the offence of sexual assault: see *R. v. Shearing*, 2002 SCC 58 at para. 46.

2. *P.J.'s Evidence*

[17] P.J. was born September 5, 1977, which makes him only nine days older than the complainant. He testified that when he was about six years old, in approximately 1983, there was a period of time when he and his older brother, C.J., were being looked after by the accused's mother, I.D., in her old house down by the lake. He said this was made necessary by the fact that his parents were away from Teslin employed as firefighters at the time. He said they stayed with his great aunt, I.D., for a period of a few weeks in the summer.

[18] P.J. testified that he was made to sleep with the accused in the same bed in her bedroom, while C.J. was allowed to sleep on a single bed in the living room area of the house and I.D. slept in her own bed in her own bedroom. He said that one night the accused fondled his penis until it became erect and then she made him get on top of her

and put his penis into her vagina. He said that the accused repeated this form of sexual assault on another night. The next time the accused tried to have P.J. sleep with her, he made a fuss and said he was allowed to share the bed which C.J. was sleeping in, in the living room.

[19] There was no dispute between counsel that, on its face, P.J.'s evidence reveals a number of fairly striking similarities with the evidence of the complainant. These include:

1. Both complainant and P.J. were similar in age at the time of the alleged sexual assaults by the accused;
2. Both sets of sexual assaults occurred in I.D.'s old house down by the lake;
3. Most of the sexual assaults upon the complainant occurred at night, as did those upon P.J.;
4. Both sets of sexual assaults occurred while the alleged victims were sharing a bed with the accused; and,
5. Both sets of sexual assaults included the rather unusual act of sexual intercourse between a pre-pubescent six-or seven-year-old and an accused who would have been about age 15 at the time; and
6. Both sets of sexual assaults were proximate in time.

[20] Thus, at first glance, the proposed similar fact evidence of P.J. would seem to have strong probative value. However, the determination of probative value must also take into account the frailties within the evidence of P.J., as well as the relationship between P.J.'s evidence and that of C.J., which in turn, includes an assessment of

whether there is a suspicion of collusion between the brothers and/or collusion between either or both of them and the complainant.

[21] I propose to deal firstly with what I find to be internal inconsistencies within P.J.'s evidence. I cite these with an appreciation for the need to accommodate the evidence of an adult testifying about events which happened when he was a very young child. Ordinarily, where matters such as time and location are peripheral, the presence of inconsistencies should be considered in the context of the age the witness was the time of the events he is testifying about. Further, any given inconsistency on its own might well be deemed understandable for that reason. However, the cumulative effect of numerous inconsistencies cannot be ignored in assessing both the witness' credibility and reliability.

[22] In cross-examination, P.J. testified that the two incidents took place in August 1983. He said he was "certain" that they did not occur before or after that month. However, in his statement to the police of March 23, 2009, he said that the incidents occurred between July and October 1983. Nevertheless, he would not concede to being wrong about the timeline in the statement, because August is "in between July and October". Unfortunately, that answer does not resolve the inconsistency.

[23] Further, in his statement of January 11, 2011, P.J. said that these incidents occurred at "the beginning of summer". Nevertheless, P.J. would not agree with the suggestion that the month of August is not the same as the beginning of summer.

[24] In his testimony, P.J. said that he was sexually assaulted two times. However, in his statement to the police of January 11, 2011, he said that it happened three times. When asked if he was wrong in that answer to the police, he initially said "no", but later conceded that three times was not correct answer.

[25] In his direct examination, P.J. says that he was crying during both sexual assaults and that this was overheard both times by C.J. However, in cross-examination he testified that he did not cry while he was being sexually assaulted by the accused on either occasion. Rather, he said that it was only when he told C.J. about what had happened the following day that he was crying. He was then asked about his statement of January 11, 2011, where he told the police that he was crying during the second sexual assault. When asked if that answer to the police was wrong, he initially said “no”, but when pressed on the matter he conceded “I was wrong when I gave my statement.”

[26] In cross-examination, P.J. said that the day after the first incident, he told C.J. what the accused had done to him. He testified that he was “certain” about that fact and was “not mistaken”. Then he was asked about his statement of January 11, 2011, where he was asked the following questions and gave the following answers:

> “Q So you never told [C.J.] about any of this at that time?
> A No…I didn't tell anybody.”

P.J. conceded that these answers to the police were wrong.

[27] In cross-examination, P.J. conceded that he could not recall how far apart in time the first and second incidents were. However, he was then reminded of his direct testimony on January 13, 2011, where he testified that the second incident happened “the next night” after the first. Once again, when asked if he was wrong when he gave that answer, he replied “no”.

[28] In cross-examination, P.J. was asked if he “freaked out” in response to either of these sexual assaults. In particular, he was asked about his response after the second sexual assault and he replied, “I didn't freak out all. I just asked my aunt [I.D.].” P.J. was

then challenged by his statement of January 11, 2011 where he gave the following answer:

> “So after the second time she done that to me, I wouldn't sleep with her. I’d freak out and tell her – let me sleep with my brother.”

He conceded that this answer to the police was incorrect.

[29] In cross-examination, P.J. testified that the accused did not say anything to I.D. when P.J. asked if he could sleep with his brother after the second incident of sexual assault. He was then confronted with his statement of January 11, 2011, where he was asked the following question gave the following answer:

> “Q Now who would tell you that you weren't allowed to sleep with your brother? Was it just [the accused] or was [I.D.] there as well?
> A [I.D.], [the accused] would tell her mom she wanted me to sleep with her.”

Initially, P.J. would not concede that this initial answer to the police was incorrect. However, when pressed on the point, he said he was not mistaken about his testimony in court, but “must have been” with respect to his answer to the police. He maintained that his memory was better at the time of his testimony (October 24, 2011) than it was when he gave his statement in January 2011.

[30] In his direct testimony, P.J. said that he told the complainant about the sexual assaults when they were 15 or 16 years old. In cross-examination, P.J. also admitted telling C.J. what had happened the day after the first incident. Later, he added that he told C.J. about these incidents “when we were kids” and also “over the years”. He was then confronted with this statement of January 11, 2011, where he told the police that over the approximate period of 30 years since the sexual assault, he never told anyone about what happened, with the exception of his ex-wife. He was also reminded that at the

end of the statement the police summarized what he had said, and asked him if anything had been missed, to which P.J. replied “no”.

3. *C.J.’s Evidence*

[31] The problems I have with C.J.’s evidence are not the internal inconsistencies that plagued P.J.'s testimony, but rather that so much of C.J.'s testimony is externally inconsistent with P.J’.s.

[32] In summary, C.J. testified that sometime in the early 1980’s, when he was in grade 3 or 4, or perhaps even before that, he and P.J. spent some time with I.D. during the summer months. He estimated that it was a period of not more than two weeks and that the two of them has been “billeted out”. He said that at one point he was sharing a bed with the accused and she wanted him to put his hand in her vagina, which he did. He later said that it was the first time he ever touched a female’s vagina. He said he did not like because it did not feel right and that he cried to get out of her bed. He told I.D. that he wanted to share a bed with P.J., but that I.D. split them up, and he ended up sleeping in the same bed with I.D., while P.J. shared the accused’s bed. He said that he heard rustling and P.J. crying, and knew what was going on. He told the accused to leave P.J. alone. He then said that I.D. told him to be quiet and to get to sleep.

[33] The main inconsistency between the evidence of C.J. and P.J., is that C.J. maintains that I.D. and the accused slept in the same bedroom, albeit in separate beds. Further, he said that after the two of them arrived at I.D.'s house, C.J. initially slept with the accused, while P.J. slept with I.D. Then, it was only after C.J. made a fuss following the fondling incident that I.D. switched the brothers around, such that C.J. was sleeping with I.D. and P.J. sleeping with the accused. Further, C.J. maintained that these

continued to be the sleeping arrangements until the two brothers left I.D.'s house at the end of their stay. P.J., on the other hand, testified that from their first night at I.D.'s, he slept initially with the accused, not I.D., and that he did so in a separate bedroom. Further, P.J. said C.J. was sleeping in a bed in the living room area on his own, and not in I.D.'s bed.

[34] I find this to be a significant inconsistency. If C.J. is to be believed, then P.J. is mistaken in his memory of the sleeping arrangements. That in turn causes me to question whether P.J. might be mistaken about other aspects of his testimony. Conversely, if P.J. is to be believed, then C.J. is mistaken about his evidence of the sleeping arrangements, which similarly would lead me to question the veracity of his other evidence, including the alleged fondling. Indeed, according to P.J., C.J. never slept with either the accused or I.D.

[35] Further, if C.J. is to be believed, then the question arises of how likely it would be that the accused would attempt to have full sexual intercourse with P.J., not once, but twice, in a bed in the same room as her mother, who was presumably only a few feet away. To my mind, it runs contrary to common sense to expect that the accused would act in such a brazen and foolhardy manner, given the seemingly probable risk of detection.

[36] C.J. also testified that on the night of the fondling he remembered "freaking out" about wanting to share a bed with P.J. because he wanted to be safe. He said that the accused was present at that time and that she denied that anything had happened. C.J. further testified that I.D. got angry and then switched the two brothers into different beds,

as stated above. It is noteworthy that there was no such evidence about any of this from P.J.

[37] Interestingly, C.J. also testified that, in the other bedroom of the house, he had seen someone under the covers on the bed in that room, but that he did not know who the person was. However, C.J. said that person was not present on the night of the fondling incident and was not there regularly. Nevertheless, P.J. maintained that the only persons in the house over the entire period of their stay were himself, C.J., the accused and I.D.

[38] It appears that C.J. did not provide his statement to the police about these matters until April 23, 2011. Thus, if this incident happened in early 1980s, as C.J. testified, then it has been almost 30 years between the time of the alleged incident and the first occasion on which C.J. was asked to make a detailed disclosure of what happened. The risk of faded, or worse, mistaken, memories over such a protracted period of time seems a logical common sense inference. That concern is made worse in the case of C.J., since he also disclosed to being a victim of sexual abuse by others from the age of four on. Indeed, his description of his upbringing was truly tragic. He referred to his parents having frequent house parties and fact that there was always alcohol around. He said that he would be inappropriately approached by a male guests while he was sleeping, and that a babysitter had abused him. He also spoke of physical abuse both from his parents and his caregivers. He testified about mental abuse and being called a “faggot”. He further acknowledged having been sexually assaulted by D.S. Jr. when he was about seven or eight years old. He said this happened before the incident with the accused. He said that he began drinking a lot and taking his anger out on others. He also began using

marijuana, cocaine and LSD to take his pain away. He admitted to having a significant criminal record from 1993 to 2001 because of these issues. At one point he said “I don't know how I’m sitting here alive.” Fortunately, C.J. has more recently taken counselling and anger management over a number of years, which has seemingly turned the tide for him for the better. As I understand, it he is now a recovering alcoholic, with steady employment. Nevertheless, I am left wondering whether such a traumatic upbringing might logically have had an adverse impact on his ability to remember something which might have happened almost 30 years ago when C.J. was not yet a teenager.

3. *The Similar Fact Evidence as a Whole*

[39] I am reminded by *Handy* that the onus on the Crown in these types of applications is on a balance of probabilities and not proof beyond a reasonable doubt. Nevertheless, it seems to me that I must treat the evidence of both of the similar fact witnesses as a whole for the purposes of deciding admissibility. What I am called upon to assess is the strength of the evidence that the similar acts actually occurred. Here, admissibility is bound up with, and dependent upon, probative value, and the credibility of the similar fact evidence is a factor which I must take into consideration in exercising my “gatekeeper function”: see *Handy*, para. 134.

[40] I am not being asked to make findings of fact within such an application. Therefore, it would seem inappropriate for me to conclude, at this admissibility stage, that I prefer the evidence of one witness over the other, where their testimony conflicts. Rather, I have assumed that I must treat their evidence as a whole. In that regard, I have concluded that the evidence of each witness regarding the sleeping arrangements is directly relevant to the central issue of whether the accused had the opportunity to

sexually assault that witness. Thus, because their evidence conflicts in what I conclude to be a significant manner, the evidence of one effectively negates the probative value of the evidence of the other.

[41] To be clear, had the Crown chosen only to adduce the evidence of P.J. on this application, I might well have decided differently on its admissibility. Thus, with respect, the Crown's decision to call both P.J. and C.J. as similar fact witnesses, presumably with the prior knowledge that there were significant differences in their respective descriptions of events, would appear to have been an unwise strategic decision.

4. *Potential for Collusion*

[42] Finally, my assessment of the probative value of the proffered similar fact evidence would not be complete without examining the possibility of collusion. As stated in *Handy*, this is a "crucial factor" in the analysis because the existence of collusion rebuts the premise on which admissibility depends, namely that the events described by the complainant and either or both P.J. and C.J., testifying independently of one another, are too similar to be credibly explained by coincidence: see *Handy*, paras. 104 and 110.

[43] Further, where there is some evidence of actual collusion, or at least an "air of reality" to the allegation of collusion, the Crown bears the onus of satisfying the trial judge, on a balance of probabilities, that the evidence of similar fact is <u>not</u> tainted by collusion. It is not incumbent on the defence to prove collusion. To be clear, even suspected collusion triggers the Crown's onus in this regard: see *Handy*, paras. 110, 112 and 113.

[44] P.J. testified that he and the complainant told each other about their respective sexual experiences with the accused as early as age seven or eight. As I noted earlier,

the two are only nine days apart. When asked who told whom first, P.J. said that the complainant told him. When asked if the two kept talking about this over the years, P.J. replied “No, not as much, because we’d get pretty angry when we talked about it.” (my emphasis) Obviously, the reference to “not as much” leaves open the likelihood that there were indeed further conversations between them. P.J. also testified about the time when he and the complainant were about the age of 15 and they again discussed what had happened with the accused. P.J. said “we were drinking and we started crying”. That evidence raises alarm bells with me, as it suggests the possibility of a protracted conversation where the respective inhibitions of the two may well have been reduced by alcohol, not to mention their ability to accurately recall events from long ago.

[45] I already dealt with the evidence of P.J. that he discussed what happened with the accused with C.J. both when they were kids and “over the years”. This latter answer suggests the possibility of a number of conversations over time. P.J. was also asked about the following question and answer in his statement of January 11, 2011:

> “Q When did you guys talk about this?
> A Over the years – drinking.”

P.J. acknowledged that this was a reference to the alleged sexual assaults by the accused. Once again, the prospect of possibly “boozy” conversations about what might or might not have happened years earlier does not do much to inspire me with confidence in the accuracy of their testimony about those incidents.

[46] P.J. also said in his statement that the complainant “was the one that got me to come forward”, although he qualified that in his testimony by saying the complainant did not “ask” him to come forward.

[47] C.J. testified that the complainant and P.J. “asked me to come forward” and that the reason he gave his statement to the police in April 2011 was because they asked him to do so. In particular, C.J. was asked whether he has talked with P.J. about these matters. Initially he replied that this was something you do not really talk about, but then qualified that answer by saying “unless he's really inebriated and stuff starts coming up…”. Yet again, we have alcohol introduced into the mix of likely faded memories of a time decades earlier.

[48] C.J. qualified his answers in this regard by saying that neither he nor P.J. got into any details about what happened to each of them, but he testified later in his cross-examination that they discussed such details as the accused “fooling around”, or that she had “messed around”, with them, that these disclosures were mutual, and that they occurred “at times” when the two of them were drinking. Once more, the spectre of intoxicated conversations arises, and it is clear from the use of the language “at times” that there were a number of such conversations.

[49] Finally, C.J.'s evidence in this regard is corroborated by P.J., when he said in cross-examination that the two of them talked about this when they were “teenagers”.

[50] To be clear, my concern here is not so much that the complainant and the two similar fact witnesses sat down with the specific intention of fabricating a false set of allegations against the accused. All the witnesses, in their own way, seemed sincere at times in their testimony that something had happened to them. However, as was cautioned in *R .v. Stewart* (1994), 18 O.R. (3d) 509 (C.A.) at para. 19:

> “…We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however,

> is not the sincerity of the witness but the reliability of the witness' testimony…."

My concern with the possibility of collusion goes to the reliability of the similar fact witnesses.

CONCLUSION

[51] The Crown has not satisfied me on a balance of probabilities that the similar fact evidence of P.J. and C.J. meets the threshold of being reasonably capable of belief. Therefore, this evidence is not sufficiently probative to displace the presumption that it should not be admitted because of its prejudice to the accused as propensity evidence.

[52] The Crown's application is therefore denied.

Gower J.