

Court of King's Bench of Alberta

Citation: R v Halfe, 2022 ABKB 793

Date: 20221130
Docket: 200101582Q1
Registry: Edmonton

Between:

His Majesty the King

Crown

- and -

Lenny Patrick Halfe

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify The Complainant must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

**Reasons for Decision
of the
Honourable Justice L.K. Harris**

[1] Lenny Patrick Halfe (the “Accused”) is charged with one count of sexual assault contrary to s. 271 of the *Criminal Code* and one count of sexual interference contrary to s. 151 of the *Criminal Code*. The trial proceeded over four days between August 8 – 10 and October 24, 2022. This was the second trial for the Accused on these charges. The matter proceeded to trial in May 2022, however, an issue with disclosure resulted in a mistrial being declared and a new trial set.

[2] Three witnesses were called on behalf of the Crown: the Complainant, the Complainant’s mother, and Detective Church of the Edmonton Police Service.

[3] The Accused did not testify at trial. The principal issue therefore is the reliability and credibility of the Complainant.

[4] The Complainant is currently 18 years old. She is of Indigenous descent. The Accused, who is also of Indigenous descent, is alleged to have engaged in sexual activity with the Complainant on multiple occasions between the fall of 2018 and January 2020, when the Complainant was 14 and 15 years of age. The Crown alleges that the Accused’s sexual activity with the Complainant constitutes sexual assault and sexual interference.

[5] The Accused is currently 45 years old and was in his early 40s at the material times.

I. BACKGROUND

A. The Complainant

[6] The Complainant first met the Accused online during the spring of 2018 when she was 14. At that time, she was living with her mother and siblings in Edmonton, Alberta. The Accused contacted her through Facebook. After an exchange of messages, the Accused told the Complainant he wanted to take her on a date. The Complainant testified that they talked about her age and the fact that she was 14, although her Facebook page indicated that she was either 18 or 19.

[7] The Complainant and the Accused had little further contact until the Fall of 2018 when the Complainant contacted the Accused to ask for an interview for one of her school assignments, as he was a well-known Powwow dancer. The Accused agreed to an interview but ultimately, he was unavailable before her deadline. However, he and the Complainant continued to exchange messages.

[8] The Complainant attended a Powwow between September 28 – 30, 2018. She and the Accused had exchanged messages and arranged for a time to meet at the Powwow where the Complainant says three separate incidents of sexual activity occurred.

[9] The first incident occurred when the Accused took the Complainant to a trailer on site. Once inside the trailer, the Complainant says the Accused lifted her dress up, pulled her pants down and performed oral sex on her.

[10] The Complainant says that the second incident occurred later that same day. The Complainant and the Accused went to the Accused’s vehicle where the Accused had a bed. They engaged in sexual intercourse with their clothes off.

[11] The third incident took place later that evening, when again the Complainant and the Accused engaged in sexual intercourse.

[12] After the Powwow, the Accused and the Complainant remained in contact through Facebook and text. The next time the Complainant saw the Accused was in October 2018. The Accused met the Complainant at her high school. The Complainant got into the Accused's vehicle, and he drove to Southgate Mall. The Accused parked, and the Complainant and the Accused got into the back seat where they engaged in oral sex and sexual intercourse.

[13] The Complainant states that she was in Grade 10 at the time, and that the Accused knew that she was in Grade 10 and was 14 years of age.

[14] The Complainant states that she saw the Accused frequently over the following months. They would arrange a time to meet over Facebook or text. From time to time, the Complainant would delete the Accused's messages to her because her mother would go through her phone, and she didn't want her mother to see the messages. The Complainant testified that the Accused would remind her to delete her messages from time to time, and to turn off her GPS locator on her phone. In cross examination, the Complainant confirmed that she had not told the police or anyone else about the fact that she was deleting her messages as she went.

[15] The Accused would meet the Complainant at school or at swimming practice and would take her in his vehicle to different parking lots where they would engage in oral, vaginal, and anal sex. The Complainant estimates that between September 2018 and the spring of 2019, after the Complainant turned fifteen, she was texting the Accused every day or every other day and saw the Accused a couple times per week. She also estimates that there were only two to three instances when they did not engage in sexual activity over that period.

[16] She says that at some point it was brought up that the Accused's son was the same age as her – 14. She wasn't certain as to when that conversation was but recalled it being earlier in the relationship before July 2019, when they were driving around the south side of Edmonton. The Accused was also aware of her birthday, and her age was also brought up around those times.

[17] The Complainant states that in May 2019 she told the Accused that she no longer wished to see him. She and the Accused had no contact with each other until July 2019 when she received a text message from a number that she did not recognize. The author would not tell her who he was, although after calling himself Batman, and telling the Complainant he had seen her at a Powwow, she concluded that the author was in fact the Accused. The Accused asked her to go for a drive, but the Complainant declined.

[18] However, the communications between the Accused and the Complainant recommenced after that exchange of text messages, and ultimately, in person contact resumed. The Accused would meet the Complainant and drive her to various places in Edmonton where they would engage in sexual activity. The Complainant estimates that she saw the Accused every other day, and that they would engage in sexual activity almost every time.

[19] The Complainant kept her contact with the Accused a secret from her mother. This caused the Complainant's relationship with her mother to deteriorate. The Complainant states that she was sneaking around and telling lies as she didn't want her mother to know about the Accused. The Complainant thinks that her mother had suspicions about her sexual relationship with the Accused and that she would not approve.

[20] The Complainant states that in early October 2019, however, her mother discovered that the Complainant was seeing the Accused. The relationship was reported by one of the Complainant's friends to police and investigated by Detective Church of the Edmonton Police

Service. On October 10, 2019, after the Complainant was taken to the hospital for a medical exam, Detective Church brought the Complainant to Zebra Centre for a video recorded statement. That video recorded statement was entered as an exhibit at trial pursuant to s.715.1 of the *Criminal Code*.

[21] The Complainant states that she was under a great deal of pressure from her mother and her friends to speak to the police. Her friends were asking a lot of questions and were pressuring her to “get rid of” the Accused. She felt as though family and the police were pushing her to give a statement to say that the Accused was committing a crime. She understood at the time that police were involved because of her age.

[22] The Complainant refused to release the results of her medical examination to police because she wanted to protect the Accused.

[23] The Complainant’s video recorded statement is not entirely consistent with her testimony at trial. She says that at the time she met with Detective Church, she wanted to protect the Accused. The Complainant and the Accused had discussed what to say during her interview with Detective Church beforehand and had agreed on a story which minimized the Accused’s contact with the Complainant. He told the Complainant not to say too much, to say that she spoke with him just to see his dog, and not to disclose that the first time they engaged in sexual activity was at the September 2018 Powwow.

[24] The major points from the Complainant’s video recorded statement are as follows:

- She had met the Accused on social media in the spring of 2018, and that they started talking. The Complainant’s Facebook page disclosed her age as 18 or 19, and the Complainant was sure the Accused presumed she was 18 or 19. He asked how old she was and she told him she was 15, and then things “stepped back”;
- About six months later, the Complainant reached out to him for an interview, and then they saw each other at a Powwow at the end of September. She and the Accused continued to talk and meet after that, but that it was an “on and off thing”.
- The Accused had a dog that she liked. She and the Accused would meet at Powwows and Round Dances;
- At some point, the relationship became more serious, and the Complainant advised that by the end of July 2019, she considered the Accused to be her boyfriend. She described turning 15 (which would have been in January 2019) and thinking she could talk to the Accused;
- The Complainant estimated that the first time she and the Accused had sex was before her 15th birthday, in December 2018. The Complainant and the Accused met at Southgate Mall, and then they had sexual intercourse in his car while it was parked in the parkade;
- The Complainant didn’t see the Accused again until March 2019 (she would have been 15 years old by then) when she ran into him at another Powwow. They exchanged messages but nothing else occurred;
- The Complainant and the Accused saw each other about once every two weeks over the summer of 2019. They would meet, get something to eat and then would have sex. The Complainant defined this as genital sex. This occurred primarily

in the Accused's car although, the Complainant recalled it sometimes being in a hotel on Gateway Boulevard;

- At times, they would also see each other at Powwows and they would meet and have sex in his trailer;
- The Complainant and the Accused talked about her age a few times. She stated that they didn't think much of the age difference because it had become normalized amongst Indigenous people due to the intergenerational trauma they had suffered;
- The Complainant denied that either she or the Accused took video recordings of their sexual activity;
- The last time they met to have sex was the Sunday before the interview. The Accused picked the Complainant up from work and they went to get something to eat. Then they parked his car and had sex;
- The last time they spoke was the Monday before the interview. They met, and the Complainant ended the relationship.

[25] At a certain point during the interview, Detective Church left the room to speak with her partner. The video shows the Complainant texting on her phone. In her trial testimony, the Complainant states that she was texting the Accused.

[26] During her trial testimony, the Complainant testified that there were many things that she was not truthful about during her police interview, including the fact that she and the Accused first had sex in September 2018, the frequency of her communications with the Accused, the frequency of their sexual activity, and that they had not ended their relationship. She also did not disclose that she and the Accused engaged in oral, genital, and anal sex. She says that the information she provided to Detective Church was part of the plan that she and the Accused had agreed upon to "make the whole situation go away". She acknowledged that she agreed with Detective Church that she would tell the truth, but "obviously" did not.

[27] The Complainant states that after her interview with Detective Church, she and the Accused were still seeing each other frequently, although they were cautious because of the police involvement. She estimates that between October 2019 and January 2020, when she turned 16, she saw the Accused about twice a week, and engaged in oral, genital, and anal sex. They also talked about the police involvement and the court proceedings.

[28] At trial, the Complainant stated that the Accused had video recorded some of their sexual activity using his phone. She couldn't recall if he also took pictures. She acknowledged that she told Detective Church during her interview that no videos had been recorded, but states that was a lie.

[29] The Complainant's relationship with her mother continued to deteriorate because of the Complainant's efforts to hide her relationship with the Accused. In February 2020, the Complainant's mother moved the family to Cold Lake.

[30] The Complainant and the Accused saw each other somewhat less frequently after this point, but the Accused would drive to Cold Lake to see her once or twice a week.

[31] In January 2021, the Complainant sent an email to Detective Church which stated:
“...My email is in regards of Lenny.

Firstly I wanna say, in the interview I wasn't exactly truthful and left some important things out. Reason being I was trying to protect him (not anymore tho)

From what I understand he's not supposed to have any contact with me However we've been texting with a fake number of his.

Last February my family moved to Cold Lake, Ab

And he has been coming here to see me. We last saw each other lat week, jan 7 I believe.

I was wanting to ask for help on keeping this man away from me for good, if that's a doable thing.

Thanks...”

[32] Detective Church responded by email and advised the Complainant that all she needed to do was report the contact to the RCMP and asked the Complainant if she had changed her mind about releasing the SART exam results.

[33] The Complainant states that she did not go to the RCMP because she would have had to tell her mother that she was still seeing the Accused. The relationship with the Accused finally ended in November or December 2021, just before she turned 18. She states that there were several times when she tried to end it earlier, but the Accused would ignore her requests. When she did end the relationship, she blocked the Accused from her Facebook account and deleted the rest of the messages that were still on her phone.

[34] The Complainant confirmed that the police never asked her for any of her messages with the Accused.

B. TJ

[35] TJ is the Complainant's mother. She testified that she first became aware of a relationship between her daughter and the Accused during a Powwow in Maskwacis. She was unclear as to whether this was in July 2018 or 2019, stating that it was about six months prior to the start of Covid. On cross examination, however, she stated that once she considered the ages of her children, she became certain that this was in July 2018. She was also certain that the Complainant was 14 years of age at the time.

[36] It is apparent that TJ was in error about the date because six months prior to the onset of COVID-19 would be approximately mid-2019.

[37] While she and her children were at the Powwow, TJ noticed that the Complainant kept disappearing. When questioned, the Complainant advised that she was with a friend. TJ asked the Complainant to bring her friend over. The Complainant did not but pointed out an adult male to her mother. TJ was shocked that the person the Complainant pointed out was male and an adult and felt that the Complainant was trying to hide this person.

[38] TJ was concerned because the Complainant was too young to be in a relationship. She was suspicious and asked her some questions about it. The Complainant was shy, and TJ did not ask her if there had been any sexual contact. TJ described the fact that the Complainant had told

her she had been braiding this man's hair, which TJ felt was highly inappropriate given the cultural significance and intimacy of such an act.

[39] After this Powwow, TJ noted that the Complainant's behavior had changed significantly. She described the Complainant's relationship with her and her siblings as chaotic. The Complainant stopped participating in music and sports. She began lying to her mother about many things. They would fight to the point where TJ felt it was necessary to call the police. The Complainant was disappearing from school.

[40] TJ recalls one incident when the Complainant was at Meadowlark Mall, and she was waiting in the car. The Complainant had left her phone in the vehicle. The phone rang, and TJ answered it. She believed the caller to be the Accused and told him to stay away from her daughter. TJ states that at that point she knew how old the Accused was because she had searched for his profile on Facebook. She described her reaction as "very offended".

[41] TJ tried to have discussions with the Complainant about the situation, but they never ended well. The Complainant would tell her mother that the relationship had ended but TJ had evidence that it had not, including the fact that the Complainant would frequently disappear without saying anything and TJ noticed that the Complainant had new things that she could not afford such as a cell phone.

[42] One day, TJ received a phone call from one of the Complainant's friends who advised the Complainant had left school with the Accused. TJ went to the high school and asked to speak with police. TJ relayed her concerns to the School Resource Officer. This led to the police investigation.

[43] The Complainant's behavior did not improve after her interview with police. Eventually, TJ moved the family to Cold Lake. She became aware that the Accused was driving to Cold Lake to see the Complainant. It bothered TJ that he knew where they lived. One day, she observed some messages on a computer that the Complainant had been having with the Accused arranging to meet in Cold Lake. When she heard a vehicle approaching the house, she drove out to meet it, but the driver sped away. She identified the driver as the Accused.

C. Detective Church

[44] Detective Church confirmed that the file had been assigned to her October 9, 2019. She knew ahead of time that the Student Resource Officer at a high school had received a report that a student had disclosed a sexual relationship with an adult. The Complainant was being taken to the University of Alberta Hospital for a SART exam, and the Complainant had chosen the "third option" which was to not provide police with the results of the SART exam. The exam results are disposed of after a year, and so by the time the matter proceeded to trial they were no longer available.

[45] Detective Church described the Complainant as cooperative with both the SART exam and the interview, but that she was very clear that she did not want to participate in the police investigation otherwise. Accordingly, Detective Church chose not to lay charges against the Accused at that time. Sometime later in the fall of 2019 however, Detective Church learned of a mental health investigation in which the Complainant and her mother had had a fight over the Complainant's ongoing sexual relationship with the Accused. As a result of that incident, Detective Church formed the opinion that the Complainant was not able to protect herself, and she then arrested and charged the Accused.

II. DISCUSSION

[46] As the Accused did not testify at trial, both Crown and Defence agree that the issue in this case is whether the Complainant's testimony satisfies me of the Accused's guilt beyond a reasonable doubt.

A. Counsel's Submissions

[47] The Accused argues that the Complainant's evidence falls short of the reasonable doubt standard. He says she has severe credibility issues that compromise the Court's ability to reach the conclusion that the Accused is guilty. The Complainant engaged in active deception during her interview with police in October 2019, and that this is not merely a case of delayed or piecemeal disclosure.

[48] Some of the examples of the inconsistencies the Accused references include the following:

- The Complainant advised Detective Church that during the initial communication with the Accused in the spring of 2018 she told him she was 15. At trial, she stated that she told the Accused she was 14;
- The Complainant lied to Detective Church about the first sexual contact with the Accused being in December 2018, instead of September 2018;
- The Complainant advised Detective Church that after that exchange, communications stopped for a period of time. At trial, she stated that this was not true, and in fact they two continued to have communications;
- The Complainant lied about wanting to see the Accused's dog;
- The Complainant advised Detective Church that she and the Accused were acquaintances. At trial, she testified to a much closer relationship;
- The Complainant advised Detective Church that the Accused did not record their sexual activity. At trial, she testified that he did in fact record some of their sexual activity using his phone;
- The Complainant advised that she saw the Accused approximately once a month after September 2018. At trial, she testified to a much more frequent schedule;
- The Complainant did not advise Detective Church that their sexual activity included oral or anal sex.

[49] These inconsistencies, say the Accused, go to the core of the chronology and extent of the relationship and compromise the Complainant's effectiveness as a witness to the extent that the Court ought not to give her testimony any weight.

[50] The Accused also argues that the Complainant's explanation for why she lied to police about the extent of her relationship with the Accused is not believable. Although the Complainant explained that she was attempting to protect the Accused by minimizing the extent of the relationship, the Accused points out that she still disclosed facts amounting to a criminal offence in that she told the police that she and the Accused had a sexual relationship when she was 14 years of age. This cannot be taken as protecting the Accused. Further, the Complainant appeared calm when she was speaking to Detective Church. There was nothing that indicated she felt pressured by friends, family, or police to give a statement. She agreed during cross

examination that she was calm, able to think clearly and was given the opportunity to speak for herself.

[51] The Accused says that the Court must exercise caution in accepting the evidence of TJ as she is mistaken about the dates of her various observations. The chronology she testified to at trial does not match the Complainant's and as a result, her evidence is fatally flawed.

[52] The Accused points to the fact that the text and Facebook messages between the Complainant and the Accused were not obtained by police, and this absence of corroboration highlights the failure of the Crown to meet its burden of proving its case.

[53] On the other hand, Crown argues that the Complainant's evidence represents incremental and delayed disclosure, which is to be understood in the context of a young complainant attempting to divert a police investigation to protect the Accused. The Complainant has no motive to fabricate, and any inconsistencies in her evidence really only go to peripheral points. This Court must look to the reasons proffered for the delay and inconsistencies and then decide what effect that has on credibility and reliability, rather than finding that the piecemeal and delayed disclosure automatically leads to disbelief.

[54] The inconsistencies, say the Crown, relate to peripheral matters only. The core of her evidence establishes a sexual relationship when the Complainant was 14 and 15 years of age and provides compelling details about when and how they met, their sexual activities, and their attempts to hide the relationship.

[55] At the time the Complainant spoke to the police, she was under pressure from friends and family to talk to them, while clearly still under the influence of the Accused who told her not to say too much. Her interview with police discloses instances where she declines to discuss certain topics and to pivot away from further disclosure, but the key point is that she still discloses sexual contact while minimizing its extent, which is exactly what the Accused told her to do.

[56] Further, the Crown says that the Complainant held up during cross examination on key issues such as her age and the dates and nature of the sexual contact.

[57] In this case, the explanation provided by the Complainant makes sense given her age and the circumstances and should not cause this Court to be uncertain about the core of her testimony, which is that the Accused engaged in sexual activity with her when she was 14 and 15 years of age. The Crown points out that the onus is on the Crown is to show just one incident of sexual contact. The Crown argues that it has done that, and the Accused should be found guilty.

B. The Burden of Proof

[58] Section 271(a) of the *Criminal Code* states:

271 – Sexual Assault – Everyone who commits a sexual assault is guilty of

- (a) An indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year

[59] Section 151(a) of the *Criminal Code* states:

151 - Sexual Interference – Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

(a) Is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

[60] Up until January 2020, the Complainant was under the age of 16. Therefore, her consent to any sexual activity that the Crown proves to have occurred up until that date is no defence: s. 150.1 *Criminal Code*.

[61] For the purposes of s. 271(a), the Crown must prove that the Accused touched the Complainant in a sexual way. In other words, did the touching violate the Complainant's sexual integrity: *R v DAH*, 2017 ABQB 193 at para 4.

[62] For the purposes of s. 151(a), the Crown must prove that the Complainant was under the age of 16, and that the Accused touched the Complainant for a sexual purpose: *R v WG*, 2021 ONCA 578, for example, for his sexual gratification or to violate the Complainant's sexual integrity: *R v MK*, 2021 ABQB 300 at para 5.

[63] The burden of proof is on the Crown to establish the Accused's guilt beyond a reasonable doubt, and that burden remains on the Crown so that the Accused is never required to prove his innocence or disprove any of the evidence led by the Crown: *R v Ryon*, 2019 ABCA 36 at para 51. While the Crown is not required to prove the Accused's guilt to an absolute certainty, the standard of proof beyond a reasonable doubt lays closer to that standard than it does to the civil standard of balance of probabilities: *R v Lifchus*, 1997 3 SCR 320 at paras 36-38; *R v Starr*, 2000 SCC 40 at para 96.

[64] A reasonable doubt is not one that is imaginary or frivolous. It is not based on sympathy or prejudice. Rather, a reasonable doubt is one that is based in reason and common sense. It is derived from the evidence, or absence of evidence. *Lifchus*, paras 13,14, 27, 31,32, 36. Even if I believe that the Accused is probably guilty or likely guilty, that is not enough to enter a conviction. In that case, he would be entitled to the benefit of the doubt as the Crown will have failed to meet its burden of proving his guilt beyond a reasonable doubt. Only if, based on the evidence, I am sure of the Accused's guilt beyond a reasonable doubt, should I enter a conviction. *Lifchus* at para 39.

[65] The standard of proof also applies to an assessment of credibility, referring to the veracity or truthfulness of a witness' evidence, and reliability, referring to the accuracy of that evidence. When I consider the credibility of a witness' evidence, I am to consider the evidence as a whole, and not weigh individual pieces of evidence in isolation. When I assess the credibility of any witness, I may employ my common sense and life experiences, combined with logic, and in consideration of the general picture revealed on consideration of the whole of the case. *R v Beland*, [1987] 28 SCR 397 at para 20. When I consider the reliability of a witness' evidence, I am to consider the witness' ability to observe, recall and recount the events on which they are giving evidence: *R v HC*, 2009 ONCA 56.

[66] The central issue that I must resolve is whether the inconsistencies and frailties in the Complainant's evidence, including the particulars in her trial testimony which were not disclosed in her police interview, cause me to conclude that the Crown has not met its burden of proof.

C. Assessment of Credibility and Reliability

Initial Considerations

[67] There are some important points to consider in deciding whether I find the Complainant to be credible and reliable.

[68] First, in this case, the Complainant was 14 years of age when the alleged sexual activity commenced. She was 18 years of age at the time of trial. Although not a very young child, the Complainant was still a child when the alleged events occurred. In my assessment of the credibility and reliability of her evidence, I must keep in mind that the evidence of children is entitled to some special consideration because children experience and remember the world differently from adults. Their perceptions of times and places is not always the same as it is with adults and their evidence may lack details in relation to time and place that we would expect from an adult's evidence: *R v W(R)* [1992] CanLII 122 at paras. 25-26.

[69] Second, it is important to note, as many Courts have said before, that there is no typical way in which sexual assault victims behave, and to conclude that a victim's delayed or incremental reporting is presumptively unreliable may lead to an inappropriate reliance upon impermissible myths or stereotypes:

Our understanding of sexual assault has evolved over time. Courts now recognize that there is no "inviolable rule" for the way victims of sexual assault behave: *R v DD*, 2000 SCC 43 at para. 65. Some will come forward to make an immediate complaint; others will delay in their disclosure of the abuse, whether in whole or in part. Reasons for delay are "many" and include at least "embarrassment, fear, guilt, or a lack of understanding and knowledge": *DD* at para. 65.¹

[70] Third, *R v W(O)*, 2020 ONCA 392 confirms that there is no fundamental difference between delayed disclosure and piecemeal disclosure, and that the explanation must be considered when assessing credibility. There must be no presumptive adverse inference arising from either circumstance.

[71] In *R v D(P)*, 2017 ONCA 263 the complainant failed to disclose all the assaults in his first interview with police. The trial judge concluded that the complainant's explanation for his failure to disclose all the assaults in his first interview was "perfectly plausible", and observed:

The decision to disclose is a difficult one that can be very painful for victims. It cannot be surprising that it would take [the complainant] more than one occasion to shed a burden that had been weighing on him for years.

[72] I also make note of the Court's statement in *R v Ramos*, 2020 MBCA at para. 65:

Delayed or incremental disclosure is a common occurrence in sexual assault cases, particularly those involving children. Trimble J put it well when he stated in *R v. MH*, 2018 ONSC 7366 (at para 74):

¹ *R v. Garford*, 2021 ABCA 338 at para 20

Some victims of sexual assault will report immediately, some later; some incrementally, and some not at all. Some will tell the truth, initially, and some later. Their reasons for not reporting, delayed reporting, or not being truthful when initially reporting are as many and varied as the victims, but include fear, guilt, embarrassment, or lack of understanding and knowledge...

[73] To that list, I would add a complainant's desire to protect an accused as a reason for not being truthful when initially reporting.

[74] Ultimately, it is for I, as the trial judge, to assess and weigh the explanation for the piecemeal or incremental disclosure, including the breadth and scope of new allegations or details in the overall context of assessing the Complainant's credibility and whether the delayed or incremental evidence leaves me with a reasonable doubt: *Garford* at para 21. In addition, while I am to approach the Complainant's evidence with some leniency because of her age, her evidence must still be subject to judicial scrutiny, considering possible internal and external inconsistencies and assessing her evidence in context with all the evidence before me: *R v KHT*, 2017 ABQB 753.

The Complainant's Evidence

[75] The Complainant's evidence about the core of the allegation – that the Accused engaged in sexual activity with her while she was under the age of 16 – has been consistent since she gave her statement to police in October 2019. She has also been consistent that the sexual activity included genital sexual intercourse. She was not successfully challenged on that point in cross examination.

[76] The importance of “core” evidence is made plain: *R v DAH*, 2017 ABQB 193 at para 113, and the cases cited therein.

[77] Here, the inconsistencies and frailties revolve around the timing, frequency, and the extent of the sexual activity. In this case, this is secondary to the main issue as to whether the sexual activity took place: *DAH* at para 115.

[78] There are several important factors to consider when assessing the Complainant's explanation for being untruthful with the police and her delayed and piecemeal disclosure.

[79] First, she says that by October 2019, she and the Accused were engaged in a sexual relationship which the Complainant characterized as “boyfriend-girlfriend” and which the Complainant described at trial using words to the effect of “I thought that's what love was”. In other words, it was a significant relationship to the Complainant. So significant in fact, that the Complainant was prepared to allow it to degrade her relationship with her mother. It is reasonable to conclude that the Complainant would wish to protect that relationship by not disclosing the extent of it.

[80] Added to that, the Accused, approximately sixteen years her senior, exercised some level of control over the Complainant. The Accused was able to compel the Complainant to leave school, to disappear from her family home without explanation and backtrack on her requests that the relationship come to an end. The Accused had discussed with the Complainant how to approach the police interview and told her to minimize their relationship.

[81] Third, the Complainant was aware at several points that her friends, police, and mother had significant difficulties with the relationship. Full disclosure would most likely have resulted in controversy, if not outright conflict, at least with her mother.

[82] Fourth, there is no evidence of any motive to fabricate the relationship. Quite the opposite – the Complainant clearly took steps to hide the relationship and at trial, expressed upset at the relationship having occurred.

[83] All these factors would have a strong repressive effect upon the Complainant's desire to be forthright to police. Together with her age and the fact that the relationship was highly sexualized, her explanation that she was lying to police and minimizing the relationship to protect the Accused is entirely plausible.

[84] Although she still disclosed to police the fact that she and the Accused had engaged in sexual activity in December 2018, she did not disclose the full nature of that sexual contact, nor did she disclose the length of time that they had engaged in sexual contact, including the fact that the relationship was ongoing at the time the Complainant was interviewed by police.

[85] Defence argues that the Complainant's explanation makes no sense because if she truly wanted to protect the Accused, she would not have disclosed that sexual contact had occurred in December 2018 when she was still 14.

[86] I disagree with this conclusion. At 15 years old, the Complainant lacked the sophistication of a mature adult. It is apparent from the police interview that the important details to her that needed to be expressed to police was that she and the Accused did not see each other very often, and in fact, the relationship had already ended. Given her age, it is entirely plausible that she believed that this would be enough to convince the police that further investigation was not warranted. I remind myself that what may seem to be common sense to an adult may not be something that we can expect of a child sexual assault victim.

[87] The Complainant did exactly what she testified the Accused told her to do, which was minimize the relationship. She gave no evidence that the Accused told her to deny it altogether. In the face of the fact that his relationship with the Complainant had already been discovered by others, this perhaps makes sense.

[88] Seen in this light, neither her admitted untruthfulness on secondary points during the police interview, nor her delayed and piecemeal disclosure cause me to conclude that she ought not to be believed. Instead, I conclude that the various untruths and inconsistencies demonstrated an effort by the Complainant to minimize the relationship and attempt to deflect the police investigation.

[89] I have also considered some of the evidence regarding other witnesses' reactions to the situation and whether the evidence corroborates the evidence of the Complainant. TJ described her impressions upon learning of her daughter's new friend, and how she felt that it was inappropriate. She described how her daughter's behavior deteriorated after the relationship began, and how her daughter was secretive, deceptive, and often disappeared for no reason. Although TJ cannot speak to the exact nature of the relationship and although her testimony regarding the identity of the person her daughter was seeing was not strong evidence, her reactions to her daughter's behavior are compelling and consistent with the Complainant attempting to hide a relationship from her mother. Even though Defence has urged me to give TJ's evidence no weight because of her confusion over the year this took place, I find that TJ

simply made an honest mistake about the timing of these events. I find that TJ's evidence corroborates the fact that the Complainant was engaged in a relationship with an adult male between September 2018 and January 2020, and that the relationship had overtones of a sexual nature, causing TJ considerable concern.

[90] There is other (albeit vague) corroborative evidence to consider as well – TJ and the School Resource Officer found out about the Complainant being engaged in an inappropriate relationship because one of the Complainant's friends was concerned enough to report it. Although we did not hear evidence from the Complainant's friend, it is notable that the Complainant's mother was clearly not the only person who had concerns over the relationship.

[91] Also, the email that the Complainant sent to Detective Church in January 2021 corroborates her evidence regarding her attempts to bring the relationship to an end.

[92] I found the way the Complainant gave evidence at trial was candid, matter of fact and forthright. She left the impression that she had deep regrets about her behavior. Amongst other things, it significantly damaged her relationship with her mother which she is taking steps to repair. She was clear that her statement to the police contained several lies which she states was an effort to minimize the relationship to protect the Accused. She could have taken the opportunity to massage her testimony at trial to make herself appear more trustworthy, or to minimize the extent and nature of the relationship, yet she did not.

[93] Finally, the Complainant's testimony at trial regarding her evidence about when the sexual activity started, how often it occurred, how she and the Accused arranged meetings, where the activity occurred and what it consisted of was largely unshaken and showed she had a good memory. Her evidence was detailed and specific as to the ebbs and flows of the relationship.

[94] I therefore conclude that the Complainant's testimony at trial was credible and reliable, and I find the following facts based on that testimony. The Accused first contacted the Complainant over Facebook in the spring of 2018, and the Complainant disclosed that she was 14 or 15 despite the fact that her Facebook profile described her as older. The Complainant and the Accused met in person at a Powwow in September 2018, when the Complainant was 14 and while there, they embarked upon a sexual relationship including oral, anal, and genital intercourse which extended over many months. Although the contact between the two in the late spring and July 2019 was minimal, by the time the Complainant began Grade 10 in the fall of 2019, when she was 15, the contact was again regular, with the Accused meeting the Complainant and driving her to different areas within the City of Edmonton for the purpose of having sexual intercourse with her. The sexual activity that the Accused engaged in with the Complainant consisted of oral sex and penetrative genital and anal sexual intercourse. When the relationship was reported to police, the Accused and the Complainant discussed what the Complainant would say to the police and the Accused instructed her to minimize the relationship and tell police it had ended. The Complainant complied with his instructions and reported back to him over text message.

[95] The relationship, however, carried on after the interview with the Accused continuing to meet the Complainant at school or her place of employment and taking her somewhere in his vehicle where they would engage in sexual intercourse. This continued up until and after the Complainant turned 16.

[96] The Complainant finally succeeded in ending the relationship in late 2021, following which she deleted all the remaining text messages with the Accused from her phone.

[97] I accept the Complainant's testimony at trial disclosing allegations that she did not disclose to police in October 2019. In particular, I find that after July 2019, the Accused would pick the Complainant up in his car several times per week whereupon they would almost always have sexual intercourse while parked somewhere, including oral, genital and anal intercourse. Sometimes the Accused recorded their sexual activity using his cell phone.

[98] The inconsistencies highlighted by the Defence do not, in my view, raise a reasonable doubt about whether the Accused engaged in sexual intercourse with the Complainant when she was 14 and 15 years of age.

III. CONCLUSION

[99] Therefore, the Crown has met its burden of proving beyond a reasonable doubt that the Accused committed sexual interference in that it has proven beyond a reasonable doubt that the Accused touched the Complainant for a sexual purpose when he had sexual intercourse with her at the September 2018 Powwow, and on multiple occasions thereafter, until she turned 16 in January 2020. I therefore convict the Accused of this count.

[100] I also conclude that the Crown has met its burden of proving beyond a reasonable doubt that the Accused committed sexual assault of the Complainant contrary to s. 271(a) of the *Criminal Code*. I therefore also convict the Accused of this count, subject to the *Kienapple* principle and to the further submissions of counsel on that point.

Heard on the 24th day of October, 2022.

Dated at the City of Edmonton, Alberta this 30th day of November, 2022.

L.K. Harris
J.C.Q.B.A.

Appearances:

John P. Schneider
for the Crown

Dushan Coulson
for the Accused