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R v MD, 2024 ABKB 104

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Court of King's Bench of Alberta

Citation: R v MD, 2024 ABKB 104

Date: 20240222
Docket: 220314306Q1
Registry: Grande Prairie

2024 ABKB 104 (CanLII)

Between:

His Majesty the King

Crown

- and -

MD

Accused

Restriction on Publication

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

By Court Order, information that could identify victim must not be published, broadcast, or transmitted in any way.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

Corrected judgment: A corrigendum was issued on February 23, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Justice M. J. Lema

I. Introduction

[1] Did MD (an adult at all material times) have sexual contacts with his niece SD in 2004 and 2005, when she was 12 (and later 13) years old, thereby committing unlawful-touching (s. 151 CCC) and unlawful invitation-to-sexual-touching (s. 152 CCC) offences?

[2] SD (now 32) testified to sexual contacts with her uncle throughout that period and to audio-recorded admissions by him in 2021 of those contacts.

[3] MD denied all sexual contacts asserted by SD and making the asserted admissions.

[4] As explained below, I find MD guilty of both offences.

II. Synopsis

[5] SD testified that, shortly after she and her brother DD began living with MD (February 2004) in the basement of a farmhouse in northwestern Alberta owned by his employer, MD started showing her video and photo images of children being sexually abused (euphemistically and inaccurately called "child pornography", as explained by Richardson J. in ***R v LJ***, 2023 ABKB 672 (paras 50 and 51)), which led to various forms of sexual contact between them, including vaginal-penile intercourse and fellatio, throughout the period they lived together, collectively reported by her as "between 70 and 80 times" (police interview) and "greater than 50 [times]" (at trial) (I review her evidence in more detail later.)

[6] The indictment initially set a date range of February 1, 2004 to February 1, 2005. Based on evidence emerging at trial, the Crown applied successfully to extend the latter date to December 15, 2005 i.e. SD's 14th birthday. (At the time, the two noted offences contemplated complainants under the age of 14.)

[7] SD and her brother continued living with MD at the noted residence until late 2006, when they moved elsewhere.

[8] Years passed.

[9] In June 2021, MD's mother (i.e. SD's grandmother) died, in New Brunswick. In July 2021, MD (then 50) travelled from Alberta to New Brunswick, spending about three weeks, some of that time in the company of SD and her children and other family members, before travelling to Ontario for his mother's burial.

[10] Per SD, on July 24, 2021 (during the noted span), she and MD were sitting on the porch of her mother's home in Sussex, NB. At or near the start of their time together, and unbeknownst to MD, she turned on the "record" function of her close-at-hand cellphone and recorded their conversation. Per her, the first twenty or so minutes featured mostly "kid noises" from her two young children moving back and forth between the house and porch.

[11] At about the mid-point of the recording, when things were (initially) quieter, she confronted MD about their sexual contacts years before, starting with advising him she was mad at him.

[12] Then ensued a dialogue of approximately 17 minutes in which (per her) MD effectively admitted those contacts, in fact blaming SD for them ("you initiated them, forcefully") and expressing disappointment that she was raising them (effectively, "you promised you would never bring this up").

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[13] Children, traffic, and other noises are heard during this segment. At some points, the recording is very muffled, down (occasionally) to impossible to hear.

[14] However, the gist of the conversation (highly inculpatory for MD, per SD) is clear.

[15] Per MD, while acknowledging he spent some time with SD and her family in New Brunswick at that time, and that they had had at least one private conversation on that porch at or around that time, it was not the recorded conversation or anything akin. He denied having the reported conversation, or anything akin, with SD, then or ever. He also said that he did not recognize his voice on the recording (though recognizing SD's and the children's).

[16] Per his counsel in argument (effectively acknowledging similarity between MD's voice (heard during the trial) and the recorded male voice), SD may have "cloned" MD's voice (e.g. from everyday conversations) and used it to fabricate "MD's" parts of the "inculpatory dialogue."

[17] More generally, MD denied having had any sexual contact with SD at any point. I review his evidence in more detail below.

[18] In support, defence produced RW, MD's former employer and owner of the farm property where MD, SD, and her brother lived in 2004-2006.

[19] She testified she was an active, mobile, and alert presence in the household (for instance, liable to be in the basement frequently on any given day, at almost any time of day or late night), that sexual contacts between MD and SD were accordingly highly unlikely in the house and (with RW actively involved in operating various farm vehicles) in those vehicles (as reported by SD), that SD would almost certainly have reported any such contacts to her (given their very close rapport in those years), and that none were reported by SD to her.

[20] This is fundamentally a credibility- and reliability-of-witnesses case.

III. Legal framework

[21] Before turning to those analyses, I reproduce the following legal-framework review of Mandziuk J. in ***R v SGH***, 2023 ABKB 39:

> **Burden and Standard of Proof**
>
> SGH is presumed to be innocent. The presumption of innocence is connected to the requirement for proof of guilt beyond a reasonable doubt, a fundamental principle of our criminal justice system.
>
> The Crown has the burden of proving each element of an offense. That burden of proof rests on the Crown throughout the trial. The benefit of any doubt must be extended to the accused *R v Lifchus*, [1997] 2 SCR 320 (*Lifchus*) at para 36.
>
> Proof beyond a reasonable doubt is not proof to an absolute certainty, but it is proof to a high level of certainty. It is beyond proof of probable or likely guilt: *R v Starr*, 2000 SCC 40 at para 242; *Lifchus* at para 32.
>
> Reasonable doubt can arise from the evidence or from the absence of evidence. It is grounded in reason and common sense, and determined without any basis in sympathy, prejudice, emotion, sentiment, leaps of logic, flights of imagination, or frivolous considerations: *Lifchus* at para 36.

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SGH gave evidence at trial. Therefore, I must consider the Supreme Court of Canada's direction in *R v W(D)*, 1991 CanLII 93 (SCC), [1991] 1 SCR 742 (*W(D)*) as interpreted by the Alberta Court of Appeal in *R v Ryon*, 2019 ABCA 36 (*Ryon*) and *R v Achuil*, 2019 ABCA 299, leave to appeal dismissed 2020 CanLII 71203 (SCC).

These principles were helpfully summarized by Renke J in *R v Hermkens*, 2021 ABQB 1016 at para 12, as follows:

> (i) 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 person is never required to prove his innocence, or disprove any of the evidence led by the Crown ….
>
> (ii) In that context, if the accused's evidence denying complicity or guilt (or any other exculpatory evidence to that effect) is believed, or even if not believed still leaves the jury with a reasonable doubt that it may be true, then the jury is required to acquit ....
>
> (iii) While the jury should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, a trial is not a credibility contest requiring them to decide that one of the conflicting versions is true. If, after careful consideration of all the evidence, the jury is unable to decide whom to believe, they must acquit.
>
> (iv) Even if the jury completely rejects the accused's evidence (or ... other exculpatory evidence), they may not simply assume the Crown's version of events must be true. Rather, they must carefully assess the evidence they do believe and decide whether that evidence persuades them beyond a reasonable doubt that the accused is guilty. Mere rejection of the accused's evidence (or ... other exculpatory evidence) cannot be taken as proof of the accused's guilt.

Additionally, the Court in *Ryon* at para 47 held that whether evidence exculpating an accused raises a reasonable doubt must be assessed in the context of the evidence as a whole.

I will now turn to discuss the general principles of credibility assessment, myths and stereotypes and the particular considerations arising from the evidence of children.

Credibility Assessment Generally

Witness credibility and reliability are the over-arching issues and challenges in this case. Credibility assessment is about witness' honesty and truthfulness. Reliability is about the accuracy of the witness' evidence.

A number of factors require careful consideration when assessing the credibility of a witness. The uniqueness of each witness and the facts of each case must be weighed and evaluated carefully.

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As Cory J observed in *R v S (RD)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484 (*S (RD)*) at para 128:

> It is, of course, true that the assessment of the credibility of a witness is more of an "art than a science." The task of assessing credibility can be particularly daunting where a judge must assess the credibility of two witnesses whose testimony is diametrically opposed.

In making credibility findings, the evidence must be considered in its entirety. Each part of the evidence is part of the whole, and those parts interact and inter-relate. Individual pieces of evidence cannot be viewed in isolation: *White v The King*, 1947 CanLII 1 (SCC), [1947] SCR 268 at 271; *Ewanchuk* at paras 29 – 30.

The factors that can be considered in assessing credibility include the witness's character, emotions and feelings, self-interest, hostility, attitude towards the accused, motive to lie, character for truthfulness and prior deceptive behavior. Additionally, evidence of bias or dishonesty and material facts that are proven through the testimony of other witnesses can weigh into the analysis: *R v Tash*, 2013 ONCA 380 at paras 40 – 43. Inconsistencies in the particulars and the whole of the evidence are certainly an important consideration. No single factor or group of factors is necessarily determinative, and any list of factors cannot be viewed as exhaustive.

Additionally, the trier of fact's life experience and common sense can weigh into the process, which necessarily involves the trier of fact's view of the evidence in all its diversity as it emerges during the trial, in tandem with their experience, logic, and intuition: *R v Marquard*, 1993 CanLII 37 (SCC), [1993] 4 SCR 223 at para 49; *S(RD)* at para 129.

Myths & Stereotypes

Assessing credibility and reasonable doubt cannot rely on myths and stereotypes, including generalizations about how human beings behave in certain situations. This is impermissible. Such reasoning can undermine the fairness of the trial and distort the truth-finding process that is at the heart of the trial: *R v ARD*, 2017 ABCA 237 at paras 6 – 9 (*ARD*), aff'd *sub nom R v AJRD*, 2018 SCC 6. In short, myths, stereotypes, preconceptions and related irrelevant considerations must be strenuously avoided. Generalizations or other matters that are not in evidence play no part in the credibility assessment process: *S(RD)* at paras 129 – 130.

In *R v JC*, 2021 ONCA 131 (*JC*), the Ontario Court of Appeal explained that stereotypical thinking is not to be conflated with the application of logic or common sense. First, judges must avoid speculative reasoning that invokes common-sense assumptions or human experience that are not grounded in the evidence or appropriately supported by judicial notice (***JC*** at para 58). Second, factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour; it is an error of law to draw inferences about how a complainant or accused is expected to act based on stereotypical inferences (***JC*** at para 63). [paras 35-50]

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[22] I also note the following credibility-gauging guidance on an adult testifying to events experienced (or allegedly experienced) as a child, from ***R v DD***, 2022 ONCA 786:

> In *R. v. W. (R.)*, 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, it was affirmed that the evidence of children must be approached on a common sense basis bearing in mind their mental development, understanding and ability to communicate. "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": *R. v. W. (R).*, at para. 25. By way of illustration, the inability of the child complainant in *R. v. W. (R.)* to accurately describe the location of bedrooms in a house, a peripheral matter, was not significant to her credibility or reliability, since a child may not attend to such details: *R. v. W. (R.)*, at para. 30.
>
> > **Even when adults testify about events that allegedly occurred when they were children, such considerations remain relevant. This is logical. If a witness would not likely have noted the thing as a child, their failure to relate that thing years later while testifying as an adult cannot meaningfully unsettle the credibility or reliability of their evidence. Therefore, "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 <u>at the time of the events</u> to which she is testifying" (emphasis added):** *R. v. W. (R.)*, at para. 27.
> >
> > **However, "[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":** *R. v. W. (R.)*, at para. 27. … [paras 4-6] [bold emphasis added]

[23] On the same aspect, see also ***R v LL***, 2019 ONSC 3295 (Leroy J):

> CD is an adult testifying about events she says happened in her childhood. She is to be assessed as an adult witness recognizing that **minor peripheral matters as time, place and antecedent are not central to the memory and that the measure of uncertainty and inconsistency in recollection on these details may not be a good barometer of plausibility or implausibility of the complaint**.
>
> The **inconsistencies involving the chronology of places of residence, schools and CD's age for the first incident in the truck do not reflect on her central memories.** I don't think that a pubescent female who is being sexually targeted by her stepfather would focus on age, time of year, school grade at the time, whether the incident happened during access travel or as part of the workday, whether there was one or two chairs, the details of transaction negotiation, or even variations in sexual order preliminary to sexual intercourse. [paras 150-151] [emphasis added]

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IV. Credibility assessments

A. Credibility assessment of SD

[24] I find SD a credible and fundamentally reliable witness:

1. she tried to be **precise with details**, as much as she could e.g. [describing **who would sit where** when (per her) MD showed her sexual-abuse-of-children images and videos] "I would sit beside him ... [there were] two computer chairs ... each [of us] on a chair. I was on his right; he was on my left." [Q: "Always like that?"] "Sometimes [I was] on his lap." [Later she added] "[Some of the web pages he would show me] had an **orange pylon as the logo."** [Later, asked to describe other sexual contacts] "They had a **blue and white Kenworth** .. a big truck ... with a bed in the back of the cab, with a white-and-blue-striped mattress. It's a transport truck cab, [with] a driver's seat, a passenger seat, and a bed back behind the seats. [It had] a metal steering wheel and white upholstery on the roof of the cab." [Q: "What happened in the truck?"] [We were] using the auger to put grain in the back of the truck – the dump-truck part – and while waiting, I would be sitting in the truck because it was hot [outside] ... and he was outside the driver's door and I was in the driver's seat, and we were talking and then [pausing, appearing stressed] [we were] talking about if we could do it in the truck, have sex in the truck. I got into the back, where the bed is [appearing more stressed] and he would kiss me, on my lips and ... ["sorry", crying, breaking up] He would start like that and then progress to pulling his pants down, [and me] pulling pants down ... he would put on a condom on every time ... and laying on the bed, he would be on top of me ... put his penis in my vagina ... [Q: "How end?"] ... [crying, sniffling] [It would] end by him finishing and pulling out ... finishing in the condom and him removing the condom ... and [we would pull our pants up] and we would get out of the truck and continue with the task we were doing at the grain shed." Asked about yet other sexual contacts, she described **oral sex by her on him in a black pickup truck**, while he was driving: "I would unbuckle my seat belt and lean over ... [there was a] big glove compartment that [rises up] [gesturing shape of divider between seats] ... I would have to lean on it ... [I] performed oral sex on him while he was driving." Asked about more contacts, she described performing **oral sex on him in his bedroom**, with him "laying on his bed, and I was between his legs, with my stomach on the bed and facing him ... he would be playing with my hands with his pants string and [crying and appearing stressed] he would pull his pants down, just enough ... pull the front down so that his penis would be out [gesturing this action] ... he would make it seem like a game . I would ... [crying] [be] playing around, and I would put [his penis] in my mouth [crying hard] ... I would perform oral sex on him";
2. she **admitted when she did not know or could not recall things** e.g. [Q: how long known the accused?] "Since I was a kid ... since ... uh ... not sure of the exact age ... but .. at least [since I was] 6 or 7" and [Q: when did you move out [of the farmhouse]?] "I do not remember the exact date ... I would say ... end of 2006, I would say." [Q: "When you say a conversation in the tractor would switch to sexual, what would that entail?"] "I do not recall specifically";

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3. she readily **acknowledged details that might be seen as unsupportive of her account**. For example, asked whether RW would "ever come down to the basement?", she replied "yes ... she had exercise equipment and would lay on and [otherwise] use it ... the washer and dryer were down there, [as well as] bins of her clothing." Having described watching sexual-abuse-of-children images and videos with MD in his bedroom and being asked "recall if the door [to the bedroom] was open or closed?", she answered: "There were times it was open and times it was closed";

4. she provided **vivid and realistic accounts** of, for example (per her), first-time sexual intercourse with MD, **accompanied (as she testified) by seemingly congruent emotional distress (the latter also occurring while she testified about some of the events described in subpara 1 above)**: "He pulled my pants down, and my underwear, and he put a condom on, and he started slowly [she began to sniffle, then cry, and then break up considerably at this point] ... and [recapping] pulled my pants down, my underwear down, [put a] condom on and told me it might hurt at first but he would go slow. And then he put himself inside me ... his penis inside my vagina [witness very distressed at this point]. He kept reassuring me, asking me if [I was] okay, if it hurt. [Q: 'Did you say anything back?"] I winced and said 'it's okay.' [Q: "Did he say anything else?"] "He asked if it felt okay. [Q: "Recall any other comments?"] "It was just [him] asking me if [I was] okay and that it was normal to hurt a little bit. [Q: "How did it end?"] Um ... [pausing] ... he finished [later explained to mean ejaculated] on my stomach. ... He made sure I was okay, cleaned up my stomach, told me he loved me, kissed me on the forehead, and went to his room" [shaking at the end of this account]. Or [describing **sexual intercourse in the combine**] "He would ask me if I wanted to have sex. I would say yes. And he would pull down his pants, [I would remove my pants and panties – see below], he would put a condom on, and I would lean over the armrests, and he would put his penis into my vagina [crying] ... he would ... [pausing] ... ejaculate, pull out, take off the condom, [we] would pull our pants up and proceed with farmwork in the field. I would then usually fall asleep on the floor of the cab of the combine. [Q: "Why the floor?"] "[There was] no space to sleep on the end [or] the arm rest ... [there was] more space on the floor." [Q: "How about the seat?"] He would be on the seat ... [there was] no other seat ... just one seat, for the driver. [Q: "How long would you and MD be in the tractor [combine]?"] "Anywhere between eight to nine hours, depending on the work to be done";

5. she did **not seem prone to exaggerating or otherwise adding details** to paint MD in the worst light possible e.g. [After describing MD first touching her between her legs] "[It was] outside my clothing. Touching my vagina outside of [my] clothing." [Q: "Who removed your clothes in the combine?"] "I removed my pants. [Q: "And upper body [clothing]?] "No, just pants and panties";

6. she did not hesitate to **include details reflecting her (at least superficial) willingness** (i.e. as a 12- and 13-year-old groomed per her to see the now-reported sexual contacts then as normal and appropriate) to participate in and even initiate them e.g. when asked who initiated sexual intercourse: "There were times he

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would initiate and times I would initiate. When he would initiate, I would smile and say 'yes'." Asked about her reaction to being asked by MD to perform oral sex on him while he was driving (black pickup truck): "I smiled and said 'sure'";

7. she provided **plausible and squaring-with-young-age accounts of learning of certain sexual activities** e.g. [referring to the first instance of oral sex by her on him while he drove the noted pick-up truck – "So he suggested you perform oral sex?"] "Yes ... he would say 'you should ... do you know what 'road head' is?'" I said no ... I wasn't sure what it was. And then he said: "[It's] a blowjob while driving." [Q: "Did you know what a blowjob was?"] Yes, from the videos he showed me of child pornography ... they were performing oral sex." Later, she described sitting on MD's bed with her legs over his legs "or I would lay between his legs and start a game ... [crying] .. of [putting] my feet in his groin area over his clothes ... [pausing ... crying] .. and joking around ... he would pull the front of his pants down, with his penis exposed and my feet on it, rubbing my feet up and down [until] he would ejaculate on my feet or in his hands";

8. she described **unusual, even bizarre details**, which seem unlikely to be the fruits of concoction e.g. him telling her that "if you're young enough to bleed, you're young enough to breed" and on another occasion (recalling a time when, at eight years old, she had rubbed herself against him – body parts not specified) him telling her that he "wished he had acted then and not waited until [she] was 12";

9. she also provided **grooming details** that logically account for her accepting the sexual accounts as normal and appropriate. When showing her the earlier-noted abuse-of-children videos and images, he told her that the participants were "having fun" and "enjoying themselves" and "it's normal." At other times, "he would say that what we were doing was not wrong ... that it was okay ... it was normal." And also that "nobody could know, or he'd get into trouble." [Q: "Did he say what kind of trouble?"] "[He said he] could go to jail, because society does not understand." On other occasions: "He told me he loved me and that it was love and that age did not matter";

10. she **readily acknowledged not recalling every aspect** of the asserted sexual contacts, that her memory of the events was better when she gave her police statement (August 2021) than at trial (February 5-9, 2024 i.e. 29 months later), and that reviewing a transcript of her statement assisted her in refreshing her memory e.g. using the statement to refresh her memory of occasions of oral sex in the Kenworth truck, occasions of manual masturbation of MD (i.e. in addition to the via-feet occasions described by her), an occasion when MD touched her vagina covertly, under a blanket, when she and he were sitting side-by-side in a living room with family relatives sitting close by, as well as the statements described in subparas 8 and 9 above. Given the over-15-year gap between the asserted events and the police statement, the 29-month gap between that statement and the trial, and the man asserted instances of sexual contact of various kinds, and the apparent turmoil caused by recalling those instances and other details, I do not see her first-pass omissions of these noted details as casting a material shadow on her credibility or reliability;

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11. she provided a **reasonable explanation for her different estimates** – trial testimony versus earlier police statement -- of the total number of sexual contacts with MD. At trial, she said "greater than 50." In her police statement, she had said "between 70 and 80 times." In cross-examination, defence spent considerable time in probing this difference e.g. asking SD to reconcile her inability at trial to say whether the total was "greater than 60?", "greater than 55?", or "maybe 51?" First, SD appeared to be confused at one point about whether defence was probing her uncertainty over the upper range i.e. how certain or uncertain she was about the number of contacts above 50, versus uncertainty over the entire range. Second, she testified, towards the end of this exchange, that "at the time of the statement, ["70 to 80 times"] was what I recalled ... that is what I recalled then." Asked "has [your estimate] reduced ... since you told police?", she replied "it is still greater than 50." In light of the same factors noted at the close of subpara 10, I do not see these differing estimates as casting a material shadow on credibility or reliability. Besides, "greater than 50", by definition, is not inconsistent with "between 70 and 80." In my view, in light of the earlier-noted acknowledgement by SD that her memory was better when she gave the police statement, she became less certain of her initial (implicit) "at least 70" estimate but remained confident of her "greater than 50" figure. In any case, even if the net result of this questioning was some uncertainty over MD's "greater than 50" estimate, her per-activity, per-location estimates (i.e. viewed individually and then tallied) yielded a "low" number of 24 and a "high" number of 43, and this is aside from no-estimate-provided-or-asked-for-or-at-least-probed sexual contacts (e.g. oral sex in tractor, manual masturbation in pickup truck, manual masturbation in MD's bedroom, manual masturbation in her bedroom, and masturbation with feet in his bedroom) i.e. even if (conservatively) only one instance of the last five types of contact occurred, the "itemized" estimates become a "low" of 29 and a "high" of 48;

12. defence did not make material inroads either with questions probing actual, apparent or possible inconsistencies in SD's estimates of the different kinds of sexual activity in different locations. For instance, defence asserted a change in her estimate of the number of occasions of oral sex in the tractor ("by your testimony, it happened five times"). However, she had not offered any estimate in her direct examination, only stating that that form of sexual contact had occurred in the tractor. During cross, defence put to SD that she had testified to five occasions of such contact in that venue. She responded: "I believe it was more than 5 times." Asked whether it was 5 times or more than 5 times (defence: "My notes say 5 times"), she responded "I don't remember." With the witness then excused, we all reviewed our notes from the previous day and confirmed (which the FTR also confirms) that SD offered no estimate on this subject, with her "5 times" evidence referring instead to occasions in the pick-up truck. Later in cross, asked how many occasions of oral sex in the tractor, she again said she could not remember. In redirect, SD confirmed that oral sex had occurred in the tractor and that it happened in the late spring or summer. In a brief follow-up, defence put it to SD that she had denied instances of oral sex in the tractor and that she said (effectively) she could not tell if it had happened, with defence contrasting that to

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her "it happened" evidence on redirect, asserting that SD was obviously lying on this subject at some point. I disagree: as noted, SD testified in direct to oral sex occurring in the tractor, albeit with no "number of time" estimates. I believe defence confused SD with his (incorrect) "you said 5 times yesterday" assertion, leading her to say she believed it was more than 5 times and later that she could not recall the number of times. In argument, defence asserted she gave "three different answers to the same question." In fact, she was consistent on this subject (oral sex occurred in the tractor) and only offered an estimate ("more than 5") when apparently confused by the defence's incorrect assertion before eventually saying she could not return the number of times. I see no material inconsistency here;

13. [further on **asserted inconsistencies**] in argument, defence said that, in direct, SD had testified to less than 10 occasions of sexual intercourse in her bedroom (it was actually "more than 5, less than 10"). He then asserted that, during cross, she had stated she could not recall how many times it happened. He said this was "quite contradictory." Defence is incorrect. When the accused began asking SD for "time of day, month, etc" specifics of those occasions, she answered that she could not recall those details. But she did not step away from her assertion of more than 5 and fewer than 10 occasions of such sexual contact in her bedroom;

14. [another **asserted inconsistency**] per defence, SD testified to sex in MD's bedroom and that, in cross, "she admitted **no sex occurred in [MD's] bedroom**." The defence is incorrect here too. SD testified to various forms of sexual contact with MD in his bedroom: oral sex, manual masturbation, and masturbation with feet. In his questioning leading up to SD's "no sex in his bedroom" answer, defence initially asked about the sequencing, as between different locations, of "oral sex" i.e. where did that activity first occur as between two places. But he then referred to "sex", which sparked SD to ask defence to be more specific: "Can you clarify what you are referring to here: oral sex or penetrative sex?" He answered: "I did not mention oral sex [i.e. in this segment]." Based on her resulting understanding that he was referring to penetrative sex, she confirmed again that no "sex" (i.e. penetrative sex) had occurred in his bedroom. There is no inconsistency here;

15. [further on inconsistencies] asked in cross how many times she provided **oral sex in the pickup truck**, she answered "more than 5, less than 10." Asked to reconcile that estimate with her direct-phase answer ("5), she said "neither are a lie." Pressed that both cannot be true, she said "I am unsure." In light of the circumstances noted at the close of subpara 10, I do not see a material inconsistency here i.e. as between an estimate of "5" and "6 to 10." Asked about the number of occasions of **oral sex in his bedroom**, she said she could not recall and, after being pressed to provide an estimate, she said "less than 10." Being reminded that she had said "less than 5" in direct, she said "both are correct, because 5 is less than 10." I do not see a material inconsistency here i.e. as between an answer of (effectively) "up to 4" and "up to 10", especially in the noted circumstances;

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16. same for her **inability to recall the times of day, days, and months** in which given asserted sexual contacts occurred ("did [that incident] happen on a weekday or a weekend?") i.e. beyond "seasonal recollections" (e.g. being in the fields in farm equipment in growing or harvesting seasons) or **what clothing MD had been wearing** on a given occasion, given the over-18-year gap between the asserted events and the trial and the conclusions in ***DD*** and ***LL*** above about children not typically paying as much attention to (for instance) time as adults or typically not being expected to recall them with the same precision as adults experiencing the events i.e. no credibility or material reliability concerns arise here;

17. defence asserted another **credibility blemish** i.e. that SD "could **not say where other members of the household were during the [occasions of] alleged sex.**" However, SD testified that neither her brother nor RW was ever present when SD and MD had sexual contact. How was she supposed to know where they were on such occasions (even if she may have had an idea)?

18. defence argued alternatively that the **other household members would have noticed** at least one of the sexual contacts between MD and SD and that the absence of **corroborating evidence** from either or both of them was telling. Corroboration is not required. In any case, the brother was not called as a witness by either side, and no evidence placed the brother in SD's immediate vicinity at all times. As for RW, even if her evidence of SD spending considerable time with her on the main level of the house, in the garden, and elsewhere on the farm, plus of frequently going to the basement (where MD and the brother, in one room, and SD, in another, had their rooms) is accepted, it is far from proving that RW was always in the immediate vicinity of SD. For one thing, even if RW came down to the basement on a laundry trip to or get food from the freezer, such occasional and short visits do not compare to the many hours, on a given evening and night, when RW was not in the basement. And many of SD's allegations were of sexual contact away from the house, and RW did not testify that she was always present whenever MD and SD were in or near a vehicle. (In any case, corroboration (via admission) is present here, as discussed later);

19. as for the **"failure" of SD to report** any of the sexual contacts to RW or to other family members, even accepting SD was close to her and them (or some of them), no negative inference can fairly be drawn here i.e. with no typical-reporting baseline. In any case, per SD's testimony, she understood the sexual contacts to be normal and appropriate and, further, with "society not understanding" (per her account of MD explaining this to her), MD would have "gotten in trouble" if she had reported. That is, she did not have to explain any "failure" to report, but she provided a plausible reason in any case; and

20. same for (per defence) SD's **"general mood and general disposition [being] normal"**: that is a neutral factor, with no typical-disposition baseline.

[25] As stated at the outset, and as explained by these reasons, I find that SD was a credible and materially reliable witness.

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B. Credibility assessment of MD

[26] By contrast, I have many concerns with MD's credibility:

1. asked in direct if he was **ever alone with SD in his room**, he replied "No, DD [the complainant's older brother] was **always with us**. I [would be] reading a book; DD and SD would be on the computer. Or DD would have a book, and me too, and SD would be on the computer. Whenever SD was in our bedroom [i.e. the room MD and DD shared], DD was **always there**." MD gave these "always there" responses immediately, without taking a moment to consider whether, in the approximately 2.5 years these three people lived in the basement of RD's house, there was ever one time – for example, when DD left the shared bedroom, while MD and SD were also there, to go to the bathroom, or upstairs for a snack, or outside for a walk, or any other purpose, even for a few minutes, or even for a moment – MD and SD were alone in the shared bedroom. I find this "never alone in the shared bedroom" answer highly unlikely and (as explained further below on further "never alone" evidence") a material blemish on MD's credibility;

2. asked in direct if he **showed SD any "child pornography", he answered "No, absolutely not. We had dial-up [internet].** Dial-up is so slow you [effectively] cannot download [anything]. It would take days to download a video. There was nothing like that on my computer." The question here did not ask about videos specifically i.e. in contrast to photos or other forms of sexual-abuse-of-child images. Yet MD moved directly to saying (effectively) "I could not have had such videos, on account of the house having only dial-up internet." And he said nothing about (possible) photographs or other non-video images. He later added that, with such an internet connection, "You can only be on the phone for a bit [downloading] ... it takes over the phone, and the farm [was] a business ... RW [needed] the hone and, with the internet "on", you cannot use the phone." Here I note that, presumably, downloading via the internet was not the only means by which the suggested content could have ended up on MD's computer. Yet he did not testify that downloading via dial-up internet was the only means he knew by which the content in question could have ended up on his computer (if at all). As well, RW was not asked about the extent to which she needed the home phone for farm business. Or if such need ever extended to "non-business" hours e.g. into the evening, overnight, or early morning. And neither did MD add his perspective on those aspects. I find these aspects cast a further blemish on MD's credibility;

3. MD gave another highly unlikely answer when asked in direct if he **ever spent 8 or 9 hours alone with SD outside the house:** "No, I **never spent [time] outside with SD for any length of time."** He then gave a long answer about how busy he was with farm work – "have to keep going, cannot stop" – in the springtime and the fall – "have to get combining .. cannot stop for anything ... snow is coming", noting that, for a few weeks of the year, he worked up to 20 hours a day. Taking these responses at face value i.e. accepting that for a good portion of the year, MD worked full-bore, he offered no evidence about down times of the year e.g. after harvest and before seeding, when (even with some continuing level of tasks and chores), farm work was undoubtedly at a lower ebb. All asides from points, even during hectic times, when MD must have had (even limited) down time. It is not

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believable that, in the 2.5 years MD and SD lived together, with DD and RW, that MD "never spent time outside with SD for any length of time", just in the normal ebb and flow of everyday life, as the household members went about their various home-based activities – farm work for MD, children walking to and waiting for the school bus, children playing outside, adults giving children rides to and from friends' homes, and various family members working in the garden, playing with the RW's dog, walking outside to do chores, and generally living their lives in close proximity for parts of virtually every day;

4. asked in direct whether his **farm work included caring for RW's cattle**, he said he would [cut] hay, in the summertime, using [a] small tractor, which was dusty and hot, with him needing to pay close attention to cutting the hay. He was then asked who assisted in with that, to which he responded: "no one helped ... **you cannot have someone [else] in the tractor."** His counsel then clarified he had been asking who else assisted him in caring for the cattle i.e. not with cutting hay. I find that MD went out of his way here to point out that (at least per him) no one else could be in the tractor. Even if he had misunderstood the "who helped?" question, all he (reasonably) had to say was that cutting hay was a one-person operation i.e. without having to add that no one else could be in the tractor. This is an example of defensiveness i.e. of using his response as a platform to create an unasked-for impression;

5. at another point in direct he said he was **"never alone with SD in the black pick-up truck."** As far as I could tell from the vehicle-focused testimony of the various witnesses, this truck was the main "everyday" vehicle for these four individuals. I heard testimony about the Kenworth transport truck, a combine, and a seeder, and possibly a swather (not clear it that was a self-propelled or "tractor attachment" unit), but no mention of any other "non-farm" vehicles i.e. other than the black pick-up. I query the likelihood that, in the 2.5 years living together, there was not one occasion when MD and SD were in that vehicle by themselves;

6. later in direct, he said that **DD was "always there" at night** i.e. in the bedroom shared by MD and DD i.e. there was not one night, in the 2.5 years together, that DD did not sleep there i.e. was never away visiting one or both of his parents (who lived elsewhere), at a sleepover with friends, on a weekend camping trip with friends, away on an overnight school or sports-team field trip, pitching a tent outside in the yard on a warm summer night, or falling asleep elsewhere in the house after staying up late to watch TV, among other occasions when DD might have been away for at least one night in that period. I find this highly unlikely;

7. on two occasions in direct, he started **answering questions before his counsel finished asking them**, when it was not necessarily clear, from the opening, what the question was going to be. The first question: "Cast your mind back to any time in SD's grandma's house where you ...." At this point, MD answered "no", with his counsel then finishing his question " ... touched [SD] sexually." The second question: "Did you take pictures of SD ...." At this point, MD answered "no", with his counsel then finishing " ... of her having oral sex with you?" While MD may have guessed correctly what questions were coming or at least

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eventually coming, either question could have unfolded more innocuously e.g. (the first one) ... where you and SD were visiting her together." Or (the second one) " ... on any family occasion?" I find MD was **over-eager to distance himself** from the asked-about events;

8. later in direct, he was asked if there was "a time or occasion where you were driving [at the same time as] having oral sex with SD?" He answered: 'No, like I said, **I didn't teach [SD] how to drive"**, before adding that "there was no reason that ..." and "DD usually wanted to come ... he wanted to do the driving [as he was learning how to drive]." MD's initial response made no sense, as driving lessons were obviously not the only reason why MD and SD may have been driving in a vehicle together;

9. in cross, he was asked "you said you were never alone with SD on the tractor, right?" He answered: "Right." Q: "How about in the house?" His answer: **"[RW] was always in the house with us."** Again, I find this highly unlikely, given how long these individuals lived together i.e. that not one time was RW away or even just outside the house e.g. in the yard or garden or sitting on the steps, when MD and the children or either of them were in the house. Asked further about occasions when RW may have had to go "anywhere", he replied "I usually had to drive her, (for example) to get [farm-equipment] parts, or for groceries [out] to Grande Prairie." Again: highly unlikely. In other testimony, MD and RW (whose testimony I review later) stressed that RW was actively involved in driving the farm equipment – in fact, she did virtually all of the combining and other farm-equipment driving, with MD assisting in a support role e.g. driving the grain-receiving truck(s). It makes no sense that such a centrally involved and apparently robust person would effectively need MD as a full-time chauffeur, particularly given MD's other testimony about how pressing the farm work could be at many points in the year i.e. that he would actually be called into "drive RW around" service whenever RW had to go anywhere;

10. at another point in cross, he acknowledged that, while RW came into the basement to do her laundry and to collect food from the freezer, "for the most part" **she mostly stayed upstairs.** (I will return to this point in reviewing RW's testimony of often being in the basement, including late in the evening);

11. asked in cross if about RW's apparent visits to an **apartment in Chilliwack, British Columbia**, MD said that "Every time ... I had to go [out there] with her because anything that was wrong with it, I was the one to fix it." Again, this is hard to understand, with no follow-up testimony about who looked after the children at such times or whether they accompanied RW and MD on such trips. Or about why it was that only MD could "fix things" at that apartment. Or why things were prone to breaking down at the apartment. Or what things were involved? This was a nonsensical response;

12. asked later in cross if he was "**ever alone in a room with SD**?", he answered "no", immediately. Asked again: "Never?" Answer (immediately): "No." Without taking any time to ponder if that extremely-likely-in-the-circumstances-here event had occurred, even once, in the time they lived together. He added: "It

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was always DD and me and SD. If I was working, it was DD and SD in the house with RW. ... I was either working or [we were] all together." Again, as explained earlier, highly unlikely;

13. later in cross, "were you **ever alone with [SD] at any point [i.e. in any location] over those two [plus] years?**" Answer: "I cannot think of any time I was ever alone with SD for any time." I find this extraordinarily unlikely in the circumstances here. On this subject, for example, shortly after, MD described an occasion when he had to coax an unwilling SD to help with a simple task (monitoring a grain-cleaning operation and turn off a switch if anything seemed off), with no mention of either DD or RW being in the vicinity; and

14. asked further in cross about "never alone with SD" and who would go (as needed) to pick up DD from a friend's house, he said "**Usually [RW] and I would go to get DD, and either leave SD alone or she would come with us."** This seems nonsensical i.e. that these busy farm people would need to team up for a simple task like picking up one of the kids from a friend's house. Shortly after, he added "if I had to go to town, **[RW] would come [along]** ... to get groceries or whatever." Again, highly unlikely.

[27] Overall, MD was a defensive witness, unwilling to acknowledge the slightest, most innocuous, and almost inevitably occurring events, such as whether SD was ever alone with him in his room, he ever spent any material amount of time alone with SD outside the house, they were ever alone together in the pick-up truck or, in fact, they were ever alone together, anywhere, at any point, during their 2.5 years of living tighter.

[28] On this aspect, I adopt the following analysis in ***R v ASP***, 2023 ABKB 79:

> ... I query the likelihood that, over the course of approximately two years, there was not one time that AP and AK were alone in the house e.g. even if TK and YB were just sitting on the front porch or in the yard, at a neighbour's place or walking around the block: see, for example, these **cases where "never alone" evidence was rejected as implausible, most in long-running (multi-year) family settings**: ***R v BB***, 2018 ABCA 420 (paras 33, 34 and 37); ***R v. SA***, 2021 ONCA 434 (para 46); ***R v GW***, 2020 ONCA 130 (paras 2 and 3); ***R v GP***, 2014 ONCA 39 (para 39); ***R v DT***, 2014 ONCA 44 (para 52); ***R v SA***, 2017 ONSC 3169 (B.A. Allen J.) (paras 83 and 94); ***R v KR***, 2016 ONSC 2000 (Laliberte J.) (paras 389-400); and ***R v SS***, 2021 CanLII 33028 (NL PC) (Gorman PCJ) (paras 94-97). [para 41]

[29] As well, as detailed above, MD offered testimony that was variously non-responsive, nonsensical, embroidered with unsought details, and illogical.

[30] Overall, I find, based on the above-described factors, that MD was not a credible witness. He was obviously correct about various background matters. But when it comes to core issues such as how he and SD interacted during their years living together, he was fundamentally evasive and defensive, to the point that I reject his evidence of never being alone with SD, anywhere, at any time, during their 2.5 years living in the same house and also about he and RW effectively being joined at the hip i.e. about how they jointly conducted a considerable amount of

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the farm work together, shuttled the kids (or either of them) around together, got groceries and did other shopping together, and travelled to Chilliwack together.

[31] My central reading of MD is that he was trying extremely hard to hide something about his interactions with SD.

[32] I will return to MD's credibility after exploring RW's credibility.

C. Credibility assessment of RW

[33] As noted, RW was the owner of the farm and residence where MD, SD, and DD lived from early 2004 until late 2006.

[34] She said that, at some point when he was 19 or so years old, MD began to work for her and her late husband on the farm. She said that she and her husband had "embraced him like family." She agreed that "he was like family to [her]."

[35] She told us many times that she would frequently go to the basement, whether to do her laundry ("almost every second day") or to get food or food ingredients from her deep freeze, food-storage cupboard(s) ("rice"), and cold room ("potatoes, onions, and other garden vegetables").

[36] She emphasized that such visits could occur at almost any time ("did laundry, at times, in the morning, or noontime, or the evening ... depends"), including late at night, particularly following long days out in the fields e.g. when the last meal of the day could be very late ("deep into the night"). I find she was trying to create an impression of showing up downstairs at almost any time.

[37] On two occasions, asked about SD's bedroom downstairs, she added (without being asked) that one could see into SD's bedroom, via two windows, from the driveway near the house. Coupled with her two- or three-time reference to being able to see directly into SD's bedroom from various common-area vantage points in the basement, I concluded that she was trying to create an impression that whatever was happening in SD's bedroom could be easily seen by anyone.

[38] In a related series of questions and answers in direct, she told us that "I am in charge of driving the [farm] machinery ... I will do the harvesting ... I am the one who drives all the machinery ... I drove those machines ... I am the driver of the machines." That may be so, but RW's manner of insisting that she was the sole driver of the farm machinery (other than trucks and other than (very limited) occasions when MD would drive to allow her to have her lunch) seemed too insistent i.e. seemed to be straining to create an impression i.e. that MD could never have been in the combine or other farm machinery alone with SD.

[39] She said that, on occasions when SD needed a ride to a friend's place, she "will bring [MD] ... me and [MD] will [take her]." This may tend to confirm MD's evidence about RW and MD driving places together. But, on balance, it makes me doubt both of them on this aspect. Again, I stress the unlikelihood that the two adults on the farm, apparently both very busy running the farm at many stages of the year, would both be required to handle a simple task like giving one of the children a ride to a nearby ("three miles away") friend's place. Especially with no particular reason offered by either of them for why both adults would be needed or, in any case, would prefer, to handle such simple tasks jointly.

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[40] In cross, it was put to her that "you were not with [MD] 24/7?", she said: "... most of the time ... the whole day ... mostly we work together ... and I am close to [MD] the whole day ... we are almost together the whole day", before saying that "at times, he wanted to be alone and read." Later, in response to "you would not be around when [MD] went to bed?", she said: "... I am [sometimes] still awake, and I go to the basement, if [I am] hungry." Later, in response to "you were not with [MD] 24/7 ... there were times that [MD] was alone or [at least] not with you": "Rarely .. because [we were] working on [the] farm ... had to do ... even after seeding ... building together ... I would say most of the time me and [MD] will be together, doing farm work ... just farm work."

[41] I conclude that, based on other (uncontroversial) evidence about RW and SD spending considerable time together, RW was a positive and beneficial force in SD's life during the years in question.

[42] I also accept that RW is a hard-working and industrious farm owner and operator.

[43] She was also a positive force in MD's life.

[44] But I also find that her "like family" connection with MD made her unduly partial to MD, leading her to slant her evidence in his favour e.g. in going overboard on how she was the only farm-machinery operator, how she might show up in the basement at almost any time, how routine driving trips involved both adults, how she and MD were essentially joined at the hip as they went about their farm work, and how SD's activities in the house were easily monitored.

[45] Overall, I find RW to have been unduly partial to MD, to the point that I reject the centre plank of her testimony – (effectively) "I had my finger on the pulse of the household, including knowing what MD and SD, respectively, were up to most of the time."

D. Audiotaped conversation

[46] I next turn to the audiotaped conversation which, per SD, was recorded by her, via her close-at-hand cellphone, on the porch of her mother's home, in New Brunswick, on July 24, 2021 and featuring the voices of SD and MD, who was sitting close to her, as well as (occasionally) those of SD's children running between the house and the porch.

[47] Following a voir dire on the recording, I ruled that the Crown had adequately authenticated the recording i.e. that the recording was what it purported to be i.e. (in part) a capture of a conversation between SD and someone else at the reported place, time, and date.

[48] I noted in that ruling that I could not rule out MD as the male party to the conversation and, in fact, that it may be him, based on the sound of his voice (comparing to his voice heard at the trial) and the speaker making comments reflecting him having been in some sort of guardian or other responsible-person role in respect of SD and her brother when she was 12 years old, which fits with the undisputed evidence that MD in fact served as guardian or at least *de facto* guardian for the children at that time.

[49] I also noted that whether MD was the male party to the conversation would be determined in the trial proper.

[50] I will note here that, based on the sound of the voice and the guardian aspect (as well as any other factor noted on this aspect in my voir-dire ruling) that it was, and is, more likely that

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not that MD was the male party in the conversation: here see ***R v Adam***, 2006 BCSC 1884 (Romilly J.) (paras 159 and 162-165).

[51] I will now turn to how the recording should be viewed in light of the entire evidence, starting with a more detailed exploration of the conversation. (I am largely working from a transcript prepared for the Crown, which all recognized was less-than-perfect, omitting segments of the conversation. As is clear from the recording itself, there are also segments when the voices were hard to hear and when dialogue featuring or involving the children and assorted traffic noises obscured parts of the conversation. However, I am satisfied that the omitted segments are immaterial in the context of what is transcribed i.e. with nothing material omitted and same for the obscured-by-noise segments. What was captured on the transcript represents a materially accurate capture of the material segments of the dialogue between SD and the male person.)

[52] I find the following concerning the conversation:

1. the female adult voice is that of SD, as MD acknowledged;
2. the children's voices are those of SD's children, as MD further acknowledged;
3. while MD asserted that SD had "tampered with" or "chopped off" the recording, all he showed, which SD acknowledged, was that the transcribed portion of the conversation represented roughly the last half of the overall recording. Per SD, the first (approximate) half featured "kid noises" -- i.e. sounds of the children running about and talking – and that it did not feature any dialogue, direct or indirect, concerning the asserted sexual contacts between SD and MD. Nothing in the transcribed portion makes any reference to anything in the first segment, at least nothing bearing on the asserted sexual contacts. MD did not assert that the first segment included anything exculpatory for MD. I see not reason not to take SD at her word here i.e. that the first segment featured irrelevant-here conversation and sounds i.e. that its omission in SD's initial presentation of the recording to the police (i.e. by starting to play the recording at the halfway point) and the focus on that segment in this trial) is a neutral factor;
4. nothing in the recorded portion signalled any obvious signs of tampering i.e. in the sense of anything added to the original recording or anything changed in it. MD argued that SD may have created the male voice, possibly using artificial intelligence to do so (e.g. drawing on earlier recordings she may have made of MD's voice) i.e. created the "recorded" dialogue to effectively frame MD for the alleged contacts. I reject that argument as entirely speculative, with no evidence suggesting this possibility e.g. evidence that SD had any familiarity with AI or other technology that might be used to create such a dialogue, that she knew any persons who did, that SD had ever done anything like that before, that it was in fact possible, by whatever technique, to create a dialogue such as that (apparently) recorded, that she had any particular motive to so fabricate, or that forensic analysis of the recording confirmed or even suggested that the dialogue was fabricated, even in part;

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5. MD acknowledged being in New Brunswick at or around the time of the recording, to retrieve some of his mother's possessions (stored there) before going to Ontario for her burial;

6. he also acknowledged having had at least one private conversation with SD on the porch in question. Per him, it concerned the circumstances of his mother's death exclusively i.e. had nothing to do with the asserted sexual contacts;

7. comparing MD's voice heard at trial with the recorded voice, and noting the imperfect quality of the recording, especially with SD's phone to her far side i.e. i.e. with that person further away from the phone as it recorded, and also noting that, in segments, the male person spoke in a low, at points almost whispering, voice, it is plain to me that it is MD's voice or at least incredibly similar, featuring (in part) the same gravelly dimension of MD's voice heard at trial;

8. the Crown was not obliged to submit the recording for forensic analysis e.g. to obtain voice-expert analysis comparing the recorded male voice to MD's voice (however recorded for comparison purposes);

9. as noted earlier, various comments by the male speaker reflect a guardian or other "responsible adult" role in respect of SD and her brother ("... I didn't treat you like a child at any time. I don't treat, didn't treat [DD] as a child" and (later) "I never stopped you from getting [friends] or from [stet] encouraging you to go out and do whatever you needed to do. I wasn't any kind of controlling ..."). As also noted, MD in fact stood in a guardian or guardian-like role in respect of both children in the period in question;

10. congruent with SD's evidence of MD wearing a condom for every occasion of intercourse, the male speaker emphasizes many times during the conversation that he had always "been careful with that" and hence there was no risk of pregnancy for SD;

11. at one point, the male speaker observes that "my dad and your dad's dad are two different people." SD responded: "Yes, but we have the .. but grandma was ..." Male voice: "I know." SD (continuing): "... you [i.e. the male speaker and SD's father] have the same mom. Grandma was my blood grandmother." Male speaker: "I know." That accords with the trial evidence about how the grandmother connected to both SD and MD;

12. the recorded conversation also squared with SD's evidence of MD showing her sexual-abuse-of-children material. In it, she refers to "the pictures and videos ... like mothers and daughters and really young kids ...", to which the male speaker says "To me, that was just a fantasy";

13. it also squared, in general terms, with SD's evidence that, at times, she instigated the asserted sexual contacts. On the recording, MD says at one point "You kept instigating it at that time ...";

14. the male speaker demonstrates familiarity with SD's age-12-or-younger sexual history (not bearing on consent, any element of the charged offences here, or otherwise raising myths-and-stereotypes concerns), as reflected in a comment that "you weren't a virgin right when we first started." While no other evidence on

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this aspect was presented at trial, the male speaker appears to be in possession of highly personal and intimate information concerning SD, which is consistent with that person having a sexual connection with SD;

15. the male speaker's voice reflects discomfort and tension at points, squaring with an actual capture of an obviously difficult and emotion-charged conversation;

16. the male speaker appears to be familiar with SD's children, and vice versa, at one point apparently speaking to one of them, and no "who are you sitting with? or "who is this?" questions to their mother (or anything akin) from the children;

17. the male speaker expresses disappointment and upset at various points about SD raising the asserted sexual contacts, which squares with her evidence that, in the period in question, MD had told her not to tell anyone about their sexual contacts ("I could get in trouble ... could go to jail");

18. more congruence comes from the male speaker referencing "society doesn't understand" (i.e. about the apparent relationship between the speakers) and SD's evidence of MD telling her the same thing during the period in question;

19. the male speaker apologizes to SD, saying that he never meant to cause her any harm, that he loved her (and she loved him), and that he regrets any hurt that the circumstances were causing SD presently, which squares with SD's overall evidence i.e. of MD having much to apologize for;

20. at one the male speaker says: "I did it with love. I didn't do it just because of the sex. I loved you a great deal. ... And I would never, ever do anything to harm you, intentionally. I'm guessing that's why any time your kid comes near me, you yell at me or yell at the kids to get away ...." Here the speaker indirectly confirms that SD might have a reason to keep her children away from him. (Here I note MD's trial evidence that he babysat for SD's children occasionally. However, the evidence did not indicate whether that was on his own or with others);

21. I note that absence of evidence at trial about any person (i.e. besides MD) who would or may have had the level of familiarity with SD reflected in the recorded conversation;

22. SD offered a plausible – in fact, very understandable – reason for raising the asserted sexual contacts with MD when she did i.e. her emerging consciousness, as the parent of young children of the wrongfulness of the asserted sexual contacts and a growing zeal that her children not be exposed to the same or similar harms;

23. nothing in the recording or otherwise signals that the recorded conversation was staged or artificial in any way e.g. ending with "Okay, now we've finishing read the dialogue in my new play";

24. in MD's denials at trial that the recorded male voice was his, he referred at least twice to "to my ears", a possible acknowledgment (indirect) that the voice at least sounded like his i.e. "It may sound that way to you, but not the way I hear it"; and

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25. MD did not offer any particular reason for believing the voice was not his e.g. "I don't use such words or phrases", "I wouldn't have known that detail", "my voice is different from that voice in _____ way", or otherwise.

[53] Based on these factors, I conclude, beyond a reasonable doubt, that the male speaker in the recorded conversation was MD and that, in that conversation, he admitted having had sexual contacts with SD when she was 12 years old, in the particulars reflected (directly or indirectly) in the conversation, including penile-vaginal intercourse.

V. Conclusion

[54] Based on:

1. SD's evidence being vivid, frequently detailed, centrally consistent, highly candid, logical, responsive, not evidently exaggerated, unusual-detail-including, concession-included, and inconsistencies-largely-explained (and minor ones only, at that), which was corroborated in material respects by MD's admissions;
2. MD's fundamentally evasive and defensive, and often nonsensical, evidence, particularly when contrasted to his recorded admissions; and
3. RW's unduly-partial-to-MD and sometimes nonsensical evidence

I reject MD's evidence on the Crown's allegations, find that no reasonable doubt on those allegations arises from his or RW's evidence (separately or combined), and, when considering all of the evidence, including the admissions, find that no reasonable doubt arises from anyone's evidence or any combination of the evidence.

[55] Based on all the evidence, I find that the Crown proved each element of each charged offence beyond a reasonable doubt. Accordingly, I find MD guilty of both of the charged offences.

Heard on February 5-9, 2024.
Delivered orally on February 20, 2024.
Dated at Grande Prairie, Alberta this 22nd day of February, 2024.

M. J. Lema
J.C.K.B.A.

Appearances:

Amber Pickrell
Alberta Justice
for the Crown

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Obinna Ononuju
Centobin Law Office
for the Accused

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Corrigendum of the Reasons for Judgment
of
The Honourable Justice M. J. Lema

Page 16- Paragraph 13 – Name redacted and initials inserted.

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