

ONTARIO
SUPERIOR COURT OF JUSTICE

| | | |
|----------------------|---|---|
| BETWEEN: |) | |
| |) | |
| HIS MAJESTY THE KING |) | |
| |) | Samantha Saunders, for the Crown |
| – and – |) | |
| |) | |
| R.H. |) | |
| |) | |
| Defendant |) | Mitchell Worsoff, for the Defendant |
| |) | |
| |) | |
| |) | HEARD: January 8-12, 15-16, and 18-19, |
| |) | 2024 |

PUBLICATION BAN

Pursuant to s. 486.4 of the *Criminal Code*, an Order has been made directing that any information that could identify the complainant or a witness not be published in any document or broadcast or transmitted in any way.

REASONS FOR JUDGMENT

MCKELVEY J.:

Introduction

- [1] The defendant, R.H., was the stepfather of B.V. It is alleged that he sexually assaulted his stepdaughter and touched her body for a sexual purpose contrary to s. 271 and 151 of the *Criminal Code of Canada*.
- [2] Specially, the charges against Mr. R.H. are as follows:
1. THAT HE, between the 1st day of January in the year 2019 and the 30th day of September in the year 2020 at the City of Pickering in the Province of Ontario did commit a sexual assault on B.V., contrary to Section 271 of the *Criminal Code of Canada*.

2. THAT HE, between the 1st day of January in the year 2019 and the 30th day of September in the year 2020 at the City of Pickering in the Province of Ontario did, with a part of his body, for a sexual purpose, directly or indirectly touch the body of a person under the age of sixteen years, namely B.V., contrary to Section 151 of the *Criminal Code of Canada*.
3. THAT HE, between the 1st day of September in the year 2020 and the 30th day of September in the year 2020 at the City of Pickering in the Province of Ontario did commit a sexual assault on B.V., contrary to Section 271 of the *Criminal Code of Canada*.
4. THAT HE, between the 1st day of September in the year 2020 and the 30th day of September in the year 2020 at the City of Pickering in the Province of Ontario did, with a part of his body, for a sexual purpose, directly or indirectly touch the body of a person under the age of sixteen years, namely B.V., contrary to Section 151 of the *Criminal Code of Canada*.

- [3] As is apparent from the charges, they have been divided between two different time periods. The first is between September 1 and September 30, 2020. This relates to an initial complaint by Ms. B.V. which was reported to police on October 17, 2020.
- [4] The second set of charges from January 2019 to September 30, 2020 relates to an expanded timeframe where Ms. B.V. asserted that the sexual abuse had started much earlier than the beginning of September, 2020 and had been ongoing for about a year and a half prior to her initial report to police.
- [5] In October of 2020 when the matter was first reported to police, Ms. B.V. was 12 years old and in grade 6.
- [6] At trial, the Crown called the following witnesses:
1. B.V. – the complainant
 2. (V.) R.V. – the complainant’s mother
 3. J.V. – the brother of R.V. and the uncle of B.V.
- [7] In addition, at trial the Crown introduced under s. 17.1 of the Criminal Code, the original police interview of B.V. on October 17, 2020.
- [8] At trial, the defence called the following witnesses:
1. The accused – R.H.
 2. N.P. – a close friend of B.V. at the relevant time

- [9] The complainant in this case asserts that she was sexually abused by the accused for a lengthy period of time leading up to her report to police in October 2020. The evidence of the accused is that none of these events occurred. None of the alleged occurrences were witnessed and the versions given by the complainant and the accused are irreconcilable. As a result, the outcome in this case depends largely on the credibility and reliability of the evidence given by the complainant and the accused.
- [10] The Crown, of course, has the obligation to establish guilt beyond a reasonable doubt. As the defence has called evidence in this case, the principles set out in *R. v. W.(D.)*, 1991, 63 CCC (3d) 397, apply. Thus, in considering the elements of the offence, I must take into account that if I accept the evidence of the accused and/or his witnesses with respect to the essential elements of the offence, I must acquit. Second, even if I do not accept the evidence of the accused and/or his witnesses on the essential elements, but I am left in reasonable doubt, again I must acquit. Third, even if I am not left in doubt by the evidence of the accused and/or his witnesses, I must still ask myself whether on the basis of the evidence which I do accept, am I convinced beyond a reasonable doubt by that evidence of the guilt of the accused?

The Evidence of B.V.

- [11] B.V. was initially brought to the police station by her uncle J.V. on October 17, 2020. She gave a statement to the police on that occasion. In that statement she asserted that the accused had “raped” her on two occasions. The first occasion was in September, 2020. She reported that her mother and sister were sleeping upstairs and her brother was on his Xbox upstairs with his headphones. At around 3:00 a.m. in the morning, she was in the living room when the accused came and took her cellphone out of her hands. He then put the cellphone on the table, pulled down her pants and then pulled down his own pants. He then inserted his penis into her vagina from behind her as she had her hands down on a table in front of her. The accused is then reported to have told the complainant to pull up her pants and she went upstairs crying.
- [12] According to the complainant, the second incident occurred not even a week later. She was in the basement of the home. Her stepfather again came downstairs and pulled down her pants and again put his penis inside her vagina. The alleged assault again occurred in the early morning hours at about 3:00 or 3:30 in the morning.
- [13] In her evidence at trial, Ms. B.V. stated that she did not tell the police officer on October 17, 2020 everything that had happened with her stepfather. She stated that she was afraid at how the family would look at her afterwards. She explained that she gave two more statements to police. In these statements, she described how her stepfather would sexually abuse her almost every day. This involved intercourse almost every day. It would also include oral sex which occurred in his truck. He would routinely ask her to go to Tim Horton’s or the grocery store in the evening. Every time she went with him in his truck he would demand oral sex.

- [14] Ms. B.V. also described how initially her stepfather put his fingers inside of her vagina. The first time this occurred was in her mother's room while they were on the bed watching a movie. At some point her younger sister was sent to bed and her mother went downstairs for a smoke. Mr. R.H. started to touch her vagina over her clothing. Ms. B.V. estimated that the sexual abuse started when she was 9 or 10 years old.
- [15] Ms. B.V. also described how the intercourse would occur not only at night, but regularly at the lunch hour when she would come home from school. Her stepfather would be alone with her in the house as he worked on cars at the house during the day for his living.
- [16] According to Ms. B.V., Mr. R.H. told her that if she did what he wanted he would do what she wanted. This involved taking her to the mall to buy vapes for her as well as getting her hair and nails done at the mall.
- [17] In cross-examination, Ms. B.V. agreed that there were times when she was mad or angry at her stepfather and that in around September or October 2020 she wanted Mr. R.H. out of the house.
- [18] During the course of her evidence, Ms. B.V. appeared to be very sincere and was very emotional during the course of her evidence.
- [19] There was some support from R.V., the complainant's mother, for some of her evidence. R.V. testified that the accused would regularly take B.V. to Tim Horton's, but could not be exactly sure when these visits took place. She also described how B.V. had developed behavioural problems starting at around age 10 or 11.
- [20] R.V. in cross-examination reported that shortly after B.V. had reported the sexual abuse to police, she sent her to Newfoundland to live with her grandmother. She stated that she found something in the garage that concerned her and that the decision to send B.V. to Newfoundland was for her safety. She did not provide any details with respect to the nature of the concerns she had at that time.
- [21] J.V. reported that on the morning of October 17, 2020, he went to B.V.'s house. He was going to take B.V. and his daughter to get an oil change. However, his daughter reported something to him which prompted him to take B.V. to the police station because of a reported assault. He described B.V. as having been crying and looking very distraught that morning.

Evidence of R.H.

- [22] Mr. R.H. is currently age 55 and works as a mechanic and in construction. He described how he met R.V. and began living with her and her family in an apartment in Scarborough shortly after. R.V. soon became pregnant with Ireland, which was his child. B.V. was his stepdaughter. Eventually the family moved into a house in Pickering.
- [23] Mr. R.H. was adamant that he never touched B.V. in a sexual way. He denied having intercourse, oral sex or touching her in an inappropriate way. Mr. R.H. appeared genuinely

upset at the allegations. He maintained that he was trying to be a good father to B.V. and that the allegations were “sick” and that they never happened.

- [24] In cross-examination, Mr. R.H. acknowledged that he had a long criminal record. The convictions were for things like break and enter, theft, fail to appear, obstruction of justice, mischief, assault, break and enter with intent, possession of a narcotic, driving while disqualified, uttering threats and driving over the legal limit for alcohol.
- [25] Most of Mr. R.H.’s convictions took place on or before September 2012. However, there were a number of convictions relating to his relationship with R.V. These included a failure to comply with a release order, uttering threats and criminal harassment involving R.V., as well as a conviction for assault on R.V. from August 2023.
- [26] Mr. R.H. testified that he had a lot of conflict with B.V. He was the main disciplinarian. He would regularly cut off her internet and take away her laptop as well as her phone. On a couple of occasions, B.V. went out all night. On one occasion she stayed at a laundromat with her cousin in Port Perry.
- [27] Mr. R.H. agreed that he gave money to B.V. to buy a vape. This was to replace one B.V. told him she had broken that belonged to a friend. He also agreed that he went to the mall to buy another vape for B.V. This was because B.V. had promised to tell him the name of her mother’s boyfriend. Mr. R.H. also agreed that he would take B.V. to Tim Horton’s or a grocery store in his truck if she wanted to go. It is possible this occurred a couple of times per week.
- [28] Mr. R.H. also agreed that he would routinely take B.V. to the mall for shopping, to have her hair done or nails done. He also gave her money for lunch at a local restaurant called “Bubba John’s”.

Analysis

- [29] This case is a challenging one. On the one hand, B.V.’s evidence appeared sincere and genuine. On the other hand, Mr. R.H.’s denial that he touched B.V. in an inappropriate way also appeared genuine. At the same time it is apparent that the two versions of events are irreconcilable. None of these events were witnessed and there is no forensic or other independent evidence to support or refute the allegations.
- [30] With respect to Mr. R.H.’s evidence, he acknowledged purchasing vapes for B.V. and he also acknowledged regularly taking her to the mall to buy her gifts. To some extent this supports the evidence of B.V. that she was taken to the mall as a *quid pro quo* for providing sex to Mr. R.H. The Crown also points to Mr. R.H.’s long criminal record as a basis to attack his credibility generally.
- [31] It is apparent that this was a dysfunctional family. B.V. did not approach her mother about any concerns she had with Mr. R.H.’s behaviour. The mother appeared to leave all of the discipline of B.V. to Mr. R.H.

[32] One area where both B.V. and Mr. R.H. found common ground is that they both testified they often fought and had serious disagreements. I found it significant that in her evidence on cross-examination, B.V. agreed that she wanted R.H. out of the house and there were certainly times when she was very mad or angry at him. At trial she gave the following evidence:

Q. Just a few more seconds, if you will. I just had a couple questions. I just wanted to put you a couple things. Number one, just to end off. My understanding is that you really wanted [R.H.] out of the house at a certain point. You wanted him out of there. Right?

A. Sometimes, if he was to make me mad.

Q. Closer to the end, you wanted him to leave. You didn't want him to live with you anymore and your family? Do I have that correctly?

A. I wouldn't really say that, no.

Q. You wanted to remain living with him?

A. There was times where I didn't, of course, with being mad or angry.

Q. I'm talking about closer to September 2020, October 2020. You -- at that point you wanted him to be out of your life?

A. Yes.

Q. Right?

A. Yes.

[33] In Mr. R.H.'s evidence, he described many of the disciplinary actions he took against B.V. This seemed at odds with the fact that he would be routinely taking her to the mall to buy her gifts or vapes. On the other hand, however, B.V. agreed that she sent her stepfather a Father's Day card which told him she loved him and that he "frankly deserves a medal for putting up with my shit". This suggests that there were times when B.V. and her stepfather got along and that she respected him.

[34] The complainant's evidence raises an issue as to whether she had a motive to fabricate allegations against the accused as a means of getting him to leave the home. However, if the accused was harassing the complainant sexually, she would have very good reason to want the accused out of the home, although this was not mentioned by the complainant in her evidence on this issue. On balance I am not persuaded that I should find that the complainant demonstrated a motive to fabricate evidence against the accused. This conclusion is reinforced by the inferences I draw from the Father's Day card that there were times when B.V. and her stepfather got along and that she respected him. According

to the complainant's evidence she wanted her stepfather out of the home when she got mad at him from time to time.

- [35] There were, however, what I find to be significant discrepancies in B.V.'s evidence. The first and most obvious one is that in her original statement to the police, she only mentioned two incidents of sexual intercourse which had occurred during the month of September 2020. In her later evidence at trial and in subsequent statements to police, she dramatically altered her evidence to suggest that she had suffered longstanding sexual abuse from about age 9 or 10 years old. Her evidence at trial, therefore was dramatically different than her initial statement to police. Ms. B.V. attempted to explain these discrepancies by suggesting she was scared and unprepared for the police interview. She stated she didn't tell the police everything that had happened because she was afraid at how the family would look at her afterwards. At the beginning of the police interview, however, Detective Constable Sullivan specifically asked B.V. "do you promise to tell the truth today?". She answered "yes". If B.V.'s evidence at trial is true, it is apparent that she was not telling the truth to the police officer at the time of the initial interview on October 17, 2020. I reject the notion that Ms. B.V. would not have remembered the earlier episodes of sexual abuse in light of her evidence that she was having sexual intercourse with Mr. R.H. on an almost daily basis previously.
- [36] The inconsistencies between Ms. B.V.'s evidence in her original statement to police and her evidence at trial include the following:
- (a) There was no reference to the defendant inserting his fingers into her vagina in her statement to police;
 - (b) There was no reference to oral sex in the original statement to the police;
 - (c) The original statement to police references only two incidents of sexual intercourse, while in her evidence Ms. B.V. states she had experienced sexual intercourse daily since the age of 9 and 10;
 - (d) In her evidence at trial Ms. B.V. spoke of her providing sex in order to obtain benefits such as vapes and other presents from the mall.
- [37] While I appreciate that a young child like Ms. B.V. may have been genuinely concerned about how her family might react to her disclosure of sexual abuse, the fact remains that her statement to police was not truthful which must be taken into account in assessing her credibility.
- [38] Another more subtle inconsistency in B.V.'s statement to police concerns her knowledge of ejaculation. At the police interview on October 17, 2020, she was asked the following questions about ejaculation.

DCS: Ok. Do you know if anything happened to his body, like ... like as a ... like when he was doing that? When he pulled out, like do you know why he pulled out or .. ?

BV: Uh, no.

DCS: Ok. Um, do you know what ejaculation means?

BV: No.

DCS: No? Um ... so ejaculation, and ... and I know this is uncomfortable, um, to talk about. Um, when somebody gets arou --... when a male gets aroused and then, um, has an orgasm do you know what an orgasm is?

BV: Yes.

DCS: Ok. Then, um, ejaculation, its like a ... a white substance comes out of his penis ok? Are you able to tell me if that happened?

BV: Uh? I wasn't paying attention.

[39] In her evidence at trial, however, B.V. stated that a couple of times when they had intercourse in her mother's room, Mr. R.H. would go into the bathroom and ejaculate and then he would get her to wipe her vagina.

[40] I appreciate that Ms. B.V.'s understanding of exactly what was going on (if truthful) may have changed as she got older. Nevertheless, her articulation of going into the bathroom with Mr. R.H. and him ejaculating was in my view, a significant inconsistency between her statement to police and her evidence at trial. She stated in her original statement to police that she wasn't paying attention and had no recollection of the defendant ejaculating, having been given a clear explanation of what this entailed.

[41] A more significant inconsistency relates to B.V.'s evidence about a conversation she had with a good friend at the time, N.P. On cross-examination, B.V. acknowledged that she was a good friend of hers at the time. She was asked the following question about her discussions with N.P.:

Q: Do you recall saying to her that you were going to make something up about what [R.H.] did to you?

A: No.

Q: You don't recall ever saying that to her?

A: No.

[42] N.P. gave evidence for the defence. She testified that she was B.V.'s best friend at the time. She described a discussion she had with B.V. which apparently took place in the summer of 2020. She recalled that the schools were closed and it was warm outside. Both of them were wearing shorts. As they were walking together, B.V. told her that she didn't like R.H. and that she was going to claim rape against him. Ms. N.P. said that the thrust of the

conversation is that B.V. said that she didn't like Mr. R.H. and that she was going to try any way she could to get him out of the house. She said specifically that she might claim he raped her. Ms. N.P. then responded that she didn't think that was a good idea. The Crown argues that the evidence of Ms. N.P. is not reliable because she could not recall the words B.V. used and could not recall the details of the conversation before or after. She also agreed that the words "claim rape" were not used, but that in her view, that is what B.V. was saying. She did not disclose this to anyone at the time, including Mr. R.H., despite testifying that she would tell Mr. R.H. whenever B.V. was doing "bad things".

- [43] At the outset, it is to be noted that the comments reported by Ms. N.P. about her conversation with B.V. are hearsay and cannot be relied on for the truth of their contents. However, B.V. was questioned about this conversation and denied that it had occurred. Section 11 of the *Canada Evidence Act* provides as follows:

Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

- [44] Thus, while the statement which is alleged to have been made to Ms. N.P. cannot be relied upon for the truth of its contents, the fact that the statement was made to her can be considered as going to the credibility of B.V., who denied at trial making such a statement.
- [45] Contrary to the Crown's assertion that Ms. N.P. was an unreliable witness, I found her to be a very credible and reliable witness. Her assertion that she was a close friend of B.V.'s at the relevant time was confirmed by B.V. in her cross-examination. Similarly, her recollection that Ms. B.V. wanted Mr. R.H. out of the house was at least partially confirmed by Ms. B.V. in her evidence when she stated there were times when she wanted Mr. R.H. out of the house. She was unshaken in her assertion as to what her friend had told her. Her inability to recall the exact words used by B.V. is not surprising given the passage of time and that she had no interest in the outcome of the charges. Her failure to come forward to police at an earlier time is understandable given her young age at the time these events occurred.
- [46] I accept Ms. N.P.'s evidence as to what she was told by B.V. in the summer of 2020. While that evidence cannot be used for the truth of its contents, it creates a serious credibility issue in considering B.V.'s evidence.
- [47] The Crown maintains the accused lied when he denied sexually abusing his stepdaughter. It was suggested that he attempted to minimize any wrong-doing regarding his criminal record. For example, when confronted with his conviction for operating a motor vehicle with over 80 mg of alcohol in his blood, his response was that he was sleeping in the car and wasn't operating it. When confronted with his convictions for offences against R.V.

including convictions for fail to comply, assault and criminal harassment (following a guilty plea) he testified that he pleaded guilty so that he could get out of jail. I should note at this point that Mr. R.H.'s explanation about his convictions, while suspicious, don't necessarily represent an inconsistency in his evidence because in a number of cases we do not have evidence about the facts which were found underlying his convictions and which were raised by Mr. R.H. in his evidence. Having said that, the number of convictions for Mr. R.H. involving the V. family is concerning. I am also concerned about the accused's criminal record generally. This clearly has an impact on his credibility. It is also significant that to a large extent the accused's evidence is difficult to accept in a normal stepfather – stepdaughter relationship. His purchase of two vapes for B.V. represents at a minimum, very poor judgment on his part and raises a serious question as to why he would have ever agreed to this. His own evidence verified some significant details of the complainant's evidence as to how the sexual abuse could have occurred (For example, the trips to the mall and Tim Horton's). It is apparent that the accused did at least have the opportunity to commit these offences.

[48] Yet, even if I reject the evidence of the accused, I must still be satisfied beyond a reasonable doubt on all of the evidence that the accused is guilty of the offences charged. In this regard the inconsistencies of the complainant's evidence as referred to above are very concerning, especially in a case where the truthfulness of the complainant's evidence is the only real evidence before me that sexual abuse by the accused occurred.

[49] I, of course, accept that as a matter of law, no corroboration is required to support the charges against the accused. I also accept that the complainant was a young child when the allegations were made and that she was only fifteen when she testified at trial. In *R. v. W. (R.)*, 1992 CanLII 56 (SCC), the Supreme Court noted,

In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[50] In the present case the inconsistencies I am concerned with strike at the heart of the allegations against the accused and I have concluded they cannot be ignored.

[51] I have concluded that the inconsistencies in the evidence of B.V. do raise a reasonable doubt as to whether the Crown has established the charges alleged against Mr. R.H. It must be recognized that the criminal standard of proof is a high bar. While B.V. appeared sincere in recounting her evidence generally, the inconsistencies in her evidence leave me with significant concerns about her credibility and the reliability of her evidence. I have further concluded there is a reasonable doubt as to whether the alleged incidents occurred. As a result, all charges against Mr. R.H. are dismissed and an acquittal will be entered.

Justice M. McKelvey

Released: April 3, 2024

CITATION: R. v. R.H., 2024 ONSC 1920

ONTARIO

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

– **and** –

R.H.

Defendant

REASONS FOR JUDGMENT

Justice M. McKelvey

Released: April 3, 2024