

## WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

**486.4 Order restricting publication — sexual offences.** — (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

. . .

**486.6 OFFENCE** — (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

# ONTARIO COURT OF JUSTICE

CITATION: *R. v. B.(G.)*, 2024 ONCJ 260

DATE: 2024 05 30

COURT FILE No.: Central West Region 23-47103072

**B E T W E E N :**

**HIS MAJESTY THE KING**

**— AND —**

**B.(G)**

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Before Justice J. De Filippis  
Heard on April 18 – 19, 2024  
Reasons for Judgment released on May 30, 2024

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**Ms. R. Branton.....counsel for the Crown**  
**Mr. L. Triemstra ..... counsel for the accused**

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**De Filippis, J.:**

## INTRODUCTION

[1] The defendant was charged with sexual assault and sexual interference. Proof of date, jurisdiction, and identity is not controversial. There is also no doubt that the act described by the complainant, if proven, amounts to sexual assault and sexual interference. I heard from the complainant, her mother, and the defendant.

[2] The defendant is 35 years old. When he was four or five years old, he and his sister – the complainant’s mother – were apprehended by the children’s aid society as their parents could not care for them. The siblings became separated; the defendant was in foster care and then became a Crown Ward. He and his sister later reunited.

[3] The complainant is the defendant’s niece. She is 12 years old. The act alleged occurred in the complainant’s bedroom on June 29, 2022, at the City of Hamilton. She was 10 years old at the time. She told her mother about the incident one year later when she was 11 years old. Her mother called the police.

[4] These reasons explain why I find the defendant not guilty.

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NOTE: This judgment is under a publication ban described in the WARNING page(s) at the start of this document. If the WARNING page(s) is (are) missing, please contact the court office.

## EVIDENCE

[5] The complainant testified by CCTV from a room adjacent to the courtroom. The 40-minute video record of her statement to the police was played. After making the child feel comfortable with questions about school, friends, and her pet, the interviewing officer asked “Do you know why you’ve come down to see me? Tell me about that”. In response to this and other questions, the complainant provided this information:

So when I was dreaming on my bed, I closed my eyes but then, but then I was frozen in fear...because Uncle [XXX] was putting his little fingers on my no-no hairs. And I really did not like that. So I was frozen in fear. I couldn’t do anything. I was scared. No idea what the heck to even do. Nobody was in there. Probably my mom was at the store or somewhere else, I don’t know...like Uncle [XXX] was babysitting me and I did not want to like for Uncle [XXX] to just go (demonstrates). But like still was like frozen in fear...also I even forgot about it. Like, I’m a very very lazy person so I forget lots of things....it was a like a way long time ago when I was ten. So, that’s why I forgot.

...he is the best uncle. I play with him and stuff. But until that one day when I was 11, because that day was when my brain clicked and literally I just remembered. Da-dah.

I didn’t know how it started. He just, he just appeared out of nowhere. And how it ended, uh, I don’t even know.

My room. On my bed. Uncle [XXX] appears out of nowhere, pulls down, pulls down my underwear and pants and touches my no-no hairs...with one hand. More like one finger (demonstrates finger).

I didn’t know what he said...I was like, I’m still kind of scared, and don’t remember.

Like him and me are still good pals, but not anymore when I finally remember and told my mom. So, like that, like I was like, “Hey mom, also guess what?” “What?” “Also a long time ago, I just remembered, Uncle [XXX] touched my no-no hairs a long time ago.” And mom was like, “Did he actually do that?” And I said, “Yes”. And my mom deleted everything about Uncle [XXX] on our phone.

[6] At the end of the interview, the complainant was asked about “no-no hairs” and said, “So, like, he wanted to touch my vagina hairs”. When asked, “Where else did he touch”, she replied, “Nothing else”.

[7] The complainant testified that she recognized the video recorded interview and she was telling the truth. When asked if she wanted to change or clarify anything, she said that the defendant “did not appear out of nowhere, he and I were chilling on the bed having a nice conversation”.

[8] In cross-examination, the complainant was asked about a reference in the police interview to being a “therian”. She said that at the time of the events in question she was a therian and acting weirdly. In explaining that she is now a “furry”, she mentioned something about sex. Why she mentioned this is unknown to me; neither party pursued the matter, although defence counsel referenced it in submissions.

[9] The complainant confirmed that on the day she disclosed the incident, she was sitting with her mother on a bed talking about “stranger danger stuff”. She could not recall if she went to school that day or was sad but added that “I was feeling guilty because I couldn’t tell my mom sooner”. The complainant denied that her mother had told her she had been the victim of sexual violence.

[10] The complainant said she could not recall the defendant leaving the room on the day in question and added, “he said keep this a secret, that is probably what he said...I remember that, but I don’t exactly know, keep a secret or something”. Defence counsel reminded the complainant that the interviewing officer had asked her several times if the defendant said anything, and she had replied “no” each time. When asked to explain this, she said, “I don’t know how that happened, I’m a kid and my brain is still developing” and insisted that he did say it “when the thingamabob started”.

[11] The complainant could not recall the month or day of the incident. She provided varying accounts of how long it lasted. When asked if she was positive that the defendant touched her, she replied, “Yes. But I was telling some lies to the police. Because I didn’t know stuff so I told him what was in my head at that time” and added that she lied when she said the defendant appeared out of nowhere.

[12] The complainant’s answers in re-direct examination clarify that when she said, “I was telling some lies” and “I know stuff now that I didn’t know then” and gave “different answers”, she is referring to the fact that in the police statement she said the defendant appeared out of nowhere and this is not correct.

[13] The complainant’s mother, V.K., is 34 years old. She lives in a townhouse in Hamilton with her spouse and seven children. Her spouse is not the biological father of the complainant.

[14] V.K. testified that she and the defendant were taken from their parents when she was four or five years old and separated. When she was 14 years old, she saw her brother in a local convenience store. He lived nearby and they saw each other weekly. He was in receipt of income from the Ontario Disability Support Program and would help her with the children by babysitting and driving them to places as she does not have a licence.

[15] V.K. noted that the complainant has been diagnosed with attention deficit hyperactivity disorder and a learning disability. She described her daughter as follows: “A quiet child who keeps to herself. She has difficulty making friends but enjoys the friends she has. She likes to hang out in her room, watching movies, playing games, and playing with her stuffed animals and artwork”.

[16] V.K. testified that in April 2023, she noticed that the complainant was upset as they walked to school. She took the child back home and after asking what was wrong learned about these allegations. The complainant said, “I forgot to tell you. This is what happened”. She immediately called the police.

[17] V.K. acknowledged that the defendant often watched her children and noted that “the little ones would be joyous and hugging when he arrived at her home”. He would “rough house” with them and “there were no issues about this”. There was one area of concern: V.K. would not permit the defendant to be with her children when he had consumed alcohol and explained, “because he is an alcoholic”. She later added that “he has emotional, social, and temper issues when under the influence of alcohol”.

[18] V.K. confirmed that the complainant was “part of a therian and furry community with friends at school” and explained that “she likes to play, she’s a child”. She has a TV in her room with internet access subject to parental control.

[19] With respect to the disclosure of allegations, V.K. reiterated in cross-examination that the complainant was upset while walking to school and that she was crying. V.K. took her daughter home and raised several possible causes with the child, such as bullying at school or problems at home with her siblings. The complainant answered no to each subject matter. V.K. then told her daughter that she had had traumatic experiences as a child to let her daughter know she was not alone. V.K. added that she did not “get into details” about these experiences. After this, the complainant told her that the defendant had asked her to get changed and touched her private area. V.K. did not ask more questions as she had a panic attack and called police.

[20] In the almost one-year period between the date of the allegations and the disclosure of same, the defendant was often at V.K.’s home and babysat one or more of her children about ten times. V.K. did not notice any change the complainant’s behaviour. When asked about any change in the defendant, V.K. replied, “he had his own separate issues” and explained that on one occasion in that year, he was told not to come near her children and when the issue was resolved he was welcomed back. What this issue was is unknown to me; neither party pursued the matter.

[21] The defendant is single, with no children. He rents a room in a house. He has been on social assistance since 2022. He struggles with mental health issues and alcohol abuse, which he attributes to his days in foster care. Between 2013 and 2023, he has been convicted of assault, arson, and seven counts of failure to comply with court orders.

[22] The defendant testified that he was in foster care until the age of 18. He lived with several families and said that the first one, when he was four or five years old, “was “bad...of a sexual nature”. He added he knows the feeling of sexual abuse, that he has struggled with it all his life, and would not wish it on others, especially a family member. At the age of 12 he suffered a brain injury.

[23] At the age of 15 or 16, the defendant met his sister, V.K. He did not recognize her. He had a vague memory of her as a child. She approached him and told him they were siblings. She had a picture of him. In the 20 years that followed, they maintained contact. He babysat her children, sometimes four or five of them at a time, depending on V.K.’s

need. He testified that he loves his sister and described happy memories her children, building forts and playing hide and seek.

[24] The defendant denied touching the complainant inappropriately. He said he is not sexually attracted to children. He added that he is confused by these allegations, his depression is now worse, and he wishes he could reunite with his sister and her children.

[25] The defendant testified that he babysat her sister's children in the last year. When it was pointed out that he has been on bail for the present charges during that time, he seemed confused. He added that he began babysitting the complainant when she was ten years old. When confronted with his prior statement to police that he had babysat his sister's children since they were babies, he explained that he did not mean babysitting in the absence of his sister but watching them while she was in the home. When pressed by the Crown on this issue, the defendant again appeared confused. He acknowledged he may be mistaken about the number of times he babysat and over what period. Ultimately, he stated he would not quarrel with his sister's trial testimony that he babysat her children in the six years before being arrested for these charges.

[26] The defendant testified that he had always had a good relationship with the complainant. He said she looked up to him. He agreed that it was normal for him to go to her room and talk with her or play video games. The defendant denied taking advantage of the opportunity while alone with the complainant to sexually assault her; he said, "I would never do that".

[27] The defendant agreed that he is heterosexual and, at the time of these events, was not in a relationship, adding that, "my relationship with C. ended with my suicide attempt". When the Crown suggested he was sexually frustrated, he replied that that was not an issue. I interrupted further cross-examination along this line for two reasons. I asked the Crown why she was doing what the Defence could not do without leave of the court. I also questioned whether it was reasonable to infer sexual frustration in an adult would lead to sexual interference with a child. The Crown did not ask further questions but returned to the matter in submissions.<sup>1</sup>

## SUBMISSIONS

[28] The Defence began submissions with certain obvious facts: There is no independent evidence of what, if anything, happened on the day in question. The complainant testified the defendant touched her vagina with his finger. The defendant says he did not do so.

[29] It is the position of the Defence that that there are credibility and reliability concerns with respect to the complainant's evidence. The complainant admitted to lying about the

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<sup>1</sup> Since hearing the evidence in the present trial, I have read *R. v. Kruk*, 2024 SCC 7 and realize I may have erred in interrupting the Crown for the first stated reason. The Supreme Court rejected any "false symmetry" between complainants and accused and held that the law on myths and stereotypes operates asymmetrically. However, any error on my part is not relevant as I will explain.

defendant appearing out of nowhere and this, it is said, shows her initial statement was fabricated and that the clarification in trial testimony is intended to give credence to her story. Similarly, in trial testimony the complainant said the defendant told her not to tell anyone what happened and later, that he probably said this, but in her statement to police she reported that he said nothing. Moreover, she testified the incident lasted, 25 or 30 or 45 minutes. This cannot be accurate given that the defendant likely had the care of the children at the time, including a one- and three-year-old.

[30] Defence counsel points to the complainant's testimony that her internet browsing revealed a connection between furry culture and sexual activity and that she disclosed the allegations after her mother told her she had had traumatic experiences as a child. This, it is argued, explains why the complainant made up this story of sexual abuse.

[31] Counsel submits that the defendant was a credible witness. He testified he loves his sister and her family and would not inflict his suffering on others. There is no basis to conclude he is sexually attracted to children or that he was sexually frustrated at the time. Counsel adds that the defendant's confusion about when and how long he was babysitting is not suspicious and may be due to his brain injury. In any event, it is argued that this reliability problem is not such as to undermine his assertion of innocence.

[32] The Crown submits that the complainant was a credible witness. The inconsistencies in her evidence were explained or relate to peripheral matters that do not undermine her testimony. Counsel states that this much is clear: The defendant came into her bedroom, pulled down her pants and underwear, and touched her vagina. She demonstrated this as a rubbing or tickling motion with her finger. She froze with fear.

[33] The Crown argues that the complainant's clarification about how the defendant came into her room enhances her credibility. He obviously did not come out of nowhere. Moreover, the complainant testified that she and the defendant were "pals" and that she does not know if they are "still pals". This shows there is no animus.

[34] The Crown points out that V.K. testified that her daughter was upset on the day she disclosed the allegations. There is no basis to conclude she did so to obtain her mother's attention. Rather, this is a case of a child who suppressed a frightening memory, and that the complainant suppressed the memory of the incident and told her mother about it one year later.

[35] The Crown submits that the inconsistencies in the defendant's testimony about when and how often he babysat show carelessness or disregard for the truth. Moreover, he was evasive about how often and how long he would be in the complainant's room. In addition, his criminal record impacts upon his credibility. Counsel urged me to consider the defendant's sexual frustration as the reason he took advantage of the opportunity to be alone with the complainant to commit the offences. Lastly, the Crown argued that I should reject the defendant's evidence based upon my acceptance of that of the complainant beyond a reasonable doubt, as discussed in *R v A.K.* 2020 ONCA 435.

## ANALYSIS

[36] This is not a case that presents difficult issues with respect to the law of sexual offences, such as consent and capacity. It is to be decided on an assessment of the credibility and reliability of the witnesses. Were they truthful? Did they accurately recall the events? What facts are established by this evidence?

[37] The Crown must prove its case beyond a reasonable doubt if the defendant is to be found guilty. This means that if the defendant has called evidence, there must be an acquittal: (i) where the testimony is believed, (ii) where the testimony is not believed, but leaves the trier of fact in reasonable doubt, (iii) where testimony is not believed and does not leave a reasonable doubt, but the remaining evidence fails to convince, beyond reasonable doubt, that the defendant is guilty: *R v W.D.* (1991), 63 C.C.C. (3d) 397 (S.C.C.). The application of this principle does not mean the defendant's evidence is to be viewed in isolation, divorced from the context or other evidence in the case: *F v R.D.*, [2004] O.J. No. 2086(O.C.A).

[38] I have confidence in the testimony of V.K. She was a careful and fair witness. Her evidence is important but limited. She confirms that something was troubling the complainant on the day she reported the act in question; indeed, she was crying. I can also conclude that the defendant was not under the influence of alcohol on the day in question. V.K. knows her brother is an alcoholic and would never permit him to be around her children when intoxicated.

[39] In considering the evidence of the complainant, I adopt a common sense approach mandated by the Supreme Court of Canada in *R v W.(R.)* [1992] S.C.R. 122. This recognizes that children often experience the world differently than adults. That a child may not recall details about context does not necessarily mean the child is mistaken about what happened and who did it. I also recognize that the absence of a proven motive to fabricate does not necessarily mean the child's testimony is truthful.

[40] The Defence invites me to find the complainant's testimony is suspect because of her comment about furry culture and sexual activity. The fact that the complainant disclosed the allegations after her mother said she had had traumatic experiences could be, as her mother intended, an invitation to be candid, or it could be taken by the complainant as an opportunity to bond with her mother by fabricating a similar traumatic event. The Defence invites me to find the latter. There is insufficient evidence to justify these findings.

[41] I am not troubled that the complainant admitted lying to the police about the defendant coming into her room from nowhere. This is simply the child's way of saying she now recalls it differently and was initially mistaken.

[42] I do not accept the Defence submission that there are credibility and reliability concerns with respect to the complainant. However, that does not end the matter because I also do not accept the Crown's invitation to reject the evidence of the defendant. In this regard, I begin with the Crown's final submission.

[43] I understand that a conviction can be based upon a bare rejection of a defendant's testimony, if accompanied by a considered and reasoned acceptance of a complainant's testimony. In the present case, the prosecution is almost entirely dependant on the



complainant. Her evidence, which may be preferable to that of the defendant, is not of sufficient force to exclude it.

[44] The defendant looks and sounds much older than 35 years of age. It is obvious he has had a hard life with childhood trauma. He has struggled with mental health issues. He is an alcoholic. I disagree with the suggestion he was evasive in giving evidence or that inconsistencies point to untruthfulness.

[45] The defendant's testimony about babysitting in the year prior to this trial was not an attempt to mislead. He was on bail with a no contact term at the time. The lie would be obvious. Moreover, nothing turns on the matter. The defendant was clearly confused. Similarly, his confusion about when he began babysitting and for how long may impact reliability but has no bearing on credibility. Again, nothing turns on the matter.

[46] The defendant did not shy away from the Crown's suggestion that he had opportunities to be alone with the complainant in her bedroom. What he disputed was how long he could be in that room, if the other younger children were at home in need of babysitting. That is, the defendant admits the opportunity to commit the offence but denies doing so. In this regard, there is no basis to disbelieve him because of sexual frustration. Firstly, there is no evidence to support this challenge to credibility; the defendant disagreed that this was "an issue". In any event, the challenge rests on a link between sexual frustration, by an adult, and child sexual abuse. Without more, I would not draw this inference; it is not in accord with logic or common sense.

[47] I have considered the defendant's credibility through the lens coloured by his criminal record. This does not cause me to disbelieve him.

[48] It has not been proven beyond a reasonable doubt that the defendant is guilty. The charges are dismissed.

**Released: May 30, 2024**

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Signed: Justice J. De Filippis