CITATION: R. v. M.F.1 & P.F., 2010 ONSC 4018
COURT FILE NO.: 117/09
DATE: 20100825

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN	Mary Ward, for the Crown
– and –	
M.F.1 and P.F.	Donald Fraser, for the Accused M.F.1 Victoria Loh, for the Accused P.F.
	HEARD: May 10, 11, 12, 13, 14, 17, 18 and 21, 2010

REASONS FOR JUDGMENT

GRAY J.

[1] This non-jury trial took place with respect to a 15-count indictment. A summary of the charges is as follows:

Count	Complainant	Accused	Period	Charge	Section C.C.
#1	T.K.	P.F. and M.F.1	Nov 29/00-Aug 10/03	Sexual Assault	271

#2	T.K.	P.F. and M.F.1	Nov 29/00-Aug 10/03	Touch for sexual purpose person under 14	151
#3	T.K.	P.F. and M.F.1	Nov 29/00-Aug 10/03	Gang sexual assault	272(1)(d)
#4	T.K.	P.F.	Nov 29/00-Aug 10/03	Death threat	264.1(1)(a)
#5	T.K.	P.F.	Nov 29/00-Aug 10/03	Sexual Assault	271
#6	T.K.	P.F.	Nov 29/00-Aug 10/03	Touch for sexual purpose person under 14	151
#7	A.P.	P.F.	Dec 4/04	Sexual Assault	271
#8	A.P.	P.F. and M.F.1	Dec 4/04-March 31/05	Sexual Assault	271
#9	A.P.	P.F. and M.F.1	Dec 4/04-March 31/05	Gang Sexual Assault	272(1)(d)
#10	A.P.	P.F. and M.F.1	Dec 4/04-March 31/05	Sexual assault	271
#11	A.P.	P.F. and M.F.1	Dec 4/04-March 31/05	Gang Sexual Assault	272(1)(d)
#12	A.P.	P.F.	Dec 4/04-March 31/05	Sexual Assault	271

#13	A.L.	M.F.1	Oct 3/02-Oct 3/04	Sexual Assault	271
#14	A.L.	M.F.1	Oct 3/02-Oct 3/04	Counsel sexual touching	152
#15	A.L.	P.F.	Oct 3/02-Oct 3/04	Sexual Assault	271

[2] In a pre-trial ruling, I refused to sever the counts in the indictment, and instead I ordered that a single trial be held: see [2010] O.J. No. 1268.

[3] In a second pre-trial ruling, I granted an application, in part, for the production of certain third-party records: see [2010] O.J. No. 1713.

[4] During the trial, I made three additional rulings. First, I ordered that the indictment be amended to change the timeframe of the offences alleged in counts 1 to 6. This amendment was unopposed. Second, I ordered that one of the Crown's witnesses be permitted to testify in a separate room, and that her evidence be viewed in the courtroom through a closed-circuit monitor; and that she be permitted to have a support person with her; and that she be permitted to adopt a previously-recorded statement as her evidence. My reasons for this ruling were delivered orally during the trial, and I will recite an abbreviated version later in these reasons.

[5] My third ruling was made at the request of the Crown, to have the evidence given on each count in the indictment stand as similar-fact evidence on all of the counts. I granted the Crown's request, for reasons delivered orally during the trial, and I will summarize my reasons later in these Reasons for Judgment.

[6] In these Reasons for Judgment, I will first discuss the essential elements of each of the offences that is the subject of one or more counts in the indictment. I will then discuss certain legal principles that are relevant. I will then discuss the burden of proof, and principles regarding determining credibility. I will then review the evidence and make findings of fact.

The Charges

(a) Sexual Assault

[7] Section 271(1)(a) of the *Criminal Code* provides as follows:

> 271(1) Everyone who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years.

[8] Also relevant are the following provisions in s. 265 of the *Code:*

> 265(1) A person commits an assault when
>
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

[9] Also relevant is s. 150.1(1) of the *Code* which read, during the time the offences were alleged to have been committed, as follows:

> 150.1(1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 14 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

[10] The essential elements of the offence are as follows:

(a) a touching;

(b) the touching is of a sexual nature;

(c) there is an absence of consent.

In terms of the *mens rea* of the offence, there must be an intention to touch, and a knowledge, or recklessness of, or willful blindness towards lack of consent. As noted, lack of consent is an essential element of the charge. I will be discussing that issue more fully later. Consent or lack of consent is not relevant where the complainant is under 14 years of age.

(b) Touching a Person Under 14 For a Sexual Purpose

[11] Section 151 of the *Code*, at the time the offences were allegedly committed, read as follows:

> 151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 14 years
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days.

[12] The essential elements of this offence are as follows:

(a) a touching of a part of the body;

(b) the touching must be with a part of the body or with an object;

(c) the touching must be for a sexual purpose.

In terms of the *mens rea* of the offence, there must be an intention to touch a part of the body of a person under the age of 14, and the touching must be intended to be for a sexual purpose.

(c) "Gang" Sexual Assault

[13] While the term "Gang Sexual Assault" is used in the indictment, it is perhaps a misnomer. Section 272(1)(d) provides as follows:

> 271(1) Every person commits an offence who, in committing a sexual assault,
>
> ***
>
> (d) is a party to the offence with any other person.

[14] Thus, in order to commit the offence, a person must, in committing a sexual assault, be a party to the offence with any other person. The term "party" is defined in s. 21(1) of the *Code* which reads as follows:

> 21(1) Every one is a party to an offence who

> (*a*) actually commits it;
> (*b*) does or omits to do anything for the purpose of aiding any person to commit it; or
> (*c*) abets any person in committing it.

(d) Death Threat

[15] Section 264.1(1)(a) of the *Code* provides as follows:

> 264.1(1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
>
> (*a*) to cause death or bodily harm to any person;

[16] This offence is complete where the accused utters, conveys or causes a person to receive a threat to cause death to a person, and that person intends to utter the prohibited threat. It is not material whether the accused intended to carry out the threat: see *R. v. LeBlanc* (1989), 50 C.C.C. (3d) 192 (S.C.C.); reversing (1988), 44 C.C.C. (3d) 18 (N.B.C.A.).

(e) Counselling Sexual Touching

Section 152(a) of the *Code*, during the time the offence was allegedly committed, read as follows:

> 152 Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 14 years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of 14 years,
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days

[17] The essential elements of the offence are that the accused must incite, counsel or invite a person under the age of 14 years to touch the body of any person with a part of the body or with an object. Critically, it must be proven that the accused's conduct must be for a sexual

purpose.

Consent

[18] As noted, the absence of consent is an essential element of the offence of sexual assault. In the case of a person under the age of 14, the absence of consent is not relevant.

[19] If the Crown proves an absence of consent on the part of a complainant, it is also necessary, where there is an air of reality to the issue, to determine whether the accused had an honest but mistaken belief in consent on the part of the complainant. In that connection, s. 265(4) of the *Code* is germane. It reads as follows:

> 265(4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[20] The absence of consent on the part of the complainant is subjective; that is, the complainant either consented or she did not. There is no notion of "implied" consent. The absence of consent, which the Crown must prove, is part of the *actus reus* of the offence.

[21] The question of whether the accused had an honest but mistaken belief in consent on the part of the complainant is an issue that goes to the *mens rea* of the offence. In other words, if the accused person honestly believed that the complainant was consenting to sexual activity, then the blameworthy state of mind that must be present for a conviction does not exist.

[22] The relevant principles have been discussed in detail in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, and it is unnecessary for me to review them here. In essence, the Supreme Court held that in determining whether there was an absence of consent, the complainant's subjective state of mind is determinative. There either was consent or there was not.

[23] The Court considered the relevance of what it termed "ambiguous" conduct on the part

of a complainant. Major J., for the majority, held that ambiguous conduct can be relevant in assessing the credibility of the complainant as to whether she actually consented or not. It can also be relevant in determining whether the accused had an honest but mistaken belief in consent. See also *R. v. Esau*, [1997] 2 S.C.R. 777.

The Rule in Browne v. Dunn

[24] An issue arose during the trial, and during argument, with respect to evidence given by the accused, P.F., that had not been put to one of the complainants, A.P., in cross-examination. P.F. testified that A.P. had made certain entries in her diary, and that she had signed a number of letters in which she had specifically consented to sexual activity with him. None of this had been put to A.P. on cross-examination.

[25] A.P. was not called in reply by the Crown to deal with this evidence.

[26] Counsel for P.F., and the Crown, take diametrically opposite positions on the question of what I can or should do as a result. Ms. Loh, counsel for P.F., argues that it was open to the Crown to call A.P. in reply, and accordingly P.F.'s evidence must be considered to be uncontradicted. She submits that I should draw an adverse inference from the failure of the Crown to rebut the evidence. The Crown, on the other hand, argues that the failure to cross-examine A.P. entitles me to draw an adverse inference with respect to the credibility of the evidence given by P.F..

[27] The so-called rule in *Browne v. Dunn* (1893), 6 R. 67(H.L.), was originally intended as a rule of fairness to witnesses. In civil cases, it is sometimes argued that a party should be prevented from calling evidence that is contrary to evidence called by the other party, where the contrary state of affairs has not been put to a witness in cross-examination. In a criminal case, where the accused has a right to make full answer and defence, that option is obviously not available where the rule has arguably been violated by the accused.

[28] The rule is discretionary, and is not always followed. Its application in criminal cases is subject to the right of the accused to make full answer and defence. However, it can be applied in proper circumstances, so as to draw an adverse inference regarding the credibility of a

witness, including a witness who is an accused, in appropriate circumstances: see *R. v. Giroux*, [2006] O.J. No. 1375 (C.A.), at paras. 41-49. The failure of the Crown to call a witness in reply is a factor to be considered, but is not determinative: see *Giroux*, *supra*, at para. 48.

[29] In this particular case, the failure of counsel for the accused to cross-examine A.P. on certain matters testified to by P.F. does affect, to some extent, the credibility of the evidence given by P.F.. This conclusion is not affected by the failure of the Crown to recall A.P.. In *Giroux*, the Court of Appeal declined to hold it against the Crown that it did not recall an experienced police officer in reply. In this case, A.P. had already testified at some length about her experiences, sexual and otherwise, with both accused, and it would have been manifestly unfair to subject her to being cross-examined again. If it were otherwise, by the simple device of failing to cross-examine on some critical issue in the first instance, counsel for an accused could almost invariably secure two opportunities to cross-examine a Crown witness. It is also noteworthy that counsel for P.F. did not seek to recall A.P. herself, in order to ask the questions that should have been asked in the first place. She contented herself with arguing that it was incumbent on the Crown to call A.P. in reply, a proposition that I do not accept.

The *Kienapple* Principle

[30] In this case, there are 15 counts. If I were to find that precisely the same conduct is the subject of more than one count, I could not register more than one conviction in relation to the specific conduct: see *R. v. Kienapple* (1974), 15 C.C.C. (2d) 524 (S.C.C.). However, if the conduct giving rise to the offences occurred at different times, there is no prohibition against registering multiple convictions: see *R. v. D.O.*, [2001] O.J. No. 2467 (C.A.).

Burden of Proof and Credibility

[31] The evidence is in marked conflict. The three complainants gave evidence, as well as a number of other witnesses. One of the accused, P.F., also gave evidence. This is a case in which the burden of proof, and the principles of assessing credibility, will be important.

[32] As to the burden of proof, it is trite that the onus is on the Crown to prove guilt on each count beyond a reasonable doubt. That burden never shifts throughout the case. It is not for

either accused to prove or disprove anything. No matter what evidence either accused may give, or what evidence is called on their behalf, the burden remains on the Crown to affirmatively prove guilt beyond a reasonable doubt.

[33] Since P.F. has given evidence, I must apply the principles laid down by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. In that case, in the context of a jury trial, Cory J., for the majority, stated the following, at pages 757 and 758:

> A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[34] In the context of a non-jury trial, the Ontario Court of Appeal has held that it is not necessary for the trial judge to slavishly follow the formula set out by Cory J.: see *R. v. Minuskin*, [2003] O.J. No. 5253, at para. 22. However, regard must be had for the basic principles underlying the *W.(D.)* instruction.

[35] It is clear from these cases that, even if I accept the evidence given by the Crown's witnesses, I must acquit if I am left with a reasonable doubt after considering the evidence as a whole. This is so even if I do not accept P.F.'s evidence. I must consider whether I have a reasonable doubt as to his guilt after considering his evidence in the context of the evidence as a whole. In the case of M.F.1, who did not testify, I must consider whether I have a reasonable doubt as to her guilt after considering the evidence as a whole.

[36] In determining what evidence I accept and do not accept, I must, of course, make findings of credibility. There are many factors that go into the assessment of credibility. A trial judge must consider, among other things, a witness' powers of observation, his or her memory,

his or her age at the time of the events in question, the passage of time, any bias or partiality, interest in the outcome, and demeanour. Of importance is the inherent probability or reasonableness of a particular version of the facts, against the backdrop of uncontroverted facts: see O'Halloran J.A. in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at pages 356-357. In the same case, it is noted that demeanour, standing alone, is an unreliable indicator of credibility.

[37] Some of the witnesses who testified were young people when the events occurred about which they gave evidence. It is important to bear in mind what was said in this respect by the Supreme Court of Canada in *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at page 123, where McLachlin J. (as she then was), stated as follows:

> The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. 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.

[38] At page 134, McLachlin J. stated:

> It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to "adult" or "child" standards -- to do so would be to create anew stereotypes potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. 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. [emphasis added]

[39] As is not uncommon in sexual assault cases, the disclosure of the offences was delayed. In this connection, it is important to bear in mind what the Supreme Court of Canada has said about delayed disclosure. In *R. v. D.D.*, [2000] 2 S.C.R. 275, Major J. for the majority, said at

para. 65:

> A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.

[40] In the case before me, one of the complainants, T.K., had not only delayed the disclosure of her complaints, she had denied, on a number of occasions, that any sexual misconduct had occurred. In this situation, it will be necessary for me to assess her explanation, if any, for being untruthful about the matter, in determining her credibility.

[41] I will summarize the evidence of each witness, without attempting to recite each witness' evidence verbatim. I have attempted to summarize the salient points.

The Crown's Evidence

(a) A.P.

[42] A.P. was born in 1989. She met Mr. and M.F.1 through T.F. and A.K.. T.F. is P.F.'s nephew; that is, T.F.'s mother is P.F.'s sister. A.K. is M.F.1's son, through a previous relationship with B.K.. B.K. is deceased, having committing suicide in 2007.

[43] A.P. met A.K. through A.L., another complainant. She was 13 years old when she met A.K., when she dated him briefly. She dated him again in 2008.

[44] A.P. was 13 or 14 years old when she met T.F.. She dated him when she was about 14.

[45] A.P. met M.F.1, one of the accused, in about May, 2004. She met P.F. in July, 2004, when he got out of jail.

[46] A.P. started to live, to some extent, at the F's' residence. At times, she lived with her

mother.

[47] A.P. testified that she did not have much to do with P.F. at the beginning. She was still dating T.F.. She and P.F. would talk and smoke weed; he was a significant source of weed, and indeed they smoked it every day.

[48] In October, 2004, the F's were living at 150 Sandford, in Hamilton. She and T.F. slept in the same room; they were still dating.

[49] At the time, A.P. testified she was close to M.F.1, and she regarded P.F. as a role model and a good friend. Her relationship with T.F. was okay, albeit there were breaks in their dating period. P.F. smoked weed practically every day. M.F.1 regularly took "sleepers" and Gravol, which made her dopey and drowsy.

[50] A.P. testified that the first untoward incident occurred on December 4th, 2004. It was the day of her cousin's birthday party. Sometime after midnight, she and P.F. had been out for a walk. P.F. asked her to stay up, saying he had a "surprise" for her. They went to M.F.1 and P.F.'s bedroom, where they had a big bed. M.F.1 was asleep.

[51] A.P. testified that she and P.F. were on the bed, beside M.F.1, who was sleeping. They were watching television and smoking weed. She testified that she felt P.F.'s foot rubbing her buttocks. She said she was uncomfortable, and felt scared.

[52] A.P. testified that P.F. crawled over to her and placed his hand down her pants, and began fingering her vagina. P.F. suggested that they go to the living room. A.P. demurred, saying that she had to pee. When P.F. became insistent about going to the living room, A.P. said no, she was going to bed, whereupon she left the room and went to her own room.

[53] Later, after she was asleep, P.F. entered her room. She woke up and saw him at the foot of her bed and said "What are you doing?" A.P. testified that P.F. said "I hope you enjoyed the night – I have one more thing to do, a surprise". A.P. testified that she said "no", but P.F. was not deterred. He pulled down her pants and underwear and placed his penis near her vagina, but did not penetrate her. He was naked. She kept saying "no". He was there about a minute or

two. She did not try to get away, because he was too big. When P.F. was finished, he left the room. She pulled up her pants and started to cry. Eventually, she fell asleep.

[54] The next day, A.P. testified that she saw P.F., but neither of them mentioned the incidents the previous night. She did not tell M.F.1. She was scared.

[55] Notwithstanding the incidents, A.P. remained in the house. She said she was still in love with T.F., and she thought M.F.1 would have told T.F. to break up with A.P. if she said anything.

[56] A few days later, she testified that she did say something to M.F.1. She did not say anything to T.F.. A.P. testified that she was with M.F.1 in her room. She said, "I have to talk about something". She told M.F.1 that P.F. had touched her. She said M.F.1 was surprised and concerned, and said she would talk to P.F. and that it would not happen again. She believes M.F.1 told P.F. that if he did it again she would call the police.

[57] A.P. testified that she saw P.F. after her discussion with M.F.1. Neither of them mentioned any incidents, and P.F. acted normal.

[58] A.P. testified as to a number of incidents involving both P.F. and M.F.1. She said there were three or four incidents over a period of about four months.

[59] The first such incident occurred sometime after the first incident, at around 8:00 a.m. or 9:00 a.m., when one of the F's knocked on the wall and asked her to come in and smoke pot. She went into the F's' bedroom, and sat on the bed, and smoked weed with P.F.. She was in her pyjamas.

[60] She testified that one or both of them got her undressed. She was high on weed, and when she was naked, M.F.1 held her mouth with her hand. She said M.F.1 shoved a dildo into her anus. It hurt. She said P.F. began having sex with her while M.F.1 kept her hand over her mouth. She was trying to scream and fight without any success. She said her hands were being held down, and she was told to keep quiet. She thought the incident took 10 or 15 minutes. After P.F. ejaculated, she got dressed and left.

[61] She testified that she recalled another incident in which P.F. penetrated her and had sex, while M.F.1 was holding her hand and masturbating. Both she and P.F. were high on weed.

[62] A.P. testified to another incident, in which she was on the bed with M.F.1; M.F.1 was sleeping. P.F. returned to the house with T.F., and sat on the bed. She felt something on her buttocks, and when she looked it was P.F.'s hand. She jumped up and said she was going to bed, and she left.

[63] A.P. testified that similar incidents occurred very often, at least every week. She could not recall them all, and she said she was high each time. She had thought about going home to her mother, but her mother was an alcoholic and they always fought. She loved T.F., and wanted to stay.

[64] A.P. testified that she moved out at the end of March, 2005. She went to live with her mother. She was simply sick of the abuse. She said M.F.1 called her the day after she moved out and said, "It's over, bitch", referring to her relationship with T.F..

[65] A.P. testified that she was shocked at M.F.1's involvement in these incidents. She did not talk to her about them, and did not know how to get help.

[66] A.P. testified as to how she ultimately made her disclosure to the police. In 2008, she received a call from Officer Zafiridis, with the H[…] Regional Police. She had not contacted Officer Zafiridis, but assumed that he may have learned about the abuse from her brother Justin, or perhaps from A.K. or A.L..

[67] A.P. testified that she had met A.L. in grade seven; they hated each other and they were both dating T.F.. Around May, 2005, she became friends with A.L.. She saw her on the street, and they started talking. A couple of months later, they talked in general terms about abuse at the hands of the F's. She did not think they discussed any details. She said A.L. was not surprised. They spoke about it perhaps once or twice.

[68] She said that she discussed the abuse in general terms with A.K. in September, 2005 when they were dating. She told him she had been sexually abused by the F's, but gave no

details. She said A.K. was not surprised.

[69] A.P. testified that she had not considered going to the police. She did not want to go through the court process.

[70] A.P. testified that she heard about other allegations through C.F.. She testified that in 2008, C.F. was on Facebook, she thought with T.K.. Apparently, P.F. was in jail and M.F.1 had been charged as well. C.F. asked why, and was simply told there had been sex abuse. When C.F. asked on whom, T.K. went offline.

[71] A.P. testified that she was surprised that the F's had done this to someone else, who had come forward. She testified that she did not know T.K., and had no communication with her.

[72] A.P. testified that A.K., at some point, told her that the police may wish to speak to her, and he asked if he could tell the detective about the abuse. A.P. told him it would be all right as long as she would not be involved.

[73] With respect to A.L., A.P. testified that her relationship with her was up and down, and they did not talk about sexual abuse in any detail. The last time she spoke to A.L. about the abuse was in 2005.

[74] A.P. testified that, as a consequence of some other unrelated matter, she had received $7,000 through the Criminal Compensation system. She did not discuss this with either T.K. or A.L., and it had no effect on the allegations she ultimately made in this case.

[75] On January 16, 2009, A.P. gave a full statement to Officer Zafiridis. She did so because it was the right thing to do, and she wanted to get the F's off the street.

[76] On cross-examination, A.P. testified that she only saw her mother to get money from her. She lived with the F's because she could get weed, and there were no rules.

[77] With respect to the incident involving the dildo, she testified that she had been lying down and P.F. was on top of her. She was unable to say how the dildo was inserted into her anus. All she knew was that someone put the dildo there.

[78] With respect to the first incident, involving digital penetration, she testified that she struggled with P.F., and tried to stop him.

[79] She testified that she did not leave the F's' residence notwithstanding the abuse, because she was 15 years old, stupid and in love with T.F.. She said she was afraid of P.F., and tried not to be alone with him.

[80] She testified that the F's had a couple of sex toys. She denied having a bowel movement on the occasion when the dildo was inserted in her anus.

[81] She testified that she had been sexually assaulted by her own father. She had gone to court, and she did not want to go to court again.

[82] She testified that she loved T.F.; he was the first serious guy she had had a relationship with after her father.

[83] She testified that she had told M.F.1 about the first incident, because she thought M.F.1 would keep her safe. She did not want to go to the C.A.S., the police, or court.

[84] A.P. denied that sexual contact with P.F. was consensual. She denied that P.F. had become more attractive than T.F.. She said she stayed because she was stupid. T.F. broke up with her after she left. She denied that she had told T.F. that he did not satisfy her sexually.

(b) T.K.

[85] T.K. was born on November 26, 1991. Accordingly, when she testified at trial she was over the age of 18. When she had testified at the preliminary hearing, she was under 18.

[86] On October 17, 2008, T.K. gave a videotaped statement to Officer Zafiridis. That video statement was also transcribed.

[87] Because T.K. was under the age of 18 when she testified at the preliminary inquiry, ss. 486.1(1) and 486.2(1) of the *Code* applied, so that she testified in a room separate from the courtroom, and her evidence was viewed in the courtroom through a closed-circuit monitor, and

she was permitted to have a support person with her while she testified. Furthermore, pursuant to s. 715.1(1) of the *Code*, she was permitted to adopt, as her evidence, the contents of the video recording of her statement.

[88] At the trial, because T.K. is now over the age of 18, it became necessary for me to rule on whether she would be permitted to testify in a room outside the courtroom, and have a support person with her. There was no objection to her being able to adopt the contents of her video statement as her evidence. A *voir dire* was conducted.

[89] On the *voir dire*, Helen Lawrynowycz testified. She is a child protection officer with the H[…] Children's Aid Society. She has had involvement with T.K. since October, 2006. Until she turned 18, T.K. was a Crown ward. Once she turned 18, she entered an extended care maintenance plan.

[90] Ms. Lawrynowycz testified that T.K. is extremely concerned about seeing the F's. M.F.1 is her biological mother, and P.F. is her stepfather. She testified that T.K. has nightmares about seeing them.

[91] Ms. Lawrynowycz testified that T.K. will simply be unable to testify if she is in the same room as the F's. She is anxious, agitated, unable to focus, and apprehensive.

[92] Ms. Lawrynowycz testified that it will be important that T.K. have a support worker with her. She is very concerned that she will be alone, and she is paralyzed with fear.

[93] Ms. Lawrynowycz testified that T.K. presents that she is younger than her chronological years. She has attention issues, and she is easily distracted.

[94] On cross-examination, Ms. Lawrynowycz testified that T.K. has always presented as fearful and distractible. She has Attention Deficit Disorder. She can be sullen and withdrawn. Her anxiety is of long standing.

[95] After hearing argument, I ruled that T.K. could testify in a room separate from the courtroom, that she could have a support worker with her, and that her evidence would be viewed from the courtroom through a closed-circuit monitor. There was no objection to her

adopting her video statement as her evidence. The videotaped statement and a written transcript of it were entered as exhibits.

[96] In my view, the order was necessary in order to ensure that a full and candid account of the acts complained of could be obtained from T.K.. I was not satisfied that such an order would interfere with the proper administration of justice. Unlike *R. v. Rohrich*, [2009] O.J. No. 4050 (S.C.J.), this was a case in which T.K. had already testified outside the courtroom with a support worker present at the preliminary hearing. It was only through an accident of timing that the order became discretionary by the time of trial, as opposed to being mandatory as it was at the preliminary hearing.

[97] As a condition of making the order, I directed that there be no communication between T.K. and the support worker, and there was none.

[98] In her videotaped statement, which she adopted as her evidence, T.K. related an incident that occurred when she was very young. She said she had first disclosed the incident to G.E., her foster mother. She told G.E. that she had been assaulted by her stepfather when she was younger.

[99] In her statement, T.K. said she was sitting in the bath when P.F. came in and tried to have sex with her. She said he did it and then she bit him and she ran away. She said her mom told her that he was going to come in and not to be nervous and then she let him come in and rape her. She said that after P.F. was finished he told her if she told anyone he was going to kill her.

[100] Officer Zafiridis made several attempts to get details from T.K., without a great deal of success. When he first tried to get details, she said “Well, he came in and sexually assaulted me”, and when asked to tell more, she said “I don’t know what else there is to say. I think I told everything.” When asked what was it that he did, she said “Well, he had sex with me”, and when asked what she meant by that, she said “Well, I don’t know. He just had sex with me. That’s all I remember. I don’t remember most of it.” When asked what she meant by having sex, she said “He just had sex with me. I don’t know how to explain it.”

[101] On being pressed further, T.K. said “He was having sexual contacts with me in places that he shouldn’t have”, and when asked what places she was talking about she said “Um, my below my, my below area, my top area.” When asked how it was that she knew he did it, she said “Because at night-time I keep having these dreams that he’s gonna come kill me ‘cause I told people.”

[102] She said the incidents had happened once or twice, in Oakville at Highway 5 and 25. She described the bathroom as being green and dirty.

[103] She said that in the bathroom her mom was holding her hands behind her back and then P.F. was having sex with her. Her mom left and he grabbed T.K. by the chin and said if she told anyone he was going to kill her. She said “That’s why I didn’t tell anybody for a very, very, very, very, very long time.”

[104] When asked to describe the parts of the body that were used, she said “He used his bottom part and his mouth.” When asked what he did with his bottom part, she said “He put it in my bottom part.” When asked what he did with his mouth, she said “He was licking my top part.” When asked how she felt she said “Dirty. Dirty, disgusted.” When asked how she feels now, she said “I still feel dirty and disgusted, but I feel better ‘cause I’m, I don’t care what happens. I’m glad that I finally told someone.”

[105] When asked how old she was at the time, she said she was either 9 or 10.

[106] She said the sexual incident in the bathroom occurred first when they tried it standing up, but it didn’t work and they pushed her down to the floor. She said M.F.1 held her hands behind her back and then when she was lying down on the floor she held them above her head and then she left. She left when he was doing it. When asked what he was doing, she said “He’s got his bottom part on my bottom part.” She said she was trying to fight and get out, because she knew it wasn’t right. She said it finally stopped when she bit him on the arm, and then he hit her and told her that if she told anybody he was going to kill her.

[107] Later in her statement, she testified about a second incident. She said she was older, approximately 11 or 12. She said P.F. had come into her bedroom and said he wanted to have

sex with her because her mom wouldn't have it with him. She said "I don't care. I'm not having sex with you. I'm a little girl." She kicked him very hard in his private area and then he tried for a second time and she kicked him and punched him again. She said he tried to put his penis in her vaginal area. She said the first time she wasn't too sure if it was right or not, but the second time she was definitely sure that it wasn't right. She didn't want to be a victim again so she defended herself. After the kicking, he finally left, and when he was leaving he called her a bitch, and that was the only thing he said.

[108] She was asked whether she had told anybody about the second occurrence, and she said "Not even anybody in my family. I kept it away from all of them. 'Cause I was afraid he was going to kill me if I told."

[109] At the trial, T.K. testified that P.F.'s "bottom part" that she had described in her statement was his penis. Her "bottom part" was her vagina, and her "top part" was her "boobs".

[110] T.K. testified that she knows A.L., she had been her brother A.K.'s girlfriend. The last time she saw her was about two or three years ago. She said she did not believe she had ever discussed any of the sexual abuse with A.L..

[111] With respect to A.P., she said she was a friend of her siblings, but she could not describe her, and had no memory of her. She had never discussed any sexual abuse with her.

[112] With respect to C.F., she had had some communication with her on Facebook.

[113] She said that before she made the disclosure to G.E., she had never told anyone about the abuse. She was afraid that P.F. would kill her.

[114] On cross-examination, she testified that the two incidents were approximately one-and-three-quarter years apart.

[115] She testified that she was in foster care as of approximately August, 2003. She had restricted visits with the F's. She said she hated M.F.1, her mother. In fact, she had stopped considering her as her mother. She had never considered P.F. her father.

[116] T.K. acknowledged that in 2004 she was interviewed by Dr. Niec, in connection with an investigation by the Child Advocacy and Assessment Program. She said she did not recall whether she had denied that she had been physically abused. However, she acknowledged that she had denied being sexually assaulted, and she agreed that that was not the truth.

[117] T.K. testified that she did not recall a discussion with her sister, A.W., and her father, B.K., at a Tim Horton's. She acknowledged, however, that she told her father that she had never been touched by P.F.. She acknowledged that she had lied to her father. She also said the same thing to her father's girlfriend, and she acknowledged that she had lied in that connection.

[118] She testified that the first incident occurred in 2000 or 2001, when she was aged 9. The second incident occurred in 2001 or 2002, when she was aged 10. She admitted to some uncertainty as to when and where she had lived in either Hamilton or Oakville, because she had lived in too many places and had moved back and forth several times.

[119] She testified that she did not recall a conversation with A.W. after her 2008 interview. She denied telling A.W. that she was not telling the truth.

[120] She was asked about an alleged communication she had through Facebook with C.F., about the outstanding charges. She said someone had entered her Facebook account, and someone else might have had such a communication.

[121] She acknowledged that she had lied on a number of occasions about whether the sexual abuse had occurred. She said she had been afraid, she had kept it a secret, and she did not want her father to find out. She asserted that she is now telling the truth, and she knows what the truth is.

(c) G.E.

[122] G.E. has acted as a foster parent for some 25 years. She has been T.K.'s foster parent at various times. She has also been a foster parent for T.K.'s brother W.K. on three occasions.

[123] T.K. made a disclosure to G.E. about the sexual abuse on October 1st, 2008.

[124] T.K. had received a telephone call from her sister, A.W.. T.K. came to G.E.'s room, crying and upset. A.P. apparently had wanted T.K. to talk to their mother, M.F.1, and T.K. did not want to.

[125] T.K. told G.E. that her mother had allowed terrible things to happen to her, involving her stepfather P.F.. She said she had been sexually abused, but gave no details.

[126] Under a protocol with the Children's Aid Society, if an allegation of this sort is disclosed to G.E., she is to contact the responsible worker at the Children's Aid Society. She called Tammy Benwell at the C.A.S. and advised her that an allegation of sexual abuse had been made.

[127] G.E. told T.K. that she should let the workers at the C.A.S. know. Eventually, she met with the police and brought T.K. with her. She never discussed the sexual abuse in detail.

(d) A.L.

[128] A.L. was born in 1988. She has two children, of whom A.K. is the father.

[129] A.L. first met P.F. and M.F.1 through A.W., M.F.1's daughter. She then met them through A.K., whom she started dating when she was 12 years old. She and A.K. had a relationship off and on for 10 years. The relationship is no longer current.

[130] A.L. has lived at the F's' home. There were no rules, and she could skip school when she wished. She did not like the rules at her mother's house. She could smoke pot at the F's' house.

[131] A.L. testified that M.F.1 would be in the F's' bedroom virtually all day. A.L. would be there three-quarters of the time, where they would watch television and talk.

[132] While she was living there, in addition to P.F. and M.F.1, the other people living there were W.K., who was 6 to 10 years old, T.K., who was 6 to 10 years old, R.K., who was 3 years old, A.W., who was 15, and A.K., who was 16.

[133] A.L. testified that she got along well with the other children, and she was close to T.K.. Generally, the house would be cleaned up when someone from the Children's Aid Society was coming, but if not, the house was a mess.

[134] Drugs and alcohol were common. P.F., A.K. and T.F. used pot, while M.F.1 used sleeping pills and Tylenol 3's. A.L. used pot, two or three times per day, which she would get from P.F. or A.K.. She had almost no money. She saw P.F. drunk once, and M.F.1 used pills almost every day. Sleeping pills made her groggy.

[135] A.L. testified that she and M.F.1 got along fine. She would talk to P.F. here and there.

[136] A.L. related an incident involving R.K.. She testified that she and M.F.1 were sitting on the bed watching television. M.F.1 pulled her down on the bed and told R.K. to stick his "pecker" in her mouth.

[137] A.L. testified that when this happened, she tried to get M.F.1 off her. She testified that M.F.1 had grabbed her shoulders and held her down hard. She had been lying on her back on the bed with her legs hanging over the end. R.K. was in his t-shirt and a diaper. A.L. testified that R.K. took off his diaper while he was on the floor and he jumped on the bed and went to one side of her. She was trying to keep R.K. away with her left hand, and keep M.F.1 away with the other hand. She said R.K.'s penis was five or six inches from her face. Eventually, she stood up.

[138] A.L. testified that she was disgusted. She did not want to blame R.K., who was only 3, and who thought it was a game. She said both R.K. and M.F.1 were laughing.

[139] A.L. testified that one-half hour later, M.F.1 pulled her down on the bed again. She told R.K. to put his "pecker" in her mouth. He tried to do it, but only got his penis to her side. Eventually, she got loose and got up, and left the room.

[140] A.L. testified that incidents of this sort never happened again. She never discussed them with M.F.1, and she could not recall if she had discussed them with anyone else. She thought M.F.1 viewed these incidents as jokes, although A.L. did not think they were.

[141] A.L. testified as to another incident. She said M.F.1 and P.F. were having sex on their

bed, and A.L. was lying beside them watching a movie. She fell asleep. She testified that she woke up and felt P.F.'s hand touching her buttocks. She testified that his hand was on her buttocks for at least 10 seconds, and he grabbed her buttock like a stress ball. P.F. kept opening and shutting his fingers on her buttock for about 10 seconds.

[142] A.L. testified that she stood up and left the room, and she felt dirty. M.F.1 and P.F. were still having sex when she left the room.

[143] A.L. testified that she did not discuss the incident with either M.F.1 or P.F.. She did not want to cause a problem.

[144] A.L. testified as to another incident. She said M.F.1 was upstairs in her room, and called her up to talk to her. When she got there, M.F.1 asked her if she was interested in having a "threesome" with herself and P.F.. She said she was shocked and surprised, and said no. She testified that M.F.1 suggested that she decline, on the ground that she was on her period.

[145] Later, in her presence, P.F. asked M.F.1 "So what did she say about a threesome?", to which M.F.1 answered "She's on her period". A.L. testified that she did not discuss these incidents with A.K., because she was having some difficulty with him at the time. She left about one month later.

[146] After she left, A.L. dated A.K. on and off for several years. At one point she spoke to A.K. about the "pecker" incident involving R.K.. They were just talking about childhood things, and she thinks she brought it up.

[147] A.L. testified that she knows A.P.. They were best friends once, when she was 15. She testified that she never told A.P. anything about these incidents. She said a long time ago A.P. said something about a dildo, but she never discussed it with her again. She has never discussed the case with her.

[148] A.L. testified that her name was given to the police by A.K.. She had felt uncomfortable about the incidents, and simply wanted to forget about them. Now she feels happy that someone has stopped the incidents. She was scared, and did not want to be part of it.

[149] A.L. testified that she had recently had some communication with T.K. through MSN. The sexual incidents have never been discussed with her.

[150] On cross-examination, A.L. confirmed that M.F.1 thought the incident involving R.K. was a joke. She also confirmed that she did not blame R.K., that it was a game to him. She simply shrugged off the incidents.

[151] She disputed the proposition that the incident involving P.F.'s hand on her buttocks was unintentional. She said P.F.'s hand had been in place for too long for it to be a mistake. P.F. had to know that it was her buttock rather than M.F.1's. The squeezing of his hand several times meant it was not a mistake.

[152] A.L. testified that she has a good relationship with A.K. and the children. They work out any disagreements.

(e) A.K.

[153] When he testified, A.K. was 23 years old. He has two children with A.L.. His siblings are T.K., W.K., R.K., and A.W.. He first met P.F. when he was over 10 years old.

[154] A.K. testified that he first spoke to the police when Officer Zafiridis called him. He gave a statement on January 14th, 2009. He had heard through C.F. that something was going on involving P.F., M.F.1 and the police. He gave A.P.'s and A.L.'s name to the police. He had spoken to them and gave their contact information to the police.

[155] A.K. testified that he had observed an incident where M.F.1 had held A.L. down and told R.K. to put his penis in her mouth. He thought R.K. was 4 or 5 years old. He said he saw R.K. put his penis in A.L.'s mouth. He told M.F.1 that this was not right, to which M.F.1 said "Shut up, it's a joke". He said he was 5 or 6 feet away, and there was nothing blocking his view. He said M.F.1 and R.K. both laughed.

[156] A.K. testified that the same sort of incident happened again. He said he snapped, and told P.F. about it, and P.F. "freaked out". He also said similar incidents happened a couple of

other times, within a week.

[157] A.K. testified that he last spoke to T.K. a couple of months before the trial, but they did not discuss the case. He also testified that he has not discussed the case with A.W..

[158] A.K. testified that after he had spoken to the police, he spoke to A.L. and A.P., and suggested that they speak to the police. A.L. was hesitant, but finally agreed. A.P. said she did not want to be involved, but A.K. persuaded her that she should. He testified that he had been told some time earlier by A.P. about the incident in which she woke up to P.F. penetrating her.

[159] On cross-examination, A.K. said the incidents involving R.K. occurred five or six times, and on each occasion he put his penis in A.L.'s mouth.

(f) Tom Zafiridis

[160] Officer Zafiridis has been with the H[…] Police Service since 1999. He became involved in this case in October, 2008. He met T.K. on October 17, 2008. He arrested P.F. and M.F.1 on November 18th, 2008. He testified that A.P. and A.L. reluctantly met with him. They did not wish to become involved. They were interviewed in mid-January, 2009.

[161] On January 22nd, 2009, he arrested M.F.1 regarding the incidents involving A.L. and A.P..

(g) Katie Horseman

[162] Ms. Horseman has been with the H[…] Regional Police since December, 2006. She assisted with the arrest of M.F.1 in November, 2008. She had more than 20 loose Gravol pills with her when she was arrested.

Mid-Trial Rulings

(a) Amendment of the Indictment

[163] At the conclusion of the Crown's case, the Crown moved for an amendment to the

indictment, so as to change the time frame for the alleged offences in counts one, two, three, four, five and six, so that it would be alleged that the offences occurred from November 29, 2000 to August 10, 2003 in each case. There was no objection and I ordered the amendment to be made.

(b) Similar Fact Evidence

[164] At the conclusion of the Crown's case, the Crown brought an application to have all of the evidence on each count apply to all of the counts. In my ruling on the pre-trial severance application, I had noted that the Crown intended to bring such an application, and that it would likely do so at the conclusion of the Crown's case: see [2010] O.J. No. 1268, at para. 31.

[165] Ms. Ward, for the Crown, argued that the application should be granted.

[166] Ms. Ward noted that possible collusion among the complainants can sometimes defeat a similar fact evidence application. She submitted that there is no air of reality to an allegation of collusion here. She noted that there was very little evidence of any discussion whatsoever among the various complainants, and to the limited extent that there was any, very little in the way of detail was exchanged. Indeed, A.P. and A.L. were reluctant to become involved at all, and only did so after A.K. had persuaded them.

[167] Ms. Ward submitted that the evidence should be admitted as being probative of whether the accused had the specific propensity to commit the offences alleged here. She placed particular reliance on *R. v. B.(R.)* (2005), 77 O.R. (3d) 171 (C.A.), at paras. 10 and 11.

[168] Ms. Ward submitted that the evidence is capable of supporting an inference that the accused had the specific propensity to commit sexual offences involving vulnerable minors. She submitted that there are a number of important connecting factors here, namely that the times of the offences overlapped quickly, one after another; that the complainants resided with the accused at various times; that the complainants were minor adolescents; that they were vulnerable, with little family support; that they liberally used drugs supplied by P.F.; that the offences were often committed by both accused together; and that the location of the offences was in the F's' residence.

[169] Among the many cases relied upon by the Crown, Ms. Ward particularly made reference to *R. v. Shearing*, [2002] 3 S.C.R. 33.

[170] In terms of the issue of prejudice, Ms. Ward relied on *R. v. B.(T.)* (2009), 95 O.R. (3d) 21 (C.A.), and *R. v. MacCormack*, [2009] O.J. No. 302 (C.A.). In both of those cases, the Court of Appeal made the point that in a non-jury trial, the issue of prejudice is much less of a concern. The only real issue, therefore, is whether the propensity evidence has probative value with respect to all of the counts in the indictment. In Ms. Ward's submission, for the reasons she articulated earlier, the evidence has probative value as to whether the *actus reus* of the offences has been made out.

[171] In addition to the request that I admit all of the evidence as similar fact evidence on all of the counts, the Crown requested that I admit as similar fact evidence a plea of guilty that P.F. had made to a sexual offence in 1999. P.F. had pleaded guilty to committing a sexual offence at the home of a neighbour on a mentally-challenged adult woman, while her husband was in another room in the house. I did not call on counsel for the accused to respond to this request and I ruled that the evidence would not be admitted. In my view, the event relied upon by the Crown was simply too remote in time from the events that were the subject of the charges before the court, and the event itself bore little similarity to the events that are the subject of these charges.

[172] Ms. Loh made submissions, that were adopted by Mr. Fraser, on the main similar fact evidence application.

[173] Ms. Loh pointed out that the theory of the defence is different with respect to each complainant. With respect to T.K., the defence asserts that the alleged events simply did not occur. With respect to A.L., the theory of the defence is that the incidents involving R.K. were intended as jokes, with no sexual purpose, and that the incident involving touching A.L.'s buttock was unintentional. With respect to A.P., the theory of the defence is that the sexual activity was consensual, or that there was an honest but mistaken belief in consent. Thus, it is submitted that the similar fact evidence is not probative of any common issue.

[174] Ms. Loh also submitted that there are insufficient common features among the alleged

incidents to permit their admission as similar fact evidence on all the counts. For example, she notes that there was a different level of vulnerability and relationship to the accused with respect to each complainant. There is very little commonality in the way that the offences were alleged to have been committed.

[175] Furthermore, Ms. Loh submitted that any probative value in the evidence is considerably outweighed by its prejudicial effect. Ms. Loh relied in this respect on *R. v. Handy* (2002), 164 C.C.C. (3d) 481 (S.C.C.).

[176] After hearing submissions at the trial, I ruled that the evidence on each count would be admitted as similar fact evidence on all of the counts, for brief reasons that I dictated orally. I will expand on those reasons only briefly here.

[177] There are a number of leading cases on the subject of similar fact evidence, but one of the most helpful is *R. v. Batte*, [2000] O.J. No. 2184 (C.A.). At para. 96, Doherty J.A. for the court stated "While a jury must never convict based on a finding that an accused engaged in misconduct other than that alleged, and must never convict based on an assessment that the accused is a bad person, there will be cases in which a more focused form of propensity reasoning is entirely appropriate."

[178] In the next paragraph, Doherty J.A. stated that propensity reasoning involves two inferences. He stated:

> First, one infers from conduct on occasions other than the occasion in issue that a person has a certain disposition (state of mind). Second, one infers from the existence of that disposition that a person acted in a certain way on the occasion in issue.

After referring to case law, he continued:

> Assuming the evidence can reasonably support both inferences, there is nothing irrational or illogical in using propensity reasoning to infer that an accused committed the act alleged. Viewed in this way, the evidence of the accused's discreditable conduct is a form of circumstantial evidence and meets the legal relevance criterion.

[179] At para. 106, Doherty J.A. summarized the appropriate inquiry as follows:

> Evidence which tends to show no more than a general disposition must be distinguished from evidence which demonstrates a disposition to do the very thing alleged in the indictment. If the evidence of the discreditable conduct is such that it shows a strong disposition to do the very act alleged in the very circumstances alleged, then the evidence has a "real connection" to the very issue to be decided – did the accused commit the act?

[180] It has been stated in almost all of the relevant cases that the court must balance the probative value of the proposed evidence against the prejudice in allowing the evidence to be considered. Two kinds of prejudice have been identified – "reasoning prejudice" and "moral prejudice". Reasoning prejudice includes the danger that a jury might be confused by the multiplicity of incidents and/or might put more weight than is logically justified on the similar fact evidence. Moral prejudice concerns the risk that the evidence might lead to a conviction on nothing more than "bad personhood": see *R. v. B.(T.), supra,* at para. 26.

[181] In *R. v. B.(T.),* and *R. v. MacCormack, supra,* the point is made that in the context of a non-jury trial the issue of prejudice is far less significant.

[182] With respect to reasoning prejudice, at para. 27 of *R. v. B.(T.),* Borins J.A. stated:

> As trial judges are presumed to know the law and the proper and improper uses of evidence, it seems counterintuitive that similar fact evidence could be excluded in a non-jury trial based on the trial judge's determination that the evidence would confuse him or induce him to put more weight on it than is logically justified.

[183] At para. 30, Borins J.A. noted the statement of Watt J.A. in *MacCormack,* at para. 69, that "In large measure, the practical realities of a trial by judge sitting alone in a case in which the allegedly similar acts do not extend beyond the counts of a multi-count indictment reduce significantly, if not to the vanishing point, the virus of reasoning prejudice".

[184] With respect to moral prejudice, at para. 33 of *R. v. B.(T.),* Borins J.A. stated as follows:

> First, this was a non-jury trial, in which the danger that an accused would be convicted solely on the basis of his general bad behaviour was not a significant concern. Moral prejudice is not a significant risk in a judge-alone trial. Second, dismissal of the application to introduce similar fact

> evidence did nothing to address the probability of moral prejudice. The trial judge had already heard the evidence as part of the Crown's case. Thus, the trial judge's knowledge of evidence casting the respondent in a poor light was not eliminated by its exclusion of similar fact evidence. The only issue was whether the already admitted evidence could be used for another purpose.

[185] From these cases, it seems clear that, since prejudice is not a significant concern, the real issue is whether the propensity evidence, which the Crown asks me to consider, has sufficient probative value to be admitted on all of the counts. In my view, the evidence has sufficient probative value to be admitted. The incidents all occurred in the residence of the accused. The complainants were all young girls. They were all vulnerable. They all spent significant time in the accused's residence. They were emotionally and physically vulnerable, with little family support. Drugs were used that were supplied by P.F.. Both accused were involved in a number of the incidents.

[186] While the theories of the defence may differ with respect to each complainant, there are common elements to the Crown's theory in each case. On the Crown's theory, all of the offences were non-consensual assaults. There was no error or mistake. There was no consent or any honest but mistaken belief in consent.

[187] In my view, the evidence is probative of the Crown's theory on each of the counts. The double inference referred to by Doherty J.A. in *Batte* is engaged: do the accused have the disposition to commit offences of this sort; and if so, have they committed them on these occasions? Accordingly, as I ruled at the trial, the evidence is admissible on all of the counts. The actual weight to be given to the evidence will be determined after hearing all of the evidence and the submissions.

The Defence Evidence

(a) Anne Niec

[188] Dr. Niec was called as a witness by Ms. Loh.

[189] She was one of the professional staff who investigated suspected child maltreatment by

the Child Advocacy and Assessment Program at McMaster Children's Hospital. As part of that assessment, T.K. was interviewed three times. Dr. Niec was present for two of the interviews.

[190] During one of the interviews, T.K. was asked if she had ever been subject to physical abuse. T.K. denied that there was any such abuse.

[191] In another interview, T.K. was asked if she had ever been subject to sexual abuse, to which she answered no.

(b) P.F.

[192] P.F. testified. He was born in Oakville on June 27th, 1970.

[193] P.F. has been unemployed for many years. He has a pinhole in his lung, which prevents him from working. He has been collecting disability payments since 1991, and he has been on welfare.

[194] P.F. acknowledged that he has a rather extensive criminal record. He has been required to register in the Sexual Assault Registry. If he moves, he must report to the police, and must disclose where he is living once per year.

[195] P.F. was paroled after a sexual assault conviction. As of June 27, 2001, he lived at 1 Rowanwood in Hamilton, with his mother and father, and his nephew, T.F.. He was arrested for a parole violation and returned to jail and was released in July, 2002.

[196] In June, 2002, he lived in Oakville at D[…] Street with his mother, father and T.F.. In September, 2002, he moved to 6 Rowanwood in Hamilton, while his parents still lived in Oakville. In March, 2003, he again moved to Oakville to live with his parents, and this time he also lived with M.F.1 and her three children, W.K., R.K. and T.K.. The children were taken by the Children's Aid Society in March or April, 2003. In 2004, he lived at various locations in Hamilton.

[197] P.F. first met M.F.1, he thinks, in 1990. At that time, M.F.1 was seeing B.K., a good

friend of his. Eventually, B.K. and M.F.1 broke up, mostly because B.K. was never around.

[198] P.F. and M.F.1 developed a relationship in 2001, and they married on December 13th, 2004.

[199] P.F. testified that he first met A.L. in 2001 when they lived on Cathgart in Hamilton. He testified that his relationship with A.L. was good, and he considered her a friend. He testified that he was not attracted to her, and that she was like a smaller sister.

[200] With respect to the allegations made by A.L., he testified that he has tried to think of what might have occurred on the night that she says he put his hand on her buttocks. He testified that he recalls waking up and rolling over, and he put his hand over M.F.1. He said that about five minutes later, A.L. got up and left the bedroom. He said he did not recall grabbing A.L.'s buttock, but that he "could have", by mistake. He testified that during the incident that he recalls, he was not having sex with M.F.1. He said the incident occurred during the wee hours when it was dark, and that if he touched her, he did not mean to.

[201] He testified that the day after the incident that he recalls, A.L. did not say anything to him about the incident.

[202] P.F. testified that he never suggested that A.L. engage in a threesome with himself and M.F.1, either directly or through M.F.1. He testified that he was not interested.

[203] P.F. testified that he had never heard about the incident involving R.K. and his "pecker" and A.L.. He testified that A.K. had said nothing to him about it, no one else had talked to him about it, and that if he had heard about it he would have "flipped".

[204] With respect to T.K., P.F. testified that he first met her when she was about one year old. He testified that he had a good relationship with her, and that he considered that he was her friend, not her father. She was like a sister, and he was not attracted to her.

[205] P.F. testified that he never had sex with T.K.. He said he never touched her without her consent. He never raped her in the bathroom. He never hit her, or threatened to kill her.

[206] P.F. testified about A.W., the sister of T.K.. He said he had a good relationship with her. She would visit the family in Oakville. He said he never asked her for a threesome, or offered to perform oral sex on her. He said that on one occasion he asked if he could watch her having sex with her "old man", or boyfriend. He explained that he had been drinking and that this was a stupid suggestion. He testified that he was not attracted to her.

[207] P.F. gave extensive evidence regarding A.P..

[208] He testified that A.K. had brought A.P. to the house and introduced her as his girlfriend. In 2004, she moved in and was there very often. They spent time joking around, they were good friends, and they saw each other every day. They smoked pot about five times per day.

[209] As part of their good relationship, they would joke around. Sometimes they would tickle each other. While M.F.1 was in the bedroom while the tickling took place, she did not see it occur.

[210] At some point, P.F. testified that they started flirting with each other. He would touch her leg and they would joke around. He testified that A.P. would move her body towards him while they were on his and M.F.1's bed. He said she would push her buttocks towards his foot. She wore baggy clothes and lingerie. Sometimes he would rub her leg, but she did not touch him.

[211] One night, P.F. testified that he and A.P. went out to walk the dog. They went down in the elevator. While in the elevator, he reached behind and played with A.P.'s "beaver", or vagina. He testified that she did not say no. He said that on the fourth floor of the building, someone got in, so he stopped the activity with A.P..

[212] Outside the building, they walked the dog and smoked a joint. They horsed around, but A.P. did not touch him. When they went back upstairs, they were on the bed while M.F.1 was asleep. Horseplay began involving P.F.'s foot and her buttocks. After about 45 minutes, P.F. fondled her vagina with his fingers. She did not say no, and if she had, he would have stopped.

[213] A.P. went to bed. Five minutes later, P.F. went to her room and said “I’d like to try this”, to which she said “Whatever”.

[214] P.F. testified that he pulled down her pyjamas and pants, and played with his “prick” outside her vagina. She did not say anything. After about five minutes, he “came” on her, then left.

[215] The next day, they smoked some joints. Neither of them said anything about the events of the previous day. A.P. remained in the house, and there was no pressure on her to stay. She still engaged in flirting.

[216] At some point, P.F. testified that he purchased a vibrator for A.P.. He said it was a dildo. She said “Thanks”.

[217] P.F. testified that about two weeks later he spoke to A.P.. He said that if they were to have any more sex, he wanted her to sign a “promise note”. By this, he meant a note in which A.P. would acknowledge that any sex was consensual. He said he wanted this because he had been charged with having non-consensual sex before. He said A.P. was about 15 at the time.

[218] P.F. testified that about two weeks later, M.F.1 “freaked out” with him. He said M.F.1 threw A.P.’s diary at him. She said “You and A.P. are fucking around”. He said A.P. was in the room, as well as T.F..

[219] P.F. testified that he acknowledged to M.F.1 that he had had sex with A.P.. He said that he and A.P. smoked a joint together, and A.P. said “Sorry, I didn’t think she’d look for my book”. He testified that A.P. did not move out after this occurrence, and that they continued to touch each other thereafter.

[220] P.F. testified that about a month later, there was another encounter involving A.P.. He said he came home, and found A.P. and M.F.1 in the bedroom. He said they both asked him whether he wanted to participate in a threesome.

[221] P.F. testified that he smoked a joint with A.P., and asked her if she had a consent form that she could sign. He testified that she signed a consent form and gave it to him.

[222] P.F. testified that after A.P. signed the consent form, he, A.P. and M.F.1 engaged in a threesome. He said that A.P. sat on his face while M.F.1 "rolled" him. He said A.P. then lay beside him and he had sex with her. He testified that she did not say no. He said that M.F.1 read the consent letter while A.P. was there. She did not use any sex props on that occasion, but she did on another occasion.

[223] P.F. testified that he performed oral sex on A.P., but he stopped because she had "too much hair". A.P. then took a shower and M.F.1 and P.F. went to bed. He said the next day everything was back to normal.

[224] P.F. testified as to the next encounter involving himself, M.F.1 and A.P.. He testified that he and A.P. smoked a joint. A.P. took off her pants, and played with herself with the dildo. He didn't ask about a consent letter, because he already had one. He said "You shaved your thing", and then performed oral sex on her. He said he had sex with A.P. while M.F.1 was on the bed fully clothed. After he came, A.P. had a shower. A.P. did not move out after this encounter.

[225] P.F. testified as to another encounter, involving himself, M.F.1 and A.P.. He said A.P. performed oral sex on him. She gave him a consent letter, which he put on the floor.

[226] P.F. testified that A.P. took her clothes off, and she "went down" on him. He then went down on her. He said they had intercourse, he came, and she had a shower. While this was going on, M.F.1 was on the bed beside them, playing a video game. P.F. testified that A.P. did not move out after this encounter.

[227] P.F. testified as to the next encounter. M.F.1 was not there. P.F. testified that he started playing with the dildo with her. He said he put the dildo around her private area, and around the anal area. He said he pushed the dildo two inches up her rectum, and then began having sex with her. During sex, P.F. testified that A.P. had a bowel movement and the bed was soiled. At this point, M.F.1 came into the room and P.F. told her what had happened, to which M.F.1 said "Oh, okay". He said they threw the soiled sheet in the garbage.

[228] P.F. testified that he and A.P. stopped having sex after this incident. He said that about two weeks later, she left the premises, without any discussion. He said he was surprised.

Afterwards, he would see her on the street and their relationship was all right.

[229] P.F. testified that T.F. and A.P. broke up because of the sexual relationship between himself and A.P.. He testified that T.F. had found one of the consent letters.

[230] P.F. testified that he never touched A.P. without her consent, and he never forced himself on her.

[231] On cross-examination by counsel for the Crown, P.F. stated that his nephew T.F. was not like a son, but was a close nephew. He said T.F. was close to both him and M.F.1, but was closer to him.

[232] P.F. acknowledged that he and M.F.1 were married on December 13th, 2004. Accordingly, the threesomes to which he testified, in which M.F.1 participated, had occurred before they got married, and indeed very shortly before they got married. He said that he and M.F.1 had been planning their marriage for some time. He acknowledged that M.F.1 had confronted him about having a sexual relationship with A.P., and yet the threesomes had apparently occurred after M.F.1 had confronted him.

[233] P.F. acknowledged that, sometime in the past, he had had a discussion of a possible threesome with M.F.1 and a woman named Nancy. He testified that M.F.1 had been very upset at that suggestion, and she was very shocked that he would make it. She was hurt, and said "I'm not good enough". The suggestion was not discussed again.

[234] P.F. acknowledged that A.P. was about 15 years old in October, 2004. He knew that A.P. had been abused at home and that she was in therapy, and her mother was an alcoholic.

[235] P.F. testified that T.F. found out about the relationship with A.P. just before his wedding with M.F.1. He testified that T.F. said "Are you and A.P. horsing around – yes or no?" P.F. testified that he acknowledged that they were. He said "I done it, I'm sorry".

[236] P.F. testified that after this discussion with T.F., he had other sexual contacts with A.P., that he did not tell T.F. about.

[237] Counsel for the Crown asked P.F. about the specific timing of the four or five sexual encounters with A.P.. He testified the first encounter was some time before December 4th, 2004, and the last one, which included the bowel movement, was probably on December 9th or 11th. He testified that T.F. had confronted him sometime between the second and third events.

[238] P.F. testified that after the first encounter, that did not involve M.F.1, he wanted a consent letter before he would engage in threesomes. He said he primarily wanted a note because of her age, just to be safe. He said that if she had been 20 years old, he would not have asked for a note. He would ask respecting anyone under the age of 18. He wanted a note because people would otherwise think that there had been no consent. He said there were about five similar notes, and he did not know what happened to them.

[239] He testified that he got the first note a couple of days after M.F.1 had confronted him and thrown A.P.'s diary at him. He got the note because if anything did happen, it would be all right.

[240] P.F. testified that with respect to the incident on the elevator, he was playing with her "pussy" over her clothes. He said there was no conversation. She did not say or do anything. Afterwards, when they went upstairs, he started playing with her on her vagina while M.F.1 was asleep. When she went to her room, he said "I got something to show you", to which she said "Whatever", which he took to mean "yes". P.F. testified that A.P. was in love with T.F., and that she and T.F. had sex together several times per week. He testified that notwithstanding that, he did not wonder why she was agreeing to have sex with him.

[241] P.F. testified that he got the first "note" from A.P. around December 4th or 5th. He said he put it in his pocket, and then put it in a drawer. He said he was not afraid that M.F.1 would find it. He said he is not aware of where any of the notes are. He said he kept them a couple of years, and then they were lost in a flood that took place sometime in 2007.

[242] P.F. testified that on the occasion when he was confronted by M.F.1, she slammed the door. She did not say what was in the diary that she had seen.

[243] Ms. Ward asked P.F. about A.P.'s testimony that she had spoken to M.F.1 after some

sexual touching by P.F.. P.F. acknowledged that that had occurred, and that M.F.1 had confronted him about it. He testified that M.F.1 said "A.P. said something to me – is it true?", to which he said "Yes". He said that M.F.1 was more upset than she had been the first time she had confronted him. He said he was surprised that A.P. had told M.F.1. He said T.F. and he were there when M.F.1 confronted him. He said T.F. was shocked, but didn't say anything. He said this occurred after he had received the consent note from A.P..

[244] P.F. testified that after this confrontation, he did not think that A.P. did not want sexual contact with him. He speculated that perhaps A.P. had told M.F.1 because she didn't want M.F.1 to be mad at her. In fact, M.F.1 was mad. He promised M.F.1 it would not happen again.

[245] A few days after this confrontation, T.F. asked P.F. what had happened. He said "What happened, uncle?". P.F. said "We were horsing around", to which T.F. said "You shouldn't have", and P.F. said "Okay".

[246] P.F. acknowledged that the message from M.F.1 was to the effect that A.P. had told her that P.F. had touched her and did not want it to occur.

[247] P.F. stated that before the first threesome occurred about which he had testified, both A.P. and M.F.1 asked him if he wanted to participate in it. He acknowledged that this was some time after he had told M.F.1 that he would stop any sexual activity with A.P.. He also acknowledged that when he had suggested a threesome in the past, M.F.1 was shocked at the suggestion.

[248] P.F. stated that before the threesome occurred, he saw A.P. sign the promise note. He said M.F.1 read it aloud to him. It was put on the floor.

[249] P.F. testified that the next two incidents occurred while M.F.1 was in the room and watching, but that she did not participate. During the last incident, involving the bowel movement, M.F.1 was out of the room.

[250] P.F. stated that A.P. was the maid of honour at the wedding ceremony.

[251] P.F. stated that T.F. still lives with him and M.F.1, and that he is like a son to M.F.1.

[252] With respect to the incident involving his hand on A.L.'s buttock, P.F. testified that he had wakened up, rolled over, and put his arm around M.F.1. He said he had put his hand on what he thought was M.F.1's buttock. It was just resting and he does not think his hand moved. He said A.L. was lying close to M.F.1, and her butt was close to M.F.1.

[253] P.F. denied that he suggested having a threesome with A.L.. He acknowledged that he was interested in having threesomes. He had done some involving A.P. and M.F.1, and that he had asked M.F.1 if they could do one with Nancy.

[254] P.F. testified that A.W. is M.F.1's oldest daughter. He has a good relationship with her. He is like a stepfather to her. She called him dad. Once, he heard A.W. and her boyfriend having sex. He asked if he could watch them. They said no.

[255] P.F. acknowledged that A.P. was in love with T.F.. He disagreed that she did not want to have sex with him. He also disagreed that it makes no sense that M.F.1 would simply play a video game while he and A.P. were having sex. He denied that M.F.1 helped him rape T.K.. He denied that T.K. was an "easy victim". He denied threatening to kill her.

(c) A.W.

[256] At the time of trial, A.W. was 22 years old. M.F.1 and B.K. were her parents.

[257] A.W. testified that she visited P.F. when he was living with her mother in Oakville. On one occasion, P.F. had been drinking, and asked her a question. He asked if she wanted him to show her how to "please a guy". She said he touched her leg. On another occasion, he asked if he could watch her and her boyfriend having sex. She said the two events were not close together, they were about four or five years apart. She never reported these events to the police, because she did not want to.

[258] A.W. is T.K.'s sister. She said that on one occasion she had a conversation involving T.K., their father B.K., and his girlfriend Amy. She testified that T.K. said she had never been touched by P.F., and that if she had been, she would have told her father. She said her father had asked specifically whether P.F. had ever touched her.

[259] A.W. testified that T.K. had talked to her recently about the case. She said T.K. told her that the Children's Aid Society had advised her to tell the story out of spite and anger. T.K. asked her what would happen if she lied about the incidents, to which A.W. testified that she told T.K. she would go to jail.

[260] On cross-examination, A.W. acknowledged that she was interviewed at length by Officer Zafiridis on January 20th, 2009. She testified that her conversations with T.K. had occurred before her interview with Officer Zafiridis.

[261] A.W. testified that she did not ask T.K. who at the Children's Aid Society had advised her to say this out of spite and anger. She said she did not want to get involved.

[262] A.W. testified that even though T.K. had told her that her allegations were all lies, she did not mention that to the police. Counsel for the Crown suggested on cross-examination that if T.K. had acknowledged that her allegations were lies, A.W. was in a position to clear P.F.. Notwithstanding that, she did not say anything about it to the police. She testified that she now realizes she should have told the police, but that she did not. She said she did not tell the police because she was "nervous".

[263] A.W. also testified that when T.K. told her father, B.K., that P.F. had not touched her, she also did not tell B.K. about the sexual incidents involving herself and P.F.. She said she did not tell her father because she "just didn't want to".

[264] A.W. acknowledged that T.K. had given her her Facebook password. Accordingly, it was feasible for her, or anyone who had the password, to pretend to be T.K.. She said she did not know why T.K. had given her the password.

(d) T.F.

[265] At the time of trial, T.F. was 23 years old. His parents were M.F.2 (P.F.'s sister), and T.E.. He lives with M.F.1, with whom he has a good relationship. P.F. is his uncle, and he has a very good relationship with him. He has lived with P.F. and M.F.1 for many years.

[266] P.F. testified that A.P. was his ex-girlfriend, in 2003 and 2004. He said they had a good relationship, then it became rocky. He said they had arguments because she flirted with other men.

[267] P.F. said he found out that A.P. had been sleeping with his uncle. He was in the living room with M.F.1 watching television. M.F.1 told him that his uncle and A.P. had slept together, and said that he should ask A.P. about it.

[268] P.F. testified that when A.P. returned to the house, he asked her if she had slept with his uncle. She said no, then later said yes. At that point, he said the relationship was over. P.F. testified that A.P. said she slept with his uncle because his uncle's "member" was larger than his. Furthermore, he was prepared to "go down" on her, and bring her to orgasm. After this conversation, she left the house and he does not recall her coming back.

[269] P.F. testified that he saw a letter in which A.P. gave his uncle permission to have sex with her. He said A.P. showed him the letter. The letter said words to the effect that "I, A.P., give P.F. permission to have sex with me".

[270] On cross-examination by Mr. Fraser, P.F. stated that he had never seen R.K. stick his "pecker" in A.L.'s mouth. He said he had never discussed the incident with A.K.. He said that T.K. had never discussed with him any of the sex allegations.

[271] On cross-examination by counsel for the Crown, P.F. acknowledged that P.F. is like a brother to him. He also acknowledged that A.P. was very much in love with him.

[272] P.F. testified that he was at home when M.F.1 confronted P.F. about sex with A.P.. He said M.F.1 showed him the consent letter. He said A.P. then came home, and he confronted her, after which she moved out. He testified that M.F.1 did not say she had been present when any of the sexual events had occurred.

[273] P.F. testified that after A.P. moved out, M.F.1 asked P.F. how he could have cheated like that. P.F. said he was sorry, and that he hadn't been thinking properly. P.F. testified that M.F.1 forgave him.

[274] P.F. testified that a few days later, he asked P.F. about it. P.F. said he was sorry, that it had "kinda happened". He said it happened a few times.

[275] P.F. acknowledged that if someone was having sex in the house, he could hear it.

[276] P.F. testified that both P.F. and M.F.1 had planned on keeping the consent letter. He said it was lost in a move from one residence to another. He said they searched for the note, but could not find it. He said this was about five years ago.

[277] P.F. denied that his evidence was based on a desire to help P.F. and M.F.1.

General Findings

[278] Earlier in these reasons, I listed some of the factors that go into assessing the credibility of witnesses. One of those factors is demeanour. As has been observed in other cases, demeanour is generally an unsatisfactory indicator of credibility. This case is no exception. However, demeanour has played a minor role with respect to some witnesses. For example, I noted that A.W. had difficulty explaining why she had not told the police that T.K. had stated to her that her allegations were lies. When she was confronted with this by Ms. Ward, she became defensive. She began to hesitate and she became flustered. I am not willing to entirely overlook her demeanour. Her defensive, flustered and hesitant state is consistent with the improbability of the proposition that was being put to her by Ms. Ward, and, in my view, is consistent with the improbability that her evidence on this point is true.

[279] For the most part, however, I have not given demeanour a high degree of weight.

[280] There is a broad divergence in the various versions of the facts related by the witnesses.

[281] The complainants have given evidence as to events that occurred some years ago, but also at times when they were quite young. T.K. was somewhere between 9 and 12 years old. A.P. was about 15 when the events about which she testified occurred. A.L. was also about 15.

[282] In assessing the credibility of the complainants, particularly T.K., I have placed little

weight on the lack of specifics regarding time, location and other peripheral matters. What matters, in my view, is the testimony regarding the events themselves.

[283] I have also placed little weight on delayed disclosure of the events. A.P. and A.L. both testified that they did not disclose the events earlier than they did because they did not want to get involved in court proceedings. In both cases, they only became involved because they were persuaded to do so by A.K.. In the case of T.K., she not only did not disclose the events, but she was untruthful when asked whether any sexual abuse had occurred, both by her father and by a psychiatrist who was investigating child maltreatment. She explained that she was afraid because P.F. had threatened to kill her, and on cross-examination she said she kept it all secret because she didn't want her dad to find out because she was too scared at what her dad would do.

[284] In my view, these explanations are reasonable, and accordingly I have given little weight to delayed disclosure and, in the case of T.K., to her untruthfulness when asked about sexual abuse.

[285] I found each of T.K., A.P., and A.L., to be generally credible witnesses. There was no strong suggestion of any collusion among them.

[286] Each of them was obviously nervous while testifying. There is no doubt that each of them would have preferred to be somewhere else. Notwithstanding that, I have no doubt that each of them attempted to tell the truth to the best of her ability. While there is also no doubt that they do not like both M.F.1 and P.F., I do not think any of them is making up a story simply to cause them harm.

[287] In the case of A.P., there are some aspects of her testimony that cause me some concern. On her own evidence, she was on drugs most of the time, and her perceptions may be somewhat shaky as a result. She had difficulty explaining how a dildo was inserted in her anus at the same time as P.F. was having sex with her. However, she was clear that whatever sexual activity was done or attempted by P.F., she did not consent to any of it.

[288] T.K. was very nervous when she gave evidence. She clearly has no regard for her mother, or P.F.. To say she hates them is not an understatement. Her descriptions of the actual

events about which she testified were somewhat vague and imprecise. She was quite uncertain as to exactly when they occurred. However, she was firm on the essential nature of what had occurred in the bathroom, and, sometime later, in her bedroom. She was very willing to acknowledge discrepancies and inconsistencies between her evidence and statements she had made earlier, both in her videotaped statement and at the preliminary inquiry.

[289] I found A.L. to be a very credible witness. She did not seek to exaggerate or embellish any of her allegations. If anything, she tended to downplay them. As noted earlier, the disclosure of her allegations was not made because she came forward with them. She was encouraged to do so by A.K.. I have no reason to disbelieve or discount her evidence in any way.

[290] I have serious doubts about the evidence of P.F.. In some respects, his evidence simply defies credulity.

[291] I noted earlier in these reasons that, to some extent, P.F. testified to certain things that had not been put to A.P. in cross-examination. In my view, this is significant. P.F. testified that M.F.1 had confronted him about sexual activity with A.P., and had thrown A.P.'s diary at him. P.F. testified that A.P. said "Sorry, I didn't know she'd look for my book". It had never been put to A.P. that she had even made a diary, let alone said anything in it about sexual activity with P.F., nor that her diary had been found by M.F.1, nor that M.F.1 had thrown it at P.F., nor that A.P. had said anything about the diary to P.F..

[292] Of even greater significance, in my view, is the evidence about the so-called "promise letters". P.F. testified that he had obtained anywhere up to five such notes or letters from A.P., purportedly giving her consent to sexual activity with him. T.F. testified that he had seen one such letter. It was never suggested in any way to A.P. that she had prepared or signed any such letters, nor that P.F. had requested that she sign them.

[293] Because of the prominence those letters had in P.F.'s evidence, this is an appropriate case in which an adverse inference can and should be drawn as to P.F.'s credibility. Those letters, as well as A.P.'s diary, are significant matters on which she should have been given an opportunity to respond.

[294] Other aspects of P.F.'s evidence are of concern. For example, I have difficulty with his explanation about the incident involving his hand on A.L.'s buttock. She testified that his hand was on her buttock for at least 10 seconds, and that he had squeezed it several times, like a stress ball. P.F.'s evidence was that the incident had not occurred in the way it was described by A.L.. He described a benign occurrence in which he woke up and put his arm across M.F.1's body while she was asleep. He did not recall touching A.L.'s buttock at all. In my view, putting an arm across the body of one's spouse while she is asleep would be a very common occurrence. If nothing untoward happened, as P.F. testified, it is difficult to believe that he would have any memory of such an occurrence. Why he did so in this particular case was not explained.

[295] I found P.F.'s explanation of the various allegedly consensual sexual encounters with A.P. to be bizarre. According to him, they occurred very shortly before he and M.F.1 got married. Some of them occurred as consensual threesomes after M.F.1 had apparently been very upset at discovering sexual activity between P.F. and A.P..

[296] I have serious difficultly in accepting much of T.F.'s evidence. His explanation for his benign acceptance of his uncle's explanation of having sex with his girlfriend is difficult to accept when contrasted with his evidence that he was so upset with his girlfriend that she left the house. I simply do not accept his evidence respecting the so-called promise note, and his explanation that the note was lost in a move between residences. That explanation is fundamentally at odds with that of P.F., who testified that whatever number of notes there were (as many as five), they were all lost in a flood.

[297] I also have serious difficulty with A.W.'s evidence. If T.K. had actually confessed to her, that her allegations against P.F. and M.F.1 were lies, I have no doubt that she would have been anxious, to say the least, to ensure that the police were made aware of this. However, according to her, she said nothing about it to the police, because she was "nervous". I do not accept that T.K. made any such confession to her.

Specific Findings

[298] I will discuss my findings in connection with the specific counts in the indictment, in

the order in which they appear in the indictment.

(a) Counts 1, 2 and 3

[299] These counts relate to the alleged sexual assault of T.K. in the bathroom of the F's' residence. The issue is whether the evidence, taken as a whole, satisfies me beyond a reasonable doubt that either accused, or both of them, are guilty of the offence or offences charged.

[300] T.K. was adamant that P.F. had sex with her in the bathroom, after she had been removed from the bath, and that M.F.1 held her arms while P.F. did so.

[301] In describing the acts committed by P.F. in the bathroom, T.K. was reluctant to use terminology that would be appropriate to describe P.F.'s conduct. She referred to his "bottom part", and her "bottom part" and "top part". In contrast, when describing the attempted sexual assault that occurred when she was older, she referred to P.F.'s "penis" and her "vagina".

[302] Clearly, T.K. was attempting to recall, and describe, what happened to her in the bathroom through the eyes of the young child that she was at the time, and used terminology that would have been appropriate to her perception at the time. It would have been easy for her to have embellished her description of the incidents by using more adult-like terminology, but she did not. In my view, she was attempting to describe, honestly, as best she could, what happened to her through the eyes of a young child. While she was quite uncertain as to when the events occurred, she was consistent in her description of the events themselves.

[303] Having reviewed T.K.'s evidence carefully, and having listened to her and observed her as she gave her evidence, and as she was extensively cross-examined by experienced counsel, I am not left in any reasonable doubt that the events occurred as she described them. That includes being removed from her bath, her arms being held by M.F.1 as P.F. attempted to have sex with her while she was standing up, her arms being held by M.F.1 while T.K. was on her back and P.F. having sex with her on the bathroom floor, and P.F. threatening to kill her if she ever told anyone, after the assault was complete.

[304] P.F. denied altogether that the events occurred as described by T.K.. His evidence does not leave me in any reasonable doubt after considering it in the context of the evidence as a

whole.

[305] The evidence is sufficient to justify findings of guilt on each of counts 1, 2 and 3. The essential elements of each offence have been made out. Because precisely the same conduct is sufficient to justify findings of guilt on all three counts, it is likely that the *Kienapple* principle applies. I will hear submissions in due course as to whether the principle applies, and if so, which count or counts should be stayed.

(b) Count 4

[306] This count relates to the alleged threat made by P.F. to T.K. after the sexual assault in the bathroom, to the effect that he would kill her if she ever told anyone. As reviewed above, I accept the evidence of T.K. that P.F., after committing the assault in the bathroom, threatened to kill her if she ever told anyone. Thus, I am satisfied beyond a reasonable doubt that the threat was made by P.F.. P.F. has denied that he made such a threat. Having considered his evidence in the context of the evidence as a whole, his evidence does not leave me in any reasonable doubt. The essential elements of this offence have been made out.

[307] Accordingly, I find P.F. guilty on count 4.

(c) Counts 5 and 6

[308] These counts relate to the assault in T.K.'s bedroom that she described when she was older. She testified that P.F. came into her bedroom and attempted to have sexual intercourse with her. She testified that she struggled and fought him off, and he called her a "bitch" as he was leaving her bedroom.

[309] As referred to earlier, T.K. was somewhat older when this assault occurred, and she used more appropriate terminology to describe what occurred to her. Having listened to her evidence as she described it, and after she was cross-examined at some length by counsel, I have no doubt that the events occurred as she described them. P.F., in his evidence, denied altogether that the events occurred. I have considered P.F.'s evidence in the context of the evidence as a

whole, and it does not leave me in any reasonable doubt. The essential elements of these offences have been made out.

[310] Thus, I find P.F. guilty on each of counts 5 and 6. Since it would appear that the same conduct gives rise to findings of guilt on both counts, the *Kienapple* principle may have application. I will hear submissions on whether the principle has application, and if so, which count should be stayed.

(d) Count 7

[311] This count relates to the alleged sexual assault by P.F. on A.P. on December 4, 2004. According to A.P.'s evidence, the assault commenced in the F's' bedroom while M.F.1 was asleep, when P.F. started with his foot on her buttocks, and then he used his fingers on her vagina, and then progressed to an assault in her bedroom later when he pressed his penis near her vagina.

[312] With respect to all of the counts in relation to A.P., there is a fundamental issue as to whether sexual activity between P.F. and A.P. was consensual, or whether P.F. had an honest but mistaken belief that A.P. consented to the activity.

[313] Having listened to the evidence of both A.P. and P.F., there is no doubt that sexual activity occurred. Indeed, P.F. acknowledges the activity, and described it in great detail. While the evidence diverges to some extent in terms of the exact details, P.F. does not really dispute the essential elements of the sexual activity as described by A.P..

[314] A.P. denied that she consented to any of the sexual activity. P.F., on the other hand, testified that not only did A.P. consent to the activity, she signed a number of documents in which she specifically consented to the activity. Further, he testified that she recorded something in her diary about the sexual activity. As noted earlier, none of P.F.'s evidence about the consent letters or A.P.'s diary was put to her in cross-examination.

[315] As held by the Supreme Court of Canada in *Ewanchuk, supra*, the question of whether A.P. consented to the activity depends on her subjective state of mind. She either consented or

she did not. Any "ambiguous" conduct on her part is relevant only to assessing her credibility as to her state of mind, and to the question of whether P.F. had an honest but mistaken belief as to her consent.

[316] A.P. testified that she did not consent. In fact, she said "no" when P.F. attended in her bedroom and placed his penis next to her vagina.

[317] It is significant, in my view, that A.P. told M.F.1, shortly after the first incident, that P.F. had touched her. P.F. acknowledged that this had happened, and that M.F.1 was angry about it and told him so. If A.P. had actually consented to the activity, it is unlikely that she would have complained to M.F.1 as she did. It is also highly unlikely, in my view, that having made her opposition to the sexual activity known in this way, she would have subsequently consented to further sexual activity, not only with P.F. but with M.F.1 as well.

[318] In my view, all of the evidence regarding the various counts involving A.P. must be considered, in determining whether she consented to the activity, or whether P.F. had an honest but mistaken belief in consent. According to P.F., the sexual activity progressed from one form of sexual activity to another, but A.P. consented to all of it. It is impossible, in my view, to isolate periods of time during which she consented or did not consent, and indeed it was P.F.'s position that her consent ran throughout the period.

[319] Having considered the evidence as a whole, I am satisfied, beyond a reasonable doubt, that A.P. did not consent at any time to any of the sexual activity. She testified as to her subjective state of mind, and I accept it. She acknowledged that she remained in the F's' residence even while the sexual assaults were taking place, but she explained that she was in love with T.F., and she was "stupid". She acknowledged that she regularly used drugs, but that it had no effect on her state of mind as it related to sexual activity. She complained to M.F.1 after the first sexual encounter. I accept her evidence and her explanation.

[320] I have considered P.F.'s evidence, and the other evidence called on his behalf, and I am not left in any reasonable doubt by it. According to P.F., A.P. signed as many as five documents in which she specifically consented to sexual activity. Apart from the fact that this was not put to A.P. in cross-examination, the evidence itself is bizarre. This seems a most unusual way of

obtaining consent. Why more than one such letter would be required was not satisfactorily explained. Assuming the letters had the importance that they seemed to have had, one would expect P.F. to have made sure they were kept in a safe place. Instead, according to him, they were either placed on the floor or in a drawer, and they were all lost in a flood. T.F. testified as to only one such letter, and said it was lost in a move from one residence to another.

[321] P.F. also testified that all of the apparently consensual sexual activity took place a very short time before his marriage to M.F.1. Furthermore, according to his evidence, M.F.1 quickly went from anger at discovery of the sexual activity, to acceptance of it, and then to willing participation in it.

[322] According to T.F., he discovered that A.P. was having sex with P.F., and she admitted this and told him that it was because P.F.'s member was bigger, he came down on her and brought her to orgasm. He said he asked his uncle about it, who calmly told him the activity occurred, and then he forgave him. He acknowledged, however, that M.F.1 had angrily confronted P.F. about the activity.

[323] Most of this evidence defies credulity on its own, is riddled with inconsistencies and improbabilities, and does not leave me in any reasonable doubt as to whether A.P. consented to sexual activity with P.F.. For the same reasons, it does not leave me in any reasonable doubt as to whether P.F. had an honest but mistaken belief in consent on the part of A.P..

[324] For all of these reasons, I am satisfied beyond a reasonable doubt that on December 4, 2004, P.F. applied force to A.P. for a sexual purpose, that she did not consent, and that P.F. did not have an honest but mistaken belief in her consent. Accordingly, I find P.F. guilty on count seven.

(e) Counts 8, 9, 10 and 11

[325] These counts relate to two separate incidents of sexual assault, in which both P.F. and M.F.1 were involved. Two counts allege sexual assault, and two counts allege gang sexual assault.

[326] According to A.P., the first incident involved the situation in which a dildo was placed in her anus, she thought by M.F.1, and M.F.1 held her mouth while P.F. had sex with her. The second incident occurred while M.F.1 held her hands and masturbated while P.F. had sex with her.

[327] According to P.F., there were two consensual "threesomes" involving M.F.1, and the incident involving the dildo was a consensual act that involved only A.P. and himself, and that resulted in A.P.'s bowel movement.

[328] While the details differ, there is no dispute that at least two sexual events occurred that involved A.P., P.F., and M.F.1. The issue is whether they were consensual, or whether P.F., or M.F.1, had an honest but mistaken belief in consent.

[329] For the reasons articulated earlier, I find that there was no consent to the sexual activity on the part of A.P.. Further, there was no honest but mistaken belief in consent on the part of P.F. or M.F.1.

[330] Based on the evidence as a whole, I find that A.P. was touched for a sexual purpose by both P.F. and M.F.1 on two occasions without A.P.'s consent, and I find that there was no honest but mistaken belief in consent on the part of either P.F. or M.F.1. Both events occurred when both P.F. and M.F.1 were parties to the events.

[331] For these reasons, I find that both P.F. and M.F.1 are guilty on counts 8, 9, 10 and 11. It would appear that the *Kienapple* principle may have application, and I will hear submissions on whether it does, and if so, which count or counts should be stayed.

(f) Count 12

[332] According to A.P., this incident occurred on an occasion on which she was on the F's' bed while M.F.1 was sleeping. She testified that she felt something on her butt, and it turned out to be P.F.'s hand. She jumped up and left.

[333] Based on A.P.'s description of the event, I am not satisfied beyond a reasonable doubt that the touching of A.P. by P.F. was for a sexual purpose. Thus, I find P.F. not guilty on this count.

(g) Counts 13 and 14

[334] These counts relate to the incidents involving M.F.1 holding A.L. down on the bed, and encouraging her 3-year-old son, R.K., to put his "pecker" in A.L.'s mouth.

[335] Having considered the evidence as a whole, I have no doubt that the incidents as described by A.L. occurred as described by her.

[336] In order to find M.F.1 guilty on count 13, I must be satisfied beyond a reasonable doubt that her holding A.L. down on the bed was for a sexual purpose. I am not so satisfied. I would need to be satisfied that it was M.F.1's intention that A.L. commit fellatio on a 3-year-old boy, or that the 3-year-old boy put his penis in A.L.'s mouth for the purpose of fellatio. I am not satisfied beyond a reasonable doubt that that was M.F.1's intention. Rather, the evidence is more consistent with a sick joke.

[337] For the same reasons, in connection with count 14, I am unable to find, beyond a reasonable doubt, that M.F.1's counselling of her 3-year-old son, R.K., to place his penis in A.L.'s mouth was for a sexual purpose. Again, it is more likely that this was simply a sick joke.

[338] For these reasons, I find M.F.1 not guilty on counts 13 and 14.

(h) Count 15

[339] This count relates to the incident in which P.F. placed his hand on A.L.'s buttock for about 10 seconds, and squeezed it a number of times, while he and M.F.1 were having sex.

[340] Earlier, I described the evidence in connection with this incident in some detail. Having considered the evidence as a whole, I am left in no doubt that the incident occurred as described by A.L.. The question is whether I can be satisfied beyond a reasonable doubt that, in

the circumstances described by A.L., P.F. applied force intentionally to A.L. for a sexual purpose without her consent. I am so satisfied.

[341] The incident occurred while P.F. and M.F.1 were having sex. It is highly unlikely, therefore, that when P.F.'s hand rested on A.L.'s buttock, who was lying next to them, that he could have mistaken it for part of M.F.1's body. He squeezed her buttock a number of times, like a stress ball. I am satisfied that there was nothing inadvertent about it. Squeezing A.L.'s buttock, in the manner described, could only be for a sexual purpose. She clearly did not consent to what occurred.

[342] I have considered P.F.'s evidence in the context of the evidence as a whole, and it does not leave me in any reasonable doubt. As noted earlier, if the incident occurred as described by him, there would be little reason he would remember it at all. I am satisfied that the incident occurred as described by A.L..

[343] For these reasons, I find P.F. guilty on count 15.

Some Concluding Observations on the Similar Fact Evidence

[344] As noted earlier, at the conclusion of the Crown's case I admitted the evidence on each count as similar fact evidence on all of the counts, because the evidence had probative value. As it happens, I found it unnecessary to rely on any of the similar fact evidence, except on the issue of whether A.P. consented to sexual activity with P.F., or he had an honest but mistaken belief in her consent. On that issue, it was clear that it was necessary to examine the entire course of conduct of A.P., P.F., and M.F.1 throughout the entire period A.P. was in the F's' residence.

[345] At the end of the day, I was satisfied beyond a reasonable doubt as to the guilt of P.F. and/or M.F.1, on the counts on which I made findings of guilt, without relying on any of the propensity evidence.

GRAY J.

Released: August 25, 2010

CITATION: R. v. M.F.1 & P.F., 2010 ONSC 4018
COURT FILE NO.: 117/09
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ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

M.F.1 and P.F.

REASONS FOR JUDGMENT

Gray J.

Released: August 25, 2010