PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Fogelson*, 2018 NSPC 7

Date: 20180309
Docket: 2902434
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Brian David Fogelson

Judge:	The Honourable Judge Timothy D. Landry
Heard:	September 15th & November 10th, 2017 Bridgewater, Nova Scotia
Decision	March 9, 2018
Charges:	Sec. 156 Criminal Code, Sec. 157 Criminal Code
Counsel:	Sarah Lane for the Crown Stanley MacDonald, Q.C., for the Defence

PUBLICATION BAN

S. 486.4 CC A ban on publication of any information that could disclose the identity of the victim and/or complainant

By the Court:

[1] Brian David Fogelson is facing two charges, namely that between January 1st, 1975, and December 31st, 1977, at or near Kingston, Nova Scotia, did indecently assault K.E., contrary to Section 156 of the Criminal Code, R.S.C. 1970 as amended, and further at or near the same place and on or about the same date aforesaid, did commit an act of gross indecency with K.E., contrary to Section 157 of the Criminal Code of Canada, R.S.C. 1970 as amended.

[2] Evidence was called in relation to these matters on September 15th, 2017, and November 10th, 2017, both dates taking place at the Bridgewater Justice Centre. On September 15th, 2017, the complainant testified on behalf of the Crown. The Crown then closed its case. The accused testified that same date on his own behalf. The Crown applied to re-open its case wishing to call rebuttal evidence. On November 10th, 2017, the Court granted that application and the Crown then called the mother of the complainant, D. E. During summations, the Crown advised the court that it was not seeking a conviction of the count under Section 157 of the Criminal Code. That charge, bearing case number 2902434 will be shown as dismissed.

[3] This is a criminal trial. The Crown bears the burden of proof beyond a reasonable doubt. The Supreme Court of Canada in **R. v. Lifchus** [1997] 3 SCR 320 noted at paragraph 39:

> "39 Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this

> demonstrates that you are satisfied of his guilt beyond a reasonable doubt."

[4] In this case, the accused has testified. The Court must assess the evidence and must make findings of credibility. The Supreme Court of Canada in **R. v. W.(D).** [1991] 1 SCR 742 noted at pages 757 to 758:

> "In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in *R. v. Morin*, *supra*, at p. 357.
>
> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. 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.
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> 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.

> If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in
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> charging the jury on this basic principle."

[5] The distinction between a witness' credibility and reliability was discussed in the Nova Scotia Supreme Court decision of **R. v. J.J.C.** 2014 NSSC 114 at paragraphs 30 to 36:

> "[30] In historical sexual offence cases, the distinction between credibility and reliability is essential in the analysis of the witness's evidence.
>
> [31] Credibility has to do with a witness's veracity. Reliability deals with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. However, a credible witness can be honestly mistaken (Justice Michelle Fuerst, Mona Duckett, Q.C. and Judge Frank Hoskins, ***The Trial of Sexual Offence Cases*** (Toronto: Carswell, 2010) 58, ***R. v. C.(H.)***, 2009 ONCA 56 (CanLII), [2009] O.J. No. 214(Ont. C.A.) and ***R. v. Morrissey*** (1995), 1995 CanLII 3498 (ON CA), 1995 CarswellOnt 18 (Ont. C.A.).
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> [32] Justice P. Rosinski in ***R. v. C.R.H.***, 2012 NSSC 101 (CanLII) commented on the relationship between credibility and reliability at para 35:
>
> > [35]…a witness's credibility is a mixture of their reliability (are they now recalling matters they had a proper opportunity to observe and commit to memory in the past?) and impartiality or honesty (are they

> disinterested in the outcome of the case and do not favour any party over another?).

[33] At page 30-2 of the text ***McWilliams, Canadian Criminal Evidence*** (Toronto: Canada Law Book, 2013), the authors express the relationship this way:

> What do we mean by credibility? In order to answer this question, it is necessary to separate the truthfulness of the witness….from the factual accuracy of his or her evidence. With respect to the credit prong of credibility, we ask whether the witness is worthy of belief? In other words, are we confident that the witness is trying to be truthful and not deceiving us. Having satisfied ourselves of this, we move on to the second inquiry. Is the factual content of the witness's evidence trustworthy or reliable? For example, are we confident that the witness has accurately recalled or observed whatever he or she is testifying about. Once we are satisfied that the witness is trying to be truthful and that his or her account is reliable, we can safely conclude that the evidence is credible.

[34] The evidence of the complainant is determinative in this case. In my assessment of the evidence adduced, I am instructed by Justice Sopinka in ***R. v. Morin*** (1998), 1988 CanLII 8 (SCC), 44 C.C.C. (3d) 193 (S.C.C.) at p. 211:

> …the law lays down only one basic requirement: during the process of deliberation the jury or the other trier of fact must consider the evidence as a whole and determine whether guilt is established by the prosecution beyond a reasonable doubt. Beyond this injunction it is for the trier of fact to determine how to proceed…..
>
> …to inject into the process artificial legal rules with respect to natural human activity of deliberation and decision would tend to detract from the value of the jury system. Accordingly, it is wrong for a judge to lay down additional rules for the weighing of the evidence. Indeed, it is unwise to attempt to elaborate on the basic requirement referred to above. I would make two exceptions. The jury should be told that the

> facts are not to be examined separately and in isolation with reference to the criminal standard…..

[35] While it is true that no formal rules for the assessment of credibility can be enunciated, a general framework often cited is found in the reasons of Justice Mossip in ***R. v. Filion*** [2003] O.J. No 3419 (S.C.J.) which provides the following questions:

> 1. Does the witness seem honest? Is there any particular reason why the witness should not be telling the truth or that his/her evidence would not be reliable?
>
> 2. Does the witness have any interest in the outcome of the case, or any reason to give evidence that is more favorable to one side than to the other?
>
> 3. Does the witness seem to have a good memory? Does any inability or difficulty that the witness has in remembering events seem genuine, or does it seem made up as an excuse to avoid answering questions?
>
> 4. Does the witness's testimony seem reasonable and consistent as he/she gives it?...
>
> 5. Do any inconsistencies in the witness's evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because he or she failed to mention something? Is there any explanation for it? Does it make sense?
>
> 6. The manner in which a witness testifies may be a factor, and it may not, depending on other variables with respect to a particular witness.

[36] I have further reviewed and considered the credibility assessments of our court in ***R. v. C.R.H.***, 2012 NSSC 101 (CanLII), ***R. v. R.R.D.G.***, 2014

> NSSC 78 (CanLII) as well as that of Judge Tufts in ***R. v. Keyes***, 2013 NSPC 25 (CanLII). In the end, I refer to and adopt the reasoning of Saunders J.A. of our Court of Appeal in ***R. v. S. (D.D.)*** at para 77:
>
> > It would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experiences are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanor too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof. …"

[6] The complainant in this case was 53 years of age when he testified on September 15th, 2017. The incident of which he testified allegedly occurred when he was between the ages of 10 to 13 years old. The Supreme Court of Canada in **R. v. W.(R.)** [1992] 2 SCR 122 provided the Court with guidance with how to assess the evidence of an adult testifying about matters that allegedly occurred when they were children. At page 134, Chief Justice McLachlin noted:

> "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."

[7] As stated previously, the accused in this case did testify. I will begin my analysis of the evidence by examining the evidence of Brian Fogelson. Mr. Fogelson is 63 years of age and resides in the United States. On September 9th of 1975, the accused arrived in Lunenburg County and began his teaching career. Mr. Fogelson went through the history of his professional career. From 1975 to 1980, he taught music at both the elementary school and junior high school levels. Furthermore, Mr. Fogelson indicated that he established a band class in the 1976-1977 school year, which would have been the second year of his teaching career. He recalls the alleged victim in this case as his student from 1975 to the time the complainant left school in grade 10. Mr. Fogelson described a conversation he had with the alleged victim's father at which time he was asked to encourage Mr. E. to do better in school.

[8] It was at this time that the accused was putting together a school band and he recalled encouraging Mr. E. to join. Mr. Fogelson told the Court that he remembered a band camp being held at Acadia University and he further told the Court that he encouraged students to take home to their parents applications to that band camp that was to be held at Acadia University. Mr. Fogelson recalled that the parents would send in those applications directly to Acadia. The accused denied attending the band camp and denied driving the alleged victim to a band camp at Acadia or at any other band camps.

[9] Mr. Fogelson then provided the Court with details of how he spent his time in the summers of 1976, 1977 and 1978. During those summers, Mr. Fogelson indicated that he would take summer school to upgrade his license and that began the first part of July of each summer. Following that summer school, he would travel back to his home of New Jersey to work in his father's store selling sporting goods and trophies. Mr. Fogelson told the Court that he had not been able to confirm the definitive dates for the summer school that he attended and that he was also not able to obtain any confirmation of his travel to the US during those summers, such as used tickets or passports.

[10] The accused told the Court that he did know a Mr. Perrot. He confirmed that he attended university with him. The accused, however, denied taking the alleged

victim to Mr. Perrot's house. In addition, the accused denied ever giving the victim any alcohol. He denied ever sleeping in the same bed with the victim and specifically denied the allegations against him in this case.

[11] On cross examination, the Crown asked the accused a series of questions about the length of his career in education. The accused agreed that, while teaching school in Lunenburg, the enrollment at that school was approximately 180 students and also agreed that, over the years, he has had interactions with thousands of students. The accused, however, maintained that he remembered Mr. E. The accused described the alleged victim as having some talent as a musician. Furthermore, the accused stated that although he did not do one-on-one tutoring with band students, he would meet with students after school, but he would meet with groups of students, he suggested, by grade level. He told the Court that he would not describe his relationship with Mr. E. as being special, but he recalled specifically having been asked by Mr. E.'s father to encourage his son.

[12] The Crown asked the accused how it was that he could specifically recall Mr. E. Mr. Fogelson's response to that was that while he was teaching at Lunenburg, he essentially saw students over many years progress from lower grades to high school level. He said he first met the alleged victim in 1975 when

he would have been in grades 5 or 6 and that Mr. E. had been first in his music classes, then in his band classes.

[13] The accused was asked about a Mr. Perrot. He confirmed that he met that individual while in university and that he continued to know him after that time period because Mr. Perrot also became a music teacher. The accused confirmed going to a number of houses owned by Mr. Perrot who, during the relevant time period, was residing in the Annapolis Valley area of Nova Scotia. Mr. Fogelson indicated that he did not recall Mr. Perrot having a house close to Acadia University during the relevant time period. Mr. Fogelson's recollection was that Mr. Perrot first had an apartment that he rented in the Kentville area and then he rented a house in Greenwood. The witness described the home in Greenwood as being a one floor ranch-style home.

[14] The witness went on to say that Mr. Perrot also rented homes in Middleton and in Auburn. He described the home in Middleton as being a two storey duplex. Downstairs was an open concept with the upstairs containing the bathrooms and the bedrooms. He told the Court that he had stayed there a number of times and that he usually stayed in the same room. The only recollection he had of that room is that it had a bed, a dresser and a small closet. He could not say how the bed was facing in the room and he could not describe the room any more than that.

[15] Mr. Fogelson was asked by the Crown about whether or not he had any memory issues. The witness responded by saying that he is 63 years of age and that he continues to have a good memory. Furthermore, he indicated that during his professional career, his memory had been tested on a number of occasions by having to recall various forms of data in his professional life.

[16] In response to questions on cross examination, the accused indicated that for the first couple of weeks of July in the first summers that he stayed in the Province of Nova Scotia, he enrolled in summer school to upgrade his teaching license. During those weeks, he would stay at his home in Lunenburg. Beginning in 1978, he told the Court that for the month of August he was employed by the Nova Scotia Choral Federation and that that went on to varying degrees up to 1988. Prior to 1978, in the summers of 1976 and ’77, following summer school, he would return to his father’s home in New Jersey to assist with his father’s store.

[17] He recalled returning home to New Jersey in the summers of 1976 and 1977, the third week of July to the second week of August. The witness told the Court that in the summer of 1976, he travelled to New Jersey and then back to Nova Scotia by way of air travel. He said he recalled that because his father paid for his ticket in 1976. In 1977, Mr. Fogelson told the Court that he recalled being picked up at the airport by a friend of his which he said was further confirmed for him in

an e-mail that he had received from his friend. Mr. Fogelson agreed that in the summers of 1976 and 1977, he was in Nova Scotia for at least two weeks which was the time that the summer school ran. Mr. Fogelson was asked about when he would visit his friend, Mr. Perrot. He told the Court that he would visit with Mr. Perrot during the school year at various times and that those visits took place on weekends. He denied going to Mr. Perrot's house in the summers of 1976 and 1977 saying that he would not have had the money to travel to visit with Mr. Perrot.

[18] Mr. Fogelson had advised the Court, in direct examination, that the summer school ran from Monday to Fridays and on Saturdays, he would work on projects. The Crown asked Mr. Fogelson what would happen with the Sundays for those two weeks that he was in Nova Scotia. He indicated that during those days he would stay at home. The Crown suggested to the witness that this would amount to two Sundays in both 1976 and 1977 approximately 40 years ago and how he could know specifically what he did on those specific days some 40 years ago. Mr. Fogelson's response was that he was simply not earning enough money to be able to travel from his home during those Sundays.

[19] Mr. Fogelson told the Court that the last contact he would have had with Mr. E. was when the alleged victim would have left school in grade 10. He was asked

of the year Mr. E. would have left school. Mr. Fogelson recalled that Mr. E. had repeated grade 8 and counted the years up to 1982 when he would have left school.

[20] Mr. Fogelson was asked about his relationship with Mr. Perrot. He described them as very good friends who met in college, but he said they no longer have contact because of his lawyer suggesting to him that once he was charged with this matter, that he should sever ties with Mr. Perrot. The witness told the Court that, in his view, he and Mr. E. had a good relationship prior to Mr. E. leaving school and that Mr. E. had actually left his band in grade 9, one year prior to him actually leaving school. The Crown asked Mr. Fogelson if he knew why the alleged victim left his band and Mr. Fogelson speculated that it was because Mr. E. was having academic issues, but that he had not specifically been told.

[21] The Crown asked Mr. Fogelson if he had ever driven students in his personal vehicle for any reason. He told that Court that while he was teaching at the Mahone Bay school, that he would have early band rehearsal and that necessitated him picking up the students to arrive at the school before the scheduled buses arrived with other students. He also agreed that he had driven some students to the Nova Scotia Annapolis Valley area for individual lessons. He was asked if he had driven students for music lessons while he was at the Lunenburg School. He responded that he had and that he had driven students to a music specialist in

Middleton, Nova Scotia. He confirmed that that had happened on more than one occasion and he only recalled the first name of that music specialist, that being Dale.

[22] Mr. Fogelson went on to tell the Court that at time, Mr. Perrot was living in Middleton and that the lessons would actually take place at Mr. Perrot's house and, on one or two occasions, he had travelled there with more than one student. The Crown suggested to the accused that he was a helpful teacher and he agreed with that suggestion. The Crown also suggested to him that he had a relationship with Mr. E.'s father and, at the request of Mr. E., Sr., he wanted to help the complainant. The Crown suggested that driving Mr. E. to Wolfville for band camp would be a way to assist the alleged victim. The witness maintained that he never drove students to band camp.

[23] In addition, while Mr. Fogelson did agree that he met Mr. Perrot where Mr. Perrot taught school, he denied going to Mr. Perrot's school with other students for a tour of that school facility. Mr. Fogelson denied attending social functions with his students and, specifically with Mr. E. Mr. Fogelson was asked if he recalled Mr. E. attending band camp and he stated that he did know that Mr. E. attended band camp, but was not sure, specifically, of what years he attended band camp. In addition, the witness told the Court that he attended at Acadia University to try to

get the back records to confirm what years Mr. E. would have attended band camp, but he was unable to get those records.

[24] Mr. Fogelson was asked of how he could specifically recall Mr. E. attending band camp and his response to that question was that in the early years of his teaching career he had 25 to 30 kids in his band, 5 or 6 of which would go to bank camp. He knew specifically which of the children went to band camp. He was asked to name other children who went to band camp. He was able to name two other individuals and recalled the first name of a third individual.

[25] On re-direct, the witness told the Court that there was a level of trust between himself and Mr. E., Sr. Mr. Fogelson further described how he had been asked by the alleged victim's father to try to assist his son and Mr. Fogelson told the Court that that's what he tried to do. He was asked about his means of recalling all of the details that he has recalled with respect to this matter. Mr. Fogelson told the Court that for approximately two years he has been on a strict recognizance and he has wracked his brain to try to remember anything that would be relevant to this case.

[26] That was the evidence of the accused, Brian Fogelson. The Court has to analyze the evidence of Mr. Fogelson as mandated in the **W.(D.)** decision, *supra*.

My overall impression of the accused was that he was a very strong witness. The accused provided great detail to the Court in nearly every aspect of his testimony. For example, during the summers of 1975, 1976, 1977 and 1978, the accused advised the Court as to this whereabouts. In 1975, he told the Court that during that summer he was not yet in Nova Scotia, having only arrived here on September 9th, 1975. For the summers of 1976, '77 and '78, he told the Court that those three summers began with him attending two weeks of summer school, the purpose of which was to make him a better educator and to improve his credentials. In the summers of 1976 and 1977, he then travelled back to his home of New Jersey where he worked in his father's store for 4 to 6 weeks. He was able to indicate to the Court how he travelled to and from New Jersey those two summers. Obviously, simply because a witness provides detail to the Court does not automatically mean that a Court will accept that person's evidence. However, in this case, I must say that I found the detail provided to the Court by Mr. Fogelson to be quite compelling. I did not categorize the detail provided to the Court as someone simply making things up or remembering specifics from a script but rather I concluded that the detailed evidence being provided by Mr. Fogelson was that of an individual who has sat down and had given careful thought to what took place many years ago.

[27] There are other aspects of Mr. Fogelson's evidence which he candidly admitted to that perhaps were not in his best interest nor projected him in the best possible light. For example, he admitted to having driven students to the Annapolis Valley for music lessons with a specialist and that those visits might have meant an overnight stay. In addition, he readily admitted to his friendship with a Mr. Perrot. Mr. Fogelson admitted to having spent time at a number of Mr. Perrot's residences and having gone to Mr. Perrot's residence with students due to the fact that the music lessons with the specialist would take place at Mr. Perrot's residence.

[28] The Crown asked Mr. Fogelson on cross examination how it was that he could remember Mr. E. as well as he says he does. The suggestion being that the real reason he is recalling Mr. E. as well as he does is due to his involvement in this offence. The accused stated, and I accept, that Mr. E. was a student of his for a number of years. In addition, he told the Court that he knew the father of the alleged victim and that Mr. E.'s father had approached him to ask him to encourage his son to do better in school. Mr. Fogelson testified that there was a relationship of trust between himself and the accused's father. It is logical that that relationship, in my view, would make the alleged victim in this case stand out to Mr. Fogelson to a greater extent than other students.

[29] The Court can accept all, none or some of a particular witness' testimony. It is my view that when the accused told the Court that he could recall specifically what he did during four specific Sundays, two in the summer of '76 and two in the summer of '77, and that was an assumption that the accused made. I do not accept that the accused specifically remembers what he did on those four particular Sundays. That assumption was based on his recollection of his inability to travel due to his knowledge of his lack of financial means at that time. Overall, however, I must say that I accept the evidence of the accused and that his evidence does raise a reasonable doubt. As noted earlier in this decision, this is a criminal trial and the proof is proof beyond a reasonable doubt.

[30] I want to pause at this stage to say that I also found the alleged victim in this case to be a strong witness. There were inconsistencies in the evidence of Mr. E. pointed out by the defence. However, I have examined those inconsistencies and I did not find them to be of great significance. Mr. E. was testifying to something that allegedly occurred while he was in his early teens and, in my view, based on the guidance from the Supreme Court of Canada, those types of inconsistencies are to be expected. However, this is not a contest of witnesses. It is not a situation where the Court is simply indicating that it believes one witness over the evidence of the other. It is the application of the **W.(D.)** test. Once the Court has

determined that it cannot reject the evidence of the complainant and his denial of the offence and that that denial raises a reasonable doubt, the Court's analysis is concluded; an acquittal must be entered.

[31] In **R. v. Starr** [2000] 2 SCR 144, Justice Iacobucci noted at paragraph 242:

> "242 In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in *Lifchus* as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof beyond a reasonable doubt. In this regard, I am in agreement with Twaddle J.A. in the court below, when he said, at p. 177:
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> > If standards of proof were marked on a measure, proof "beyond reasonable doubt" would lie much closer to "absolute certainty" than to "a balance of probabilities". Just as a judge has a duty to instruct the jury that absolute certainty is not required, he or she has a duty, in my view, to instruct the jury that the criminal standard is more than a probability. The words he or she uses to convey this idea are of no significance, but the idea itself must be conveyed...."

[32] Proof beyond a reasonable doubt is the most onerous burden of proof in our system. The Crown bears that burden throughout. Having accepted the evidence

of the accused in this case, I must conclude that I am left with reasonable doubt and, therefore, an acquittal to case number 2902433 must be entered.

Timothy D. Landry, JPC