PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. C.A.M., 2010 NSPC 35

Date: 20100107
Docket: 1981804, 1981805
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

C.A.M.

Restriction on publication: s. 486.4 Criminal Code of Canada

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Judge Alan T. Tufts
Heard:	October 27, 2009, in Liverpool, Nova Scotia
Written decision:	May 26, 2010
Charge:	s. 152 Criminal Code - 2 charges
Counsel:	David Bright, Q.C. for the Crown Philip Star, Q.C., for the defence

By the Court: (orally)

INTRODUCTION

[1] In June of 2008 the defendant was 25 years of age. He often spent time at the home of his friend and co-worker who lived in Liverpool, Queens County, Nova Scotia. This man resided with his spouse and their daughter, a thirteen-year-old girl. She is one of the complainants in this proceeding. I will refer to her hereafter as "X" to protect her identity rather than using their initials. In a small community that could easily identify her given the familiarity that most people have with other individuals in small towns. I will refer to the first complainant as "X" and the other girl as "Y".

[2] It appears that the defendant had an ongoing dialogue with this girl X where they talked about various subjects and interests, and at times about subject particularly related to sexual matters. It is not clear how long this was occurring but the evidence suggests for a number of weeks ending in June of 2008.

[3] It ended when X's mother inadvertently received some of the text messages and in fact replied to one. The police were called and an investigation ensued. In the course of the investigation the police became aware of an exchange of other text messages using cell phones between the defendant and X and her friend "Y". Y was fourteen years of age at the time. This particular "conversation" or exchange occurred after the prom or * dance which Y testified was at the end of the school year 2008.

THE CHARGE

[4] It was from this exchange certain allegations arose about the defendant's conduct and as a result the defendant was charged *inter alia* with two charges under s. 152 of the *Criminal Code*. The charges are set out in the Information as follows:

> that between the 11th day of June 2008 and the 10th day of July 2008 at, or near Liverpool, Nova Scotia, did for a Sexual Purpose counsel "X" a person under the age of sixteen years to touch directly with a part of his body to wit: his penis the body of C.A.M. contrary to Section 152 of the Criminal Code.

> AND FURTHERMORE between the same dates: C. A. M. did for a Sexual Purpose counsel "Y" a person under the age of sixteen years to touch directly with a part of his body to wit: his penis the body of C.A.M. contrary to Section 152 of the Criminal Code.
> [redacted to protect the complainants' identity]

[5] The charges were laid to comply with the amended version of s. 152 of the *Criminal Code*, which changed the critical age from fourteen to sixteen, although the informant, who testified, conceded she was unaware of the effective date of the amendment. The other charges that were laid in this proceeding have now been dismissed. It is now clear that the amendment came into effect on May 1, 2008. It should be noted as well that the charges were particularized and alleged "counselled" only, not "invited" or "incited", words which are also included in s. 152 of the *Criminal Code*.

[6] The charges, as laid, alleged counselling both X and Y to touch the defendant as well as each other for a sexual purpose. It is clear that it is only necessary for the Crown to establish beyond a reasonable doubt that the counselling included only the touching of the defendant by X for one count and by Y for the second count. It is not necessary to show that the counselling included X and Y touching each other. In fact the evidence in my opinion does not disclose that in any event.

THE ISSUE

[7] The primary issue here is whether the words contained in the text messages sent by the defendant on the night in question constituted "counsel" for a sexual purpose for either complainant to touch the defendant within the meaning of s. 152 of the *Criminal Code*.

[8] Other issues also require an examination - a review of the required *actus reus* and *mens rea* for the offence under s. 152 of the *Criminal Code*. This necessarily includes a consideration of the meaning of "counsel" used in that section.

THE EVIDENCE

[9] As I mentioned above, the defendant knew X through his friendship with her father. The defendant knew Y because she was a friend of X. X was born July *, 1994 and Y was born March *, 1994. The defendant was born July *, 1982.

[10] The evidence is unclear as to the precise nature of the defendant's association with X. The evidence suggests that he had spoken to her at various times and that she was the subject of conversations he had with others in the community about her. There is no evidence that they moved in the same social circles, that they socialized in the same places or that they associated at the homes of mutual friends. The evidence does indicate however that on a number of occasions he forwarded text messages to her or spoke to her in a sexual way. He made references to parts of her body, spoke about what others thought of her sexually and he asked questions about her "sex life" – words taken from the evidence – and in some respect he shared his sexual fantasies with her.

[11] I mention this because it is probative of his intent when he sent the messages in question and in particular what if any intent he had about how the messages would be received. As I will explain later this is critical because of the legal requirement of the *mens rea* or intent for this offence. Also I mention this because the defendant says in his statement to the police the reasons for the messages was, in effect, to raise X's self esteem and inferentially not to counsel or invite sexual contact.

[12] However, it is not clear precisely what, if any, ends the defendant was trying to pursue. I will come back to what, if any, inferences can be drawn from the defendant's conduct later.

[13] On the night in question X and her friend Y had been at the prom or * dance. The defendant in fact saw them before they left for the evening. They returned to X's home where Y intended to stay the night. Both girls were on X's bed in her bedroom. X testified the defendant sent a text message to her and referenced Y. Other messages followed. X and Y replied to these messages. Part of the difficulty in determining precisely what was said is that the messages were deleted and both X and Y were very uncertain and unclear as to exactly what was said. In any event

the message appears to have been directed to Y, notwithstanding that it was sent to X's telephone.

[14] However it appears the defendant sent messages to X suggesting that the defendant, by looking into the eyes of Y and by looking at her behind, he could tell that she had had sex previously - the words in the evidence, of course, were in the vernacular and I have not repeated them here.

[15] X then described that the defendant used words which indicated the defendant wanted to have a "threesome" which reference is to an encounter where the defendant would have sex with both girls at the same time. X said that the defendant specifically mentioned that he wanted to have sex with her first. X testified that while it appeared the messages may have been directed to Y it was X who was actually responding, although the answers appeared to represent the reactions of both girls. X testified the responses included words such as "Yea", "OK" and "LOL": – an acronym for "laugh out loud". Y testified that most of the responses were "Ha Ha". Although in her direct testimony X described the defendant using the word "threesome" in cross-examination at one point she could not recall if that word was used at all.

[16] Y testified that she recalled receiving three messages. She confirmed the messages came to X's phone but were referring to her and that she mentioned that the messages indicated that the defendant wanted to have a "threesome". The messages also made references to her breasts and buttocks and were clearly sexual in nature. She testified that she felt scared and sick – the latter being a response to the "threesome" suggestion. She did however admit in cross-examination that she told others that this incident was "not a big deal" and that X had told "everyone it was cool".

[17] Y in my opinion was not a credible witness. Even taking into account her obvious nervousness, she was contradicted at different occasions by contradictory comments made in her police interview. I had the distinct impression she did not really recollect any of the details of the exact exchange of messages, that she may have been mixing in other messages received at other times and reconstructing events which she admittedly spoke to her friend about and perhaps others. Her evidence as to precisely what was said is not, in my opinion, reliable.

[18] The defendant spoke to the police. The videotaped interview was introduced by consent and without the need of a *voir dire* to determine voluntariness. The defendant did not testify and called no evidence.

[19] The defendant in the statement confirmed the sexualized talk and exchanged messages he had with X. He indicated that he was trying to persuade X to perhaps leave behind her current boyfriend and seek out others who would treat her with more respect. He said he was trying to raise her "self confidence", to use his words. He said specifically it was not his intent to follow through on any sexual innuendos.

[20] He was asked about the kinds of messages he sent to X and Y. He made a couple of particular references to the word "threesome" in the interview. However it is very difficult to tie these to the prom or * night dance incident which is particularized in the allegation here.

[21] The first reference appears at line 15-18 of Exhibit 2 - the transcript of the defendant's statement. There he made a reference to a "threesome" but he referred to it as being "a day" – a small point but also to when "that other guy was there". The Crown's evidence is clear that X and Y were alone and that no one else was present during this particular allegation. It is difficult to see how the defendant would understand that another "guy" was there during the incident which the complainants described. In fact Y was asked if any mention was made of AB [I will delete the actual name of the boyfriend to protect the identity of the two complainants] (X's boyfriend) and she said no. It is not clear that the defendant is referring to the prom night incident at all during this portion of the police interview.

[22] The other reference is contained in pages 33-34 of Exhibit 2. In this exchange with the police constable, the defendant is describing how Y had texted him from her boyfriend's phone which he mistakenly thought was her phone. He was then asked if he may have "texted" Y on that phone. He then explained to the officer that this is when something is said about Y's breasts being nice and that he said, "And I believe that's kind of where the threesome thing came in". He then explained that he made some references about leaving AB [redacted] behind and "going and having a threesome or something to that effect or...".

[23] He then goes on to confirm that the threesome was a reference to sex between him and X and Y. He also confirmed that he did mention to the girls that he had heard that Y had had sex. Again, however, this was not tied to the prom night message exchange. The evidence, again, is clear that the message came to X's phone and not to Y's boyfriend's phone. The defendant was not, in my opinion, referring to the prom night incident during this exchange with the police constable. In any event it is not clear that he was.

[24] The defendant was asked about prom night but not specifically about any text messages later that night. Part of the difficulty with the police interview was that the interview skipped around from one subject to the other and never really focused on the details of the prom night allegation, although in fairness to the officer it appears that the investigation was originally centered around a possible offence under s. 172.1 of the *Criminal Code* and that the prom night details may not have been critical at that period in the investigation.

[25] In short, the defendant's statement is not helpful as to precisely what was said during the prom night exchange. I recognize that both girls, I believe, confirm that there was only one occasion when the references were made to a "threesome" and that it seems it was on prom night. It is quite likely the defendant was referring to another occasion when he "texted" Y because of his references to the other phone and his references to the other "guy" being present. In the end the court is left with little evidence and questionable reliability as to what was said during the impugned exchange. There is also a distinct possibility that the girls were referring to other occasions and confusing or mixing in other conversations with the prom night exchange.

[26] I will come back to this in my analysis below. Before leaving this part of my decision let me make a couple of comments about the date of the alleged offence. There was no direct evidence of when the prom night was. The police constable said it was in June but she gave no indication of how she knew this - whether she was told this or had personal knowledge of the date. Y testified that it was a "dance at the end of the school year" but never described the date or the month. The only other references to the date was when the defendant was asked by the police during the interview on July 10, 2008 when the "texting" started. He replied, "A month to a month and a week ago...I can't be sure". However on the whole of the evidence I am satisfied that the prom night incident occurred after May 1, 2008.

THE LAW

[27] Section 152 of the *Criminal Code* is as follows:

> 152. Every person who, for a sexual purpose, invites, counsels or incites a person under the age of 16 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 16 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; or
>
> (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

[28] The critical age, as I mentioned above, was changed to 16 effective May 1, 2008. I will now reivew the *actus reus* of s. 152 including the definition of "counselling".

[29] "Counsel" is defined by s. 22(3) of the *Criminal Code*. It provides as follows:

> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite. [emphasis added]

[30] Given that this definition only includes words which are included in "counsel" other references are helpful. The Oxford Canadian Dictionary defines "counselling" in part as "assist or guide a person in resolving personal difficulties; recommend a course of action". The same dictionary defines "incite" as "urge or stir up" and "procure" is "to obtain, especially by care or effort; acquire" and "solicit" as "ask repeatedly and earnestly for or seek or invite (business); to make a request or petition to a person".

[31] In Black's Law Dictionary "procure", "solicit" and "incite" are also defined as follows:

> Procurement, n. 1. The act of getting or obtaining something. – also termed procuration, 2. The act ofr persuading or inviting another, esp. a woman or child, to have illicit sexual intercourse. – procure, vb.
>
> Solicitation, n. 1. The act or an instance of requesting or seeking to obtain something; a request or petition <a solicitation for volunteers to handle at least one pro bono case per year>. 2. The criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime <convicted of solicitation of murder> ...
>
> Incite, vb. To provoke or stir up (someone to commit a criminal act, or the criminal act itself). Cf. Abet.

[32] The word "counsel" has been judicially considered in the context of s. 22 of the *Criminal Code*–counselling an offence, and in the context of s. 163.1 defining child pornography by reference to material that "advocates or counsels" sexual activity.

[33] In *R. v. Sharpe* [2001] 1 S.C.R. 45 McLachlin J. (as she was then) discusses "counsel" in the latter context at ¶56:

> ¶56 "Counsel" is dealt with only in connection with the counseling of an offence: s. 22 of the *Criminal Code*, where it is stated to include "procure, solicit or incite". "Counsel" can mean simply to advise; however in criminal law it has been given the stronger meaning of actively inducing: see *R. v. Dionne* (1987), 38 C.C.C. (3d) 171 (N.B.C.A.), at p. 180, *per* Ayles J.A. While s. 22 refers to a person's actions and s. 163.1(1)(*b*) refers to material, it seems reasonable to conclude that in order to meet the requirement of "advocates" or "counsels", the material, viewed objectively, must be seen as "actively inducing" or encouraging the described offences with children.

[34] In *R. v. Hamilton*, [2005] 2 S.C.R. 432, Justice Fish discusses the word "counsel" in the context of counselling an offence. Speaking for the majority he discusses both the *actus reus* and the *mens rea* of the offence of counselling a criminal offence. He says as ¶21 and ¶22:

> ¶21 Our concern here is with the imposition of criminal liability on those who counsel others to commit crimes. In this context, "counsel" includes "procure, solicit or incite": see s. 22(3) of the Criminal Code.
>
> ¶22 In their relevant senses, the Canadian Oxford Dictionary (2nd ed. 2004) defines "counsel" as "advise" or "recommend (a course of action)"; "procure" as "bring about"; "solicit" as "ask repeatedly or earnestly for or seek or invite", or "make a request or petition to (a person)"; and "incite" as "urge". "Procure" has been held judicially to include "instigate" and "persuade": R. v. Gonzague (1983), 4 C.C.C. (3d) 505 (Ont. C.A.).

Later at ¶29 he again talks about the *actus reus* of counselling being a deliberate encouragement or act of inducement of the commission of a criminal offence:

> ¶29 In short, the *actus reus* for counselling is the *deliberate encouragement or active inducement of the commission of a criminal offence*. And the *mens rea* consists in nothing less than an accompanying *intent* or *conscious disregard of the substantial and unjustified risk inherent in the counselling*: that is, it must be shown that the accused either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct.

[35] Later in *Hamilton*, Justice Charron, (who was dissenting on other grounds) cautioned about the potential for overbreadth when interpreting the words "counsel" in that context. At ¶72 she says:

> ¶72 This Court considered *Dionne* and expressly adopted this "stronger meaning of actively inducing" in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 56. In order for the *actus reus* to be proven, the words communicated by the accused, viewed objectively, must be seen as *actively* inducing, procuring or encouraging the commission of an offence. This restricted interpretation of the meaning of counselling is not only consonant with the definition of "counsel" under s. 22(3), it ensures that the scope of the offence remains within the justifiable limits of the criminal law. It is this concern of potential overbreadth that informed this Court's adoption in *Sharpe* of a more restricted meaning of counselling.

[36] Both noted references in *Sharpe* and Justice Fish's comments in *Hamilton* were relied upon by the Supreme Court of Canada in *R. v. Déry* [2006] S.C.J. No. 53 and our Court of Appeal in *R. v. O'Brien* [2007] N.S.J. No. 9. In *R. v. Root* [2008] O.J. No. 5214 Watt, J.A. relying on *Hamilton* and *Sharpe* concluded that the *actus reus* of counselling requires: detailed encouragement or active inducement of the commission of a criminal offence–see also *R. v. Rhynes*, 2004 PESCTD 30 where the word "incite" was interpreted at ¶21.

[37] I recognize that I am required to interpret the word "counsel" in the context of s. 152 and not the other sections referred to above. However the clear wording of s. 22(3) indicates that that section applies here. Section 22 says in part "for the purposes of this Act". Parliament chose to include that word in s. 152 which is understandable given that s. 152 is in principle a "secondary liability" offence, albeit like the touching it seeks to avoid it is harmful and objectionable conduct – see *Hamilton* ¶25 for a discussion about secondary liability offences. I see no reason in principle therefore why the way "counsel" has been interpreted should not apply here subject to the necessary modifications for context and the purposive nature of the impugned section.

[38] In my opinion, therefore, "counsel" in this section must mean more than simply suggesting, insinuating, opining, describing or even fantasizing – unless from any of those actions an inference can be drawn that would lead one to conclude that counselling as I described above has occurred. There must be, in my opinion, some element of encouragement or inducement or even persuasive urging. In my opinion there must be evidence present which would support a finding of any one of these types of conduct or evidence which would allow an inference to be drawn to arrive at this conclusion that there has been counselling interpreted the way I have referred to earlier.

[39] Counselling does not have to be explicit. Counselling for sexual purpose contact with an underage child may be implicit in the nature of the exchanges between an accused and a complainant, providing the necessary inference can be drawn that meets the legal meaning of counselling which I described earlier.

[40] Counselling, however, is not facilitating, a term used in s. 172.1 of the *Criminal Code* and which includes conduct which in effect makes it easier to

commit an offence under various *Criminal Code* sections including s. 152. For a discussion on facilitating or s. 172 see *R. v. Pengelley*, 2009] O.J. No. 1682. I have not opined on what interpretation should be applied to other words used in s. 152 ie., "invite" or "incite" given that the Information was particularized using the word "counsel" and the Crown chose to prosecute using that word in the charge. No amendment was ever sought in that regard and in my opinion it would not be appropriate to amend the Information at this point.

[41] There is no doubt that there are different meanings between the word "counsel", "invite" and between "counsel" and "incite" in that "invite" has less than an encouragement or persuasive urging connotation to it than "counsel" or "incite". Although I might add the word "invite" used in this context may require a stronger meaning than simply suggesting or insinuating. However, in this case the allegation is not "invite" but it is "counsel". It is not necessary therefore for me to opine further about the meaning of "invite" or "incite" for that matter, in this context.

MENS REA - S. 152

[42] The necessary intent or *mens rea* of s. 152 is set out in *R. v. Legare* [2008] A.J. No. 373[1] - a decision that both counsel referenced in their submissions at length. There the Alberta Court of Appeal, relying on *Hamilton*, *supra*, succinctly set out the test at ¶41 and ¶45:

> ¶41 For s. 152, the Crown must show that the accused knowingly communicated for a sexual purpose with a child under the age of fourteen, and that the accused either intended that the child would receive that communication as being an invitation, incitement or counselling to do the physical conduct s. 152 would avoid, or that the accused knew that there was a substantial and unjustified risk that the child would receive that communication as being an invitation, incitement or counselling to do that physical conduct. The actus reus and mens rea must co-exist, so in that sense the mens rea must be present when the communication occurs.
>
> ¶45 It is not necessary or appropriate to read into s. 152 of the Code a requirement that mens rea include present intent for imminent sexual touching of

[1] See Appeal to Supreme Court of Canada on other grounds 2009 SCC 56

> the child by the adult, or of the adult by the child, or of the child on herself. It would appear that the trial judge found no need of imminence in paragraph 23 of his reasons. I would agree with this. There is no indication by Parliament of any time limit on how soon after the communication it must be that the accused is anticipating to have the contact happen. Present intent does not require present action.

ANALYSIS

[43] Sexual banter and innuendo between adults can be multi-layered, subtle and complex. Various messages are often intended, yet explicit requests or invitations are often avoided. Accordingly while such talk may inferentially be seen as suggestive, it undoubtedly would be considered as falling short of an invitation, incitement or counselling for sexual contact. However different considerations arise in the context of sexual innuendo and banter between an adult and an underage child. This is because the dynamics between adults and children are viewed much differently in context of discussion over sexual matters. This is not the case for interactions between adults necessarily, yet not all talk between an adult and an underage child which includes references to sex is an offence. The analysis is very much driven by the context. There are certainly cases where the invitation, counselling or incitement can be implicit in the conversations although the talk may be subtle, multi-layered or complex. This is dependent upon, in my opinion, on the nature of the conversation, the words and expressions used, the context in which it occurred and the relationship between an accused and the complainant. These types of conversations may not be viewed between adults as anything but flirtation and innocent banter but yet between an adult and a child it could easily be concluded that these types of banter could amount to an invitation or counselling or incitement to sexual contact. It is driven very much by the context.

[44] Here the defendant had an ongoing association with X and seemed to know Y at least from her friendship with X if not from the community generally. Why a 25-year-old man would be discussing sexual matters with a 13 and 14 year old seems rather odd. The obvious inference is that it was for some kind of sexual purpose. But to what end? He told X that he would never make sexual advances to her and she believed this. Certainly there is no other evidence that he intended to advance a plan to initiate any sexual contact with X or Y for that matter other than

the messages that were included in the texting and the discussion he had with X. It is certainly possible that this pattern of talk was designed possibly to gain a measure of familiarity with these girls which would make advances in the future possible. Although, however, there is a risk of making unwarranted speculation in this regard.

[45] This, in my view, is what makes this conduct so objectionable. It opens the door to more possibilities which could result in more explicit sexual talk and possibly to direct invitation or even indirect invitation or counselling for sexual contact.

[46] However, notwithstanding this backdrop I do not believe that the exchange of text messages on the evening of the prom or * dance night constituted the defendant "counselling" for a sexual purpose him touching, or being touched for that matter, by either complainant.

[47] First of all it is impossible to know exactly what was said. Without this it makes it very difficult to conclude whether this amounted to conduct targeted by s. 152. Secondly, I am not convinced that the defendant intended his remarks to be received by either X or Y as an encouragement, an inducement or an invitation, for that matter, for sexual contact by touching. The defendant's remarks were boorish, immature and inappropriate but in my opinion were not intended by the defendant to be received by either girl as counselling for a sexual contact or an invitation, for that matter. At least I cannot be convinced beyond a reasonable doubt of that conclusion.

[48] The precise wording or at least a reasonable description of its import is necessary. As Mr. Star correctly pointed out, in my view, the words are important because the words to some extent, in effect, constitute the offence. Here it is quite possible that the defendant was doing no more than opining about the prospects of sexual contact or insinuating a sexual fantasy by making these inappropriate suggestions. His remarks about the girls' figures or suggestions about their previous sexual encounters cannot be considered counselling or an invitation for

that matter. Not in this case, in my opinion. However coupled with other comments they could lead to an inference that he was counselling sexual contact. However, the only evidence of what he said is the complainant's testimony he wanted a "threesome". Whether that conclusion was the result of a direct request or some insinuation or innuendo is just not clear. There is not sufficient evidence, in my opinion, upon which I can draw an inference that he was counselling either of these girls to touch him for a sexual purpose.

[49] I accept that touching which is alleged to have been counselled does not have to be imminent, however, in my opinion more has to be shown than the defendant was engaging in a great deal of sexual talk which may make it easier at some future unknown date to actually invite sexual contact. Nor am I satisfied that the defendant sent these messages knowing that there was a substantial and unjustified risk that either girl would receive them as counselling or an invitation for sexual contact, for that matter. The responses by X and Y appear as if they did not take these comments seriously. The responses included "Ha ha" and "LOL". I recognize that one must be careful not to read too much into these types of words and that the harm associated with the targeted conduct is subtle and may not at first be evident to an underage complainant. However, in the whole context I cannot conclude that the defendant was intending that these words would be so received. This is particularly so when at best I can only infer what the import of the messages were because the evidence surrounding precisely what was said not reliable, in my opinion.

[50] In conclusion it is not clear what the defendant said during the text messages exchanged on the night in question. At most he suggested, intimated or opined about a "threesome" or some kind of sexual contact. There is real doubt that the "threesome" discussion took place on that evening in any event. The complainant's testified that the defendant "wanted" to have sex, yet they did not take the comments seriously nor am I convinced he intended it in this way nor did he know there was a substantial or unjustified risk that they would take it as such. At most the defendant was "laying the groundwork", if you will, for perhaps more advanced sexual innuendoes in the future.

[51] Clearly, as the defendant himself admitted, his conduct was inappropriate and objectionable and such that it is understandable that any parent would rightly be concerned that it immediately cease. However I am not convinced that it amounts to conduct which constitutes counselling for a sexual purpose by this defendant to have either of the complainants touch him and that is the section under which this defendant was charged.

[52] Accordingly he is found not guilty and he is acquitted.

A. Tufts, J.P.C.