IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. L. H.,2006 NSPC 46

Date: 2006/07/28
Docket: 1566720
1579410
Registry: Truro

Her Majesty the Queen

v.

L. H.

DECISION

BAN ON PUBLICATION (Section 486)

Editorial Notice

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

Judge: The Honourable Judge Anne S. Derrick

Heard: May 19; June 9, 2006

Charges: CC. 151, 145(5)

Oral decision: July 28th, 2006

Written decision: September 15, 2006

Counsel: John Nesbitt (Crown)
David Mahaney (Defence)

By the Court:

INTRODUCTION:

[1] L. H. is charged with two offences:

> Touching B, a person under the age of 14, for a sexual purpose directly with his penis, on or about April 20, 2005, contrary to section 151 of the *Criminal Code* and,
>
> Having been named in a Promise to Appear, failing without lawful excuse to attend court on August 24, 2005, contrary to section 145(5) of the *Criminal Code*.

[2] The trial was conducted over two days, May 19 and June 9, 2006. I will deal first with the charge of failing to appear.

FACTS - FAILURE TO APPEAR

[3] L. H. was arrested by police on July 30, 2005 for the s. 151 offence and given a Promise to Appear requiring him to attend Provincial Court in Truro on August 24, 2005. That would have been his first court appearance on the section 151 matter but he did not show up. Mr. H.'s evidence concerning his non-appearance was that he had been in Springhill with a friend the day before he was due to be in Court and they missed their ride back to Tatamagouche where Mr. H. was to rendezvous with a drive to Truro on August 24. Having missed his ride from Springhill, Mr. H. testified that he hitchhiked and walked, arriving home after dark on August 23 although he could not recall the time. The rendezvous with S. M., who was driving to Truro on August 24 and had agreed to take Mr. H., was at 7:30 a.m. but Mr. H. said he just missed her. It was his evidence

that he called the Truro Provincial Courthouse about 7:45 a.m. on August 24 and told someone that he wasn't going to make it to Court. He also testified that he called the RCMP to see if he could get a drive. It was Mr. H.'s evidence that he tried his very best to get to Court; he said if he hadn't wanted to get to Court he could have just stayed in Springhill. He said he didn't hitchhike from Tatamagouche to Truro on August 24th after missing his drive because he didn't think he'd make it in time for Court. When asked why he didn't come into Court the next day or the next week he said he didn't know a person could do that.

[4] There was no evidence led by the Crown to contradict Mr. H.'s version of the events of August 23 and 24. The issue therefore is whether what Mr. H. did to try and get to Court constitutes a defence to the charge. I have to determine whether the Crown has demonstrated that Mr. H. did not have a lawful excuse for failing to attend Court. I accept that Mr. H. made efforts to get to Court on August 24: he arranged a ride to Truro and he started back on August 23 from Springhill to Tatamagouche to catch it. However he missed both his drive from Springhill and his drive to Truro. Mr. H. said he arrived back home from Springhill after dark; as it was August, this would have been well before Ms. M.'s departure at 7:30 a.m. when it would have been light for some time. Presumably Mr. H. went to bed after his trip from Springhill and whatever it was that caused him to miss his drive with Ms. M. at 7:30 a.m. on August 24th, the fact is, he missed it and did not appear in Court that day or in the days immediately afterwards.

FINDINGS - FAILURE TO ATTEND COURT

[5] The obligation to attend Court is an obligation imposed by the *Criminal Code* on a person who is subject to some kind of release document, such as, in Mr. H.'s case, a Promise to Appear. Mr. H. was released from police custody after his arrest on July 30, 2005, on his promise to appear in Court in Truro on August 24. Mr. H. should have recognized that he had a serious obligation relating to the proper administration of justice to attend. In *R. v. Selamio*, [2002] N.W.T.J. No. 12, the Court held that a failure to attend Court, absent a compelling reason, should usually result in a finding of a breach of the section. The Court found that: "...the fault or mens rea requirement for this class of offence has a large element of the objective about it. Conviction can be avoided if an accused establishes a lawful excuse by a showing of due diligence to satisfy the obligation, including an honest and reasonable belief in a state of facts that would excuse non-attendance." The Court further held:

> *The only burden on the accused is an evidentiary one of adducing some evidence to put the defence of lawful excuse in issue. It is sufficient if this evidence raises a reasonable doubt. I say that because, once it is put in issue, then the Crown still bears the burden of negating it in order to establish proof beyond a reasonable doubt*.

[6] The Crown has proved the elements of the offence beyond a reasonable doubt and I must therefore move on to consider whether Mr. H. can be excused for non-attendance on the basis of

having shown due diligence by his efforts to get to Court. Mr. H.'s evidence shows that he made some efforts to get to Court but despite the importance of his obligation to get there, he missed the two crucial drives that would have got him from Springhill to Truro via Tatamagouche. It was not impossible for Mr. H. to get to Court due to being hospitalized or incarcerated. He just didn't make it. I am satisfied that the evidence has established beyond a reasonable doubt that Mr. H. did not exercise due diligence in trying to get to Court and his calls to Court Administration and the police after he missed his Tatamagouche to Truro drive amounted to nothing more than notification that he was not going to make it. I therefore find that Mr. H. failed, without lawful excuse, to attend Court in Truro on August 24, 2005 and I enter a conviction on that charge.

FACTS - SEXUAL INTERFERENCE CHARGE

[7] I will now deal with the charge under section 151 of the *Criminal Code.* Evidence was given by B, the complainant, and Cst. Scharf for the Crown; L. H. and T.C. for the Defence.

[8] In this case I will have to decide two principal issues:

(1) Did Mr. H. have sex with B; and if so,

(2) Did he take all reasonable steps to ascertain her age?

[9] If I find Mr. H. did not have sex with B then that is the end of the case against him.

[10] I want to note that Mr. H. is before the Court presumed innocent of the charge and that presumption of innocence remains in place only to be displaced by proof beyond a reasonable doubt. It is not a matter of the Crown proving that Mr. H. probably had sex with B or that he probably didn't take all reasonable steps to assess her age: I must be satisfied beyond a reasonable doubt and if I have a doubt I must give its benefit to Mr. H..

[11] The events giving rise to the charge against Mr. H. occurred on April 20, 2005. Mr. H. is charged with having touched B with his penis. At the time when this is alleged to have occurred, B was 13. She turned 14 on July 31, 2005. In April 2005, Mr. H. was 18.

[12] In 2005, B and L. H. both attended [...] High School. B was in Grade * and Mr. H. was in Grade 11 but also taking some Grade 10 courses. They did not know each other: Mr. H. did know C.M. who was B's [...] . On April 20, 2005, it was while in C.M.'s company that B met Mr. H. at the smoking area for the school.

[13] The evidence established that there was a smoking "corner" for students on the school property. Students from Grades 10, 11 and 12 congregated in this area to smoke and students from lower grades were permitted to be there if they had a permission slip. On April 20, 2005 there was a track meet going on at the school. B went to the smoking area with C.M.. Mr. H. was there with C.M.'s boyfriend, T.C. and friends, J.H. and M. L. . C.M. and J.H. were 15 at the time and in Grade 10, T.C. was 15 and Mr. L. was 19 and no longer at the school. According to B, C.M. suggested that she stay and hang around as it would be much better than going to the track meet. The older students

were smoking and drinking and, in due course, B said Mr. H. passed her a Tim Horton's cup with alcohol and pop in it. B testified that she drank almost all of it but could not recall the size. She had never drunk alcohol before. It had "a lot of effect" on her, she said, adding: "I think I was drunk." On cross-examination B agreed that being "drunk" may have affected what she remembered.

[14] Mr. H. testified that Mr. L. was "pretty drunk" and that T.C. had a "good buzz on." At the point when everyone was hanging around in the smoking area, Mr. H. said he had had one drink although he clarified that later in his direct evidence to say he had two drinks before playing football for an hour and then another drink before he left the smoking area. Mr. H. said by the time he left, the "buzz" from the two drinks had worn off. Neither he nor B had any alcohol during the time they were away from the smoking area together.

[15] The evidence established that Mr. H. decided to go and get some marijuana to bring back to the group in the smoking area. B went with him, according to her evidence because Mr. H. asked C.M. if she could come. Mr. H. said it was C.M. who asked him if B could go with him. According to Mr. H., C.M. told him that B liked him and would probably "give him head", which commonly means performing fellatio. On cross-examination, Mr. H. said that C.M. was "pushing" B and him together. Mr. H. testified that no one at the smoking area, including C.M., told him how old B was.

[16] I note that Mr. H.'s assertion in this regard contradicts T.C.'s memory that C.M. told Mr. H. that B was 14 or 15. I will summarize T.C.'s evidence later.

[17] Mr. H. and B set off walking together. Their evidence diverges on what was said between them and what happened on their excursion. I will summarize their evidence on these crucial events:

B's Evidence on the Walk and the Woods

[18] B candidly acknowledged that she may have flirted a little with Mr. H. when C.M. first called her over to the group hanging around in the smoking area. B recounted in answers on cross-examination that C.M. had asked her if she wanted to go out with Mr. H. and that she had said yes. She said she was very attracted to him and, while they were walking, may have told him she wanted to kiss him. During the walk, Mr. H. had his arm around B's waist.

[19] B was adamant in her evidence that before any sexual contact occurred with Mr. H., she told him her real age and the Grade she was in. She was less certain about where this occurred: at first she said it was while they were still at the smoking corner that Mr. H. asked her how old she was and what Grade she was in. She testified that she told him she was 13 and in Grade 8. A little further along in B's direct evidence she said the age/Grade conversation may have occurred as she and Mr. H. were walking together to get the marijuana. B acknowledged in cross-examination that she did not mention in her journal telling Mr. H. her age or Grade. She said she didn't think it was important at the time she made the entries.

[20] B said she was "sure" she did not tell Mr. H. she was 15. She said: "I didn't tell him at any time that I was 15." She denied telling Mr. H. that she was 15 so that she could have sex with him.

It was suggested to her on cross-examination that if she had told Mr. H. she was 13, she would not have been able to have sex with him. In response to this, B reiterated that she did not tell Mr. H. she was 15.

[21] While Mr. H. went to a house to get the marijuana, B waited for him at the edge of the woods. When Mr. H. returned with the marijuana, they started talking in the woods, having gone farther in where they couldn't be seen. B testified that Mr. H. asked her if she wanted to have sex and she said yes. She lay down on Mr. H.'s jacket that he had put out for her and he asked her again if she wanted to "lose her virginity to him." She said yes. On cross-examination B testified that Mr. H. asked: "Will you do it with me?" which she took to mean sex. She acknowledged that she wrote in her journal her response to Mr. H.'s inquiry about losing her virginity: "Of course I do" and "If I was not sure I wouldn't say what I've been saying." She said in her direct evidence that, "Back then, I wanted to have sex with him."

[22] According to B's evidence, Mr. H. pulled her pants and underwear down to her feet and did the same with his own. She said Mr. H. touched her vagina with two of his fingers and touched her with his penis "in the same way." It was her evidence that she and Mr. H. had sex which, when asked, she defined as a man putting his "private" (penis) in another girl's "private" (vagina)." She testified that Mr. H. wore nothing on his penis and there was no discussion about protection. The sex lasted "maybe 10 - 20 minutes" although B said she did not have a watch with her. The sex stopped when B told Mr. H. they should be going because everyone would wonder where they were. Mr. H.,

who was lying on top of B, stopped and got up. They both put their clothes back on, and walked out of the woods and back to the smoking area.

[23] After having her memory refreshed with her journal entries, B acknowledged that she initiated the physical contact with Mr. H.. She then said Mr. H. put his penis in her vagina for twenty minutes during which time his penis stayed hard. There was no ejaculation and Mr. H. "stopped" when B said people would worry about where they were.

[24] B acknowledged that she told the police in her statement of June 23, 2005 that she and Mr. H. were gone for "probably one-half hour." She agreed that what she had said about the kissing before the sex lasting "probably five minutes" was "probably right."

[25] B testified that when they got back to the smoking corner C.M. asked her what they had been doing and B told her "mostly everything". "I told her I had sex with L.." B confirmed that C.M. said she was "very proud" of her. B gave the following answers to the questions put to her on cross-examination with reference to her journal entries:

> You were quite proud of this happening? I guess so.
>
> You wanted to have sex? I might have.
>
> You started physical contact when sex was being discussed? I guess so.

You were encouraging sexual intercourse with L.? I suppose so.

You were proud of the fact [of having sex], that's why you described it [in the journal] as the best day of your life? Yes.

Did you tell her [C.M.] the truth about having sex? Yes.

Didn't make that up? No.

[26] Later on in cross-examination, B was asked if it was a possibility that she was hoping to have sex with Mr. H.. B responded: "I think so."

[27] B recalled that Mr. H. was kissing her at the smoking area after they returned from the woods. It was her evidence that she does not remember how long this went on for, but that the kissing was "on and off." She agreed Mr. H. had not seemed worried and had not told her to keep their encounter a secret.

Mr. H.'s Evidence on the Walk and the Woods

[28] Mr. H. testified that when they were walking together to get the marijuana, he asked B how old she was and what Grade she was in. His evidence was that B said she was 14 and in C.M.'s

grade. On cross-examination Mr. H. said he was "one hundred percent positive" she never told him she was 13.

[29] Mr. H. said he believed B was her stated age: he said she acted "mature" and was physically well-developed; "she looked mature and had a well-developed body." Mr. H. testified to his view that B had well-developed breasts. He also pointed to the fact that she was "hanging" with older people. He acknowledged on cross-examination that he had never seen B at events for Grades 10, 11 or 12. It was Mr. H.'s evidence that B was quite open about her interest in him, telling him she thought he was "hot". He replied to her that he thought she was "pretty cute." According to Mr. H., B also told him she would like to "hook up" with him sometime and that she "liked" him.

[30] After taking a short-cut, Mr. H. and B came out on the road near the house where Mr. H. was intending to get the marijuana. Mr. H. asked B to wait for him by the tree line. When he returned with the marijuana and met up with B in the woods, they got talking and B started "hitting" on Mr. H.. Mr. H.'s evidence was that B sat close to him and put her hand on his leg. She then "jumped" him and began hugging, fondling and kissing him. Mr. H. kissed her back. He touched her breast over and then under her sweater. He said he probably touched B's other breast and "would have touched some skin." She laid back and he lay beside her. He touched her "bum", over her underwear and she touched his penis. Mr. H. said B's pants were unbuttoned a little but not pulled down past her hips. His pants were up. Mr. H. said B touched his penis through his unbuttoned and unzipped jean shorts and the opening in his boxers, her hand "half on my boxers and half on skin." Mr. H. said he had an erection. Mr. H. testified that he did not put his fingers or his penis in B's vagina. He

denied touching B with his penis, saying it was only her hand that touched his penis. He said the whole interaction took 5 - 6 minutes.

[31] Mr. H. testified that B said they should be getting back. He got up and buttoned up his pants. He and B then returned to the group in the smoking area where the marijuana was smoked. The group then dispersed although Mr. H. recalls meeting B at the marina and was "pretty sure" he kissed B there. When asked about kissing B at the smoking area, Mr. H. was "pretty sure" they had not kissed.

[32] Events of the days following April 20 are important also, and as B's and Mr. H.'s versions differ somewhat, I will summarize that evidence as well:

B - After April 20

[33] B agreed in her evidence that after April 20 Mr. H. wanted nothing to do with her. She confirmed that when she did see Mr. H. at school following the incident in the woods, he was quite angry with her and told her he wanted nothing to do with her. He was denying he had sex with her. B allowed that he may have said it was because she lied about her age, but she testified she had not lied about her age. B acknowledged that she "liked [Mr. H.] quite a bit" and contacted him several times after he rebuffed her. She said: "I think I was really mad, I don't really remember" and admitted to being upset with Mr. H. for breaking off with her and denying the sexual intercourse. She agreed she was mad about this because it made her look like a liar to her friends. She agreed that

her feelings for Mr. H. soured, not because of the sex, but because he rejected the relationship and denied having sex with her. B denied lying in Court because she was angry with Mr. H..

[34] While there were some contradictions in B's evidence about conversations she had with Mr. H. after April 20, there was general agreement that B did tell Mr. H. that she had contracted a disease from him. B said she was angry to learn that Mr. H. was denying that he met her and that anything happened. In direct examination she said that she told Mr. H. she had seen a doctor and was told she had a disease. She said on cross-examination that she saw a Dr. Bush the day after she and Mr. H. were together and then saw Mr. H. at the school but did not tell him she had been to the hospital or that she had a disease. She was asked on cross-examination if she had made up in court what she had said about this on direct and she said "yes". She admitted that she didn't see a doctor until a month afterwards when she was told she had a disease, information she testified she did then relate to Mr. H.. B said she believes she did tell C.M. both that Mr. H. gave her chlamydia and that it could be possible she was having a baby. She said on re-direct examination that she had been confused in her earlier evidence in Court about when she saw the doctor and spoke to Mr. H.. I do not find that B was trying to mislead the Court in her evidence; she seemed to me to be a candid witness who got muddled about aspects of the post-April 20 events, but was trying to tell the truth.

Mr. H. - After April 20

[35] Mr. H. testified that on April 21 he discovered B's true age. He said he found out from his friends that she was only 13. He said he "snapped" and told B he never wanted to see her again. He

said he called her "jailbait" and that had he known she was 13 he would never have kissed or touched her in any way. Mr. H. testified that he "blew up" at B because she lied to him about her age and he knew he would get into trouble with the law even for kissing and touching her. Mr. H. said he rebuffed B whenever she came up to him after that. He said he knew 14 was the legal age of consent and had known that for a couple of years prior to April 20, 2005. Mr. H. said it was the Monday following that B told him he had given her a disease. He said he knew this was a lie because he had not had sex with her.

T.C.

[36] T.C. testified for the Defence. He said he had hung around with L. H. a lot, having known him since Grade 10. He said he still hangs out with Mr. H. although not as much now as before. He recalled being at the school smoking area on April 20, 2005 with Mr. H., C.M., J.H., Mr. L. and B. He said he and Mr. H. were drinking and "minding our own business." T.C. testified that C.M. was going to Mr. H., saying: "...she's 14, 15...telling L., B was older than what she was." When asked to specify what he heard C.M. say, T.C. responded by saying: "I'll say 14 but I heard C.M. say to L. that B was over 13 for sure."

[37] T.C. remembers Mr. H. and B talking. As for himself, he was drinking, "getting there" drunk. He said it was evident that B, who looked 14, 15 to him, "wanted Mr. H....you can tell when someone is flirting." He said after Mr. H. and B walked down the sidewalk, he saw them again around 4:20 p.m., a time he remembers because it is a special time for smoking up on April 20,

which he did. It was his evidence that there was no kissing between Mr. H. and B and that he would have remembered a kiss.

[38] T.C. admitted to drinking heavily on April 20: he said he started drinking before 2 p.m. and does not remember past 6 p.m., although he said by 4:20 p.m. he had only had 2 drinks totaling about 4 inches of whisky. He testified that he also may have had a drink of rum. He did acknowledge that he was drunk when C.M. was talking to Mr. H.. On cross-examination he said: "I don't really remember what C.M. said about B's age on April 20." He then said on re-direct: "I do remember certain things. I don't remember if C.M. said she's 14 or 15."

[39] The next day when T.C. got to school around noon, he saw Mr. H. under the stairs, and heard something said about "13". Mr. H. was mad and appeared stunned; "He couldn't believe it", said T.C.. He said that every day after that Mr. H. tried to avoid B. Mr. T. said he found out on April 21 that B was 13; he testified he had assumed she was older because she hung around with his 15 year old girlfriend, C.M..

[40] That concludes my summary of the evidence.

ISSUES

[41] The issues in the case are as described by the Defence: first, I must decide if sexual activity, intercourse and/or digital penetration, as described by B occurred: it is agreed by Crown and Defence

that the kissing and touching described by Mr. H. would not constitute the offence. If I do find that there was sexual intercourse, and/or digital penetration, then I must consider whether Mr. H. has a defence. In relation to the first issue, I must apply the principles of *R.v. W(D), [1991] 1 S.C.R. 742*, whereas, if I get to the issue of a defence, I must apply the law relating to section. 150(4) of the *Criminal Code* which provides that it is not a defence to the charge for Mr. H. to have believed B was fourteen years of age or more at the time the offence is alleged to have been committed unless he took all reasonable steps to ascertain B's age.

Did sexual intercourse and/or digital penetration occur on April 20, 2005?

[42] Mr. H. denies that he had sexual intercourse with B or that he inserted his fingers into her vagina. He says that he only touched her breasts and her "bum" with his hand over her underwear. He does acknowledge that he had an erection and says that B was touching his penis. If I believe Mr. H. I must acquit him. Do I believe him?

[43] Mr. H.'s denial of intercourse or digital penetration does not ring true. He was in the woods with a girl whom he says was coming on to him. B confirmed that she let Mr. H. know she was interested in him. Mr. H. had been told B might perform fellatio on him. B has testified that she initiated physical contact with Mr. H., and I do not believe all that happened was mutual touching and fondling. Mr. H. was aroused and had an erection. I don't believe his assertion that he just touched B's breasts and "bum" and that nothing more happened. In Mr. H.'s statement to the police on July 30, 2005, he said that B had her pants off and "maybe" her panties too. This contrasts with

Mr. H.'s evidence at trial where he said that B's pants were never below her hips. Mr. H.'s description of events at trial comes across as minimized, tailored to limit his liability for the encounter with B, an encounter I believe Mr. H. came to realize could have criminal implications.

[44] Although I do not believe Mr. H.'s version of events in the woods, I must still consider if I am left with a doubt notwithstanding and whether, on the whole of the evidence, I have a reasonable doubt as to whether sexual intercourse and/or digital penetration occurred. I am not left with a reasonable doubt having considered Mr. H.'s evidence, nor am I left with a doubt having considered the whole of the evidence. In addition to what I have already said, other evidence contributes to my being satisfied beyond a reasonable doubt that sexual intercourse and digital penetration occurred in the woods as B described. While I question B's claim that the intercourse lasted twenty minutes, I do not regard her possible error in respect of the time frame as discrediting her testimony. It would be understandable that a young person of 13 might perceive the length of time that passed as longer than it was. In addition, B was under the influence of the alcohol she had consumed which may have distorted her perception of the passage of time. I note the remarks of the Supreme Court of Canada in *R. v. W. (R), [1992] 2 S.C.R. 122*, referencing Justice Wilson's comments in *R. v. B. (G.), [1990] 2 S.C.R. 30*: "While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it."

[45] It is apparent from the evidence that what happened in the woods was regarded by B as an important event in her life. I accept that upon returning to the smoking area, she immediately told C.M. she had sex with Mr. H. and was praised for the accomplishment. She recorded it in her journal as "the best day of my life" and was angry when Mr. H. later denied that it had happened. She was very frank about this: that she was not angry with Mr. H. because he had sex with her, she was angry because he was saying it didn't happen. I do not accept that it was all concocted: that she fabricated having sex with Mr. H. as a flight of an adolescent fantasy and did not want to be exposed, through Mr. H.'s denials, as a liar to her friends. Mr. H.'s angry reaction on April 21 does not appear to have been because the word was out that he and B had sex: his evidence is that he was reacting to the information that she was 13. Furthermore, Mr. H.'s angry reaction is consistent with him having had sex with B: why would he have had such a strong reaction to the news that she was 13 if no sex had happened? When asked on cross-examination if she had told C.M. the truth about having sex with Mr. H., B said she had. When she was asked: "You didn't make that up?", she said no. Although B testified she was drunk from the alcohol, there was no evidence that her memory of her interactions with Mr. H. was affected. B's evidence that there was intercourse and digital penetration was not shaken and she was candid about her interest, at the time, in having sex with Mr. H.. I find that B was receptive to having sex with Mr. H., communicated that to Mr. H. through verbal and physical cues, and that some degree of both digital and penile penetration followed. I therefore find, as a fact, that Mr. H. touched B with his penis.

Did Mr. H. Take All Reasonable Steps to Ascertain B's Age?

[46] For Mr. H. to be convicted of the charge of touching B with his penis the Crown must prove beyond a reasonable doubt that he failed to take all reasonable steps to ascertain her age. There is no issue of B's consent: at age 13, she was legally incapable of consenting to sex with Mr. H. by virtue of section 150.1(1) of the *Criminal Code*. The purpose of the section is to protect young persons from sexual activity that may harm them at an age where they lack the maturity to deal with such activity.

[47] Mr. H. has testified he believed B was 14; he says she told him she was and he was emphatic that she had not told him she was 13. Mr. H. also said that no one from the group told him how old B was: he said he inquired when they were walking together. T.C. recalls overhearing C.M. telling Mr. H. B's age, although he was somewhat unclear as to whether she had said 14 or 15. He testified on cross-examination that he didn't really remember what C.M. said about B's age, then stated on re-direct that he didn't remember if C.M. said 14 or 15. To the extent that T.C.'s stated recollection is relevant to the issue of what Mr. H. did to determine B's age, the reliability of T.C.'s evidence has to be considered in relation to his state of sobriety at the time. The problems with T.C.'s evidence are that he was drunk when the purported conversation occurred, a conversation that did not involve him, and he is unsure of what was said about B's age. I am left with some significant concerns about the reliability of T.C.'s testimony.

[48] Mr. H. did not recall anything about the conversation T.C. says he overheard. In his trial testimony, Mr. H. stated that at the time C.M. suggested to him B might "give him head" she "didn't say anything about B's age." In his July 2005 statement to police, Mr. H. did however say he was

told by C.M. that B was 15. When responding to police questioning about his knowledge on April 20 of B's age, Mr. H. said he had been drunk, although in his evidence at trial Mr. H. said the "buzz" he got from drinking at the smoking corner had worn off by the time he and B went to get the marijuana.

[49] Whether Mr. H. was drunk on the afternoon of April 20, 2005, which I do not accept he was, or had a "buzz" on, he was still required by law to take "all reasonable steps" to ascertain B's age before having sex with her.

[50] Although Mr. H. testified that C.M. did not tell him that B was 15, it does seem logical that she might have done so as the evidence suggests she was trying to pair B off with Mr. H. for the purpose of sexual contact. Her reaction to B when she returned from the woods indicates her enthusiasm for B's sexual initiation. However, even if C.M. had told Mr. H. that B was 14 or 15, I do not find that would automatically relieve him of the responsibility of taking all reasonable steps himself to ascertain her age, as required in law.

[51] Notwithstanding what, if anything, C.M. said to Mr. H. about B's age, it is the evidence of both Mr. H. and B that Mr. H. asked B her age. So, even if he had been told 14 or 15 as B's age, Mr. H. must have decided he should ask her himself. And here the evidence diverges: Mr. H. testified B claimed to be 14. He testified that having had time to think about it, he remembers she said she was 14. B says she told him she was 13 and in Grade 8. Mr. H. was emphatic that B had not told him she was 13.

[52] If I find that B did tell Mr. H. she was 13 then the issue of taking "all reasonable steps" does not come into play as Mr. H. could not, in such circumstances, have believed B was 14 or more. He would therefore not be entitled to the defence provided by section 150(4) of the *Criminal Code*. However, if I have a doubt about B's evidence in this regard, I must proceed to consider whether there is proof beyond a reasonable doubt that Mr. H. failed to take all reasonable steps to ascertain that B was at least 14.

[53] I have considered the evidence I heard at trial very carefully and concluded that I do have a doubt about whether Mr. H. knew, on April 20, that B was only 13. According to the evidence, there is only one way he could have known this - by B telling him as she testified she did. She may have done so: she presented herself, in my opinion, as a witness who was trying to tell the truth. However I cannot only consider B's apparent credibility in assessing the crucial issue of whether she told Mr. H. she was 13. I must consider all of the evidence that bears on this issue and the reliability of that evidence. There are several aspects of the evidence that, taken together, cast a doubt in my mind about whether B told Mr. H. she was 13:

(1) As I previously noted, B did not have a flawless memory; for example, she got confused about when she saw the doctor and talked to Mr. H. about having contracted a disease. I have to consider that she could be mistaken about a detail such as having told Mr. H. she was 13.

(2) B acknowledged in her testimony that she was interested in some degree of sexual contact with Mr. H.. B said she found Mr. H. attractive and the evidence indicates she was interested in making a sexual connection. “I knew we might have sex, I didn’t know we were going to” was her evidence. In these circumstances, I have a doubt that she would have told Mr. H., when he asked, that she was as young as she was. I think it is likely she would have wanted to appear older and more of a peer, at least as much as her foster “sister” was. I think it is likely B was presenting herself as more sophisticated than she was, perhaps wanting to fit in with an older group, one that included C.M. who later praised B for having sex with Mr. H..

(3) There is also Mr. H.’s reaction on April 21. Both B and Mr. H. testified that Mr. H. wanted nothing more to do with B on April 21 and the days following. Mr. H. says the next morning at school he “freaked” and “snapped” and wasn’t very nice to B. This is consistent with him just then discovering that she was only 13, a fact that cast the sex from the day before in a very different and far more serious light for him.

[54] I am therefore left with a doubt about whether Mr. H. knew on April 20 that B was 13.

[55] This then leads me to the further issue of whether Mr. H. took all reasonable steps to ascertain B’s age before he had sex with her.

[56] Mr. H.'s burden in this regard is an evidentiary one. This means that he is obliged to advance evidence which, if true, would entitle him to an acquittal. This evidence need not be believed; it is only necessary that it create a reasonable doubt in my mind. *(R. v. Osborne, [1992] NJ No. 312 (Nfld. C.A.))* To secure a conviction against Mr. H., the Crown has the burden of proving beyond a reasonable doubt that Mr. H. failed to take all reasonable steps to ascertain B's age.

[57] Mr. H. did not know B and had no reason to be aware that she was only 13. I accept that he made certain assumptions about her being a peer of C.M. and T.C., both of whom were 15 at the time. He seems to have taken into account B's physical development, his assessment that she "acted mature", and the fact that she was hanging out with kids in Grade 10. In addition to which there is the fact that Mr. H. met B in the smoking area frequented by Grades 10, 11 and 12. There is also C.M.'s reference to the possibility that B might "give him head" which would likely have suggested to Mr. H. that she was sexually active. All of these indicators could reasonably have led Mr. H. to assume that B was older than she was.

[58] In *R. v. R.A.K., [1996] N.B.J. No. 104*, the New Brunswick Court of Appeal expressed some doubt about visual observation alone being sufficient to constitute "all reasonable steps", but noted that the circumstances of each case must be taken into account. The factors in *R.A.K.* that constituted "all reasonable steps" were that the complainant and R.A.K. associated together with a group of older persons for a period before the consensual sexual intercourse took place, their relatively narrow age differential, the complainant's demeanour and appearance and her lack of a curfew. The Court was of the view that the "greater the disparity in ages, the more inquiry will be required. More will

be required of an older and more sophisticated accused than from a youth...” In *R. v. Osborne,* the Appeal Division of the Newfoundland Supreme Court talked about the requirement to make an inquiry as being “more than a casual requirement.” There must, the Court said, “...be an earnest inquiry or some other compelling factor that obviates the need for an inquiry.”

[59] As described by the British Columbia Court of Appeal in *R. v. L.T.P., [1997] B.C.J. No. 24* at paragraph 20, beyond a visual observation of the complainant, further reasonable steps could include indicators of her age, the ages and appearance of others in whose company she is found, the activities being engaged in by her individually or as part of the group, and other circumstances. The facts taken note of in *L.T.P* do bear some resemblance to the facts in this case: there was a gathering of older girls, aged 15 and 16, all but two of whom were in Grades 10 and 11; the complainant had just completed Grade 8 in June and was three months shy of her fourteenth birthday. She was bigger and a little more developed than most girls her age. There was evidence she appeared to be the same age as the other girls. She was drinking a beer and hugged and flirted with some of the boys, who arrived on the scene, including the accused. The accused was 16. The Court of Appeal held that the trial court must ask whether, looking at such indicators, “a reasonable person would believe the complainant was fourteen years old or more without further inquiry, and if not, what further steps a reasonable person would take in the circumstances to ascertain her age.”

[60] A recent decision from the Manitoba Court of Queen’s Bench, *R. v. N.W., [2005] M.J. No. 108*, held that asking the complainant, or some other apparently knowledgeable person how old she is, constitutes a reasonable “and perhaps minimally reasonable step.” The Court held this inquiry to

be a threshold step, and was critical of the notion that an accused could be allowed to guess at the complainant's age based on her stage of physical development. The Court noted the comments of the British Columbia Court of Appeal in *L.T.P.* that visual observations and the company the complainant keeps can lead to a finding of doubt in favour of the accused but rejected these factors as capable of providing a defence to N.W. While the *L.T.P.* and *N.W.* decisions may seem to be hard to reconcile, I do note that the Manitoba Court expressed itself as "frankly suspicious" about whether N.W. ever turned his mind to the complainant's age. N.W. acknowledged in his testimony that he had made no inquiry of the complainant or anyone else as to her age, which demonstrated N.W. had failed to take even the most minimal responsibility to ascertain the girl's age, contributing to the Court's view that he was reckless in assuming she was at least 14.

[61] Mr. H.'s conduct can be distinguished from N.W.'s. In this case, the evidence has established that Mr. H. did inquire. While Mr. H. and B disagree as to what B's response was, as I indicated earlier, I am left with a doubt that Mr. H. was told by B that she was 13 years old. In addition to making an inquiry, Mr. H. also assessed B's age on the basis of reasonable indicators - the older peer group she was with, her foster "sister" promoting her as a sexually active girl, and B's expressed interest in being sexually active with him. And, in fact, B was just 3 month's short of turning 14.

[62] In my opinion, it would not be appropriate for me to try and enumerate an exhaustive list of reasonable steps for ascertaining a young girl's age. Each case must be decided on its own facts. However, it does seem to me that the *Criminal Code* requirement of "all reasonable steps" does

appear to include, as it should, a direct inquiry about the complainant's age. In my view that inquiry should at least be an inquiry of the girl herself. At the very least, she should be accorded the opportunity to disclose her true age. Depending on the facts, further inquiries may be necessary and criminal liability may result from the failure to make them. In *N.W.*, at paragraph 14, the Court agreed that "demanding photo identification is not generally required to satisfy the all reasonable steps requirement..." That being said, sexual activity carries with it certain responsibilities and it is appropriate to expect diligence in ascertaining the age of prospective sexual partners. There is a fundamental public interest in promoting responsible and respectful sexual behaviour. Parliament has identified children under the age of 14 as vulnerable to sexual exploitation, and employs the criminal law to denounce and prohibit sexual activity where all reasonable steps have not been taken to ascertain the age of a youthful participant.

[63] Considering all the evidence in this case, for the reasons I have discussed, it is my determination that the Crown has not proven beyond a reasonable doubt that Mr. H. failed to take "all reasonable steps" to ascertain that B was at least 14. I therefore direct an acquittal of the charge of sexual interference under section 150.1(1).

Anne S. Derrick, P.C.J.