PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Fidgen*, 2023 NSPC 55

Date: 20231122
Docket: 8561141
Registry: Kentville

Between:

His Majesty the King

v.

Cole William George Fidgen

Restriction on Publication: Any information that might identify the complainant shall not be broadcast or transmitted in any way – section 486.4 *Criminal Code of Canada*

Judge:	The Honourable Judge Ronda van der Hoek, JPC
Heard:	November 8, 2023, Kentville, Nova Scotia
Decision:	November 22, 2023
Charges:	s. 271 of the *Criminal Code of Canada*
Counsel:	Don Urquhart for the Crown Lauren Haas for the Defendant

Section 486.4

486.4(1) Order restricting publication — sexual offences
Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
(a) any of the following offences:
(i) an offence under section
151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
(iii) [Repealed 2014, c. 25, s. 22(2).]
(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

486.4(2) Mandatory order on application
In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
(a) as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;
(b) on application made by the victim, the prosecutor or any such witness, make the order; and
(c) if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

486.4(2.1) Victim under 18 — other offences
Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

486.4(2.2) Mandatory order on application
In proceedings in respect of an offence other than an offence referred to in

subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
(a) as soon as feasible, inform the victim of their right to make an application for the order;
(b) on application of the victim or the prosecutor, make the order; and
(c) if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

486.4(3) Child pornography
In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

486.4(3.1) Inquiry by court
If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall
(a) if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;
(b) if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and
(c) in any event, advise the prosecutor of their duty under subsection (3.2).

486.4(3.2) Duty to inform
If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have
(a) informed the witnesses and the victim who are the subject of the order of its existence;
(b) determined whether they wish to be the subject of the order; and
(c) informed them of their right to apply to revoke or vary the order.

486.4(4) Limitation
An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or
(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

486.4(5) Limitation — victim or witness
An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

By the Court:

Introduction

[1] The defendant is charged with touching/grabbing the buttocks of the teenaged complainant. The Crown called as witnesses two police officers who responded to the 911 call, the complainant's guardian, who photographed the suspect, and the complainant. The defence did not call evidence.

[2] Mr. Fidgen was arrested and charged with sexual assault contrary to s. 271 of the *Criminal Code of Canada*.

[3] Date and jurisdiction admitted, the sole issue for determination is whether the Crown established beyond a reasonable doubt that it was Mr. Fidgen who touched the complainant. These are my reasons for finding the Crown did not establish identification beyond a reasonable doubt.

Burdens and Principles Applicable on a Criminal Trial

[4] In a criminal trial the Crown bears the burden to prove the elements of the offence charged beyond a reasonable doubt. Mr. Fidgen is not required to prove he did not commit the offence, he need not testify, and that is because he benefits from the presumption of innocence. The presumption of innocence remains firmly in place until such time as the Crown discharges its heavy burden.

[5] Proof beyond a reasonable doubt is a heavy standard that does not equate with probable or likely guilt. Instead, it lies much closer to absolute certainty than to the civil standard of proof on a balance of probabilities. Only after considering all of the evidence as a whole can the Court determine whether the Crown has met its onus.

[6] Assessing the testimony of each witness requires the Court to consider its reliability and truth. In doing so, I focused on such things as intrinsic and extrinsic consistency in the evidence, things said differently at different times, plausibility, balance, possible interest, the ability to recall and communicate what was observed and how that ability might be impacted by such things as note taking, the passage of time, emotion, or other factors. I also considered whether a witness was being sincere, candid, biased, reticent and/or evasive. Finally, I can accept some, none, or all of a witness' testimony.

[7] Only after considering all of the evidence, the closing submissions, and reflecting on the applicable law did I reach conclusions and make findings of fact.

[8] This case involves circumstantial evidence. Mr. Fidgen was not apprehended immediately at the scene, but rather some distance away. The guardian photographed the suspect from a distance and provided a description of him to a 911 operator. This evidence is relied upon to support the conclusion the man arrested is the suspect.

[9] In order to be satisfied beyond a reasonable doubt Mr. Fidgen is the suspect, the Court must be satisfied that this is the only reasonable inference available in respect of the circumstantial evidence: *R. v. Villaroman*, 2016 SCC 33.

The Evidence:

Assessing the testimony of A.K.:

[10] A.K. was crossing Acadia University campus with a group of other girls when, she says, "a man grabbed my butt". She explained that she and two girls walked ahead, while the others were "scattered about walking" behind them. So, initially A.K. thought perhaps one of those other girls touched her, "but the man walked up beside me and grabbed my butt". This testimony was not particularly well explained.

[11] While the man was beside her, A.K. observed the side of his face and saw him looking at his phone. She described him as tall, in his twenties, with blonde hair. She also noticed he was "wearing a lot of clothes", and believes his hoodie was darker colour "but not black, maybe brown, or gray", and his pants "were tan/khaki coloured". The clothing stood out because it was a "hot day". On cross-examination, A.K. agreed that her first look at the man was brief because "I was scared and shocked when he passed". She would have a second opportunity.

[12] A.K. testified that after passing her, the man sat down on a bench and looked at his phone. She "told the other girls not to go near him because he grabbed my butt". On cross-examination, she testified that while the man was on the bench, "I got a decent look, without staring, because I was worried about the others". That "look was brief, but I got a good look at him". A.K. did not see the man leave the bench and has never seen him again.

[13] A.K. explained that she and the two older girls told the leaders what happened and "we decided we would head back to the residence…" She also testified that she provided a description of the man to police, adding the man's hood was not all the way up, and so she could see his blonde hair. She did not participate in a police photo line up and says she was never shown a photograph of the man.

[14] That said, at trial Mr. Fidgen was asked to rise from behind the testimonial aid screen, and A.K. testified that she recognized him as the man who assaulted her based on his facial features. While she certainly sounded convinced, the Court cannot accept as reliable her in-dock identification. The manner in which it occurred was severely compromised.

[15] A.K. was however a credible witness. Clearly nervous at the beginning of her testimony she warmed up to the process as the questioning progressed. She is very confident about her description of the suspect and her in-dock identification;

however, the Court is wary of both. Despite being the only witness who had an opportunity to look into the suspect's face, her evidence lacks reliability given the nonspecific description of the man that did not include the facial features that aided her identification in Court, as well as the fairly significant passage of time. In the courtroom, Mr. Fidgen also had short, dark brown hair.

Assessing the Testimony of Ms. Anderson:

[16] Ms. Anderson, the Path Finders/Rangers leader, who accompanied the group of teenaged girls on a university camp/tour of Acadia University can best be described as a very earnest and interested witness. She was deeply offended by what happened to the girl in her charge. She was also a credible witness who testified with conviction.

[17] Ms. Anderson was walking behind the group of approximately ten girls who she described as "slightly ahead". The girls turned, huddled, and ran toward her. A.K. told Ms. Anderson, "That man up there grabbed my ass", and the girls proceeded to explain how the man approached them.

[18] She did not see the incident, but testified that she observed the man heading/walking away from them down a hill. She used her cell phone to photograph him because she was worried about the situation. Her worry increased when she saw the man following another young woman. Ms. Anderson called 911. She testified

that she has no doubt the man she photographed was the same person indicated by A.K. because there was nobody else in that area of the campus.

[19] The Crown entered her photograph into evidence, and asked her, "From this photograph and from your observation, is this what he was wearing?" She replied, "dark clothing with a hood". The Crown did not ask the usual questions about how the photograph compared or accorded with what she actually saw. This is of note because the person in the photograph is clearly wearing black pants and a grey hoodie. On cross-examination, Ms. Anderson says she provided a description to the 911 operator, but it was of "the man's clothing only, not his face because I did not see his face". She testified that her description to 911 included a black or grey hoodie, and black or grey pants. She testified that she also believed the man had a phone and facial hair, although she could not be sure on that last point.

[20] It makes sense to set out here the 911 description recorded by the investigating officer in his *General Occurrence Report*:

> 911 call, sexual assault TD five minutes, com reports a male [26 to 30] touched and underaged girl guide on her butt, white male 5'8" thin build with beard **roots hoodie** black track pants SOC [subject of complaint] is on foot leaving town toward Balcom Drive, S0C is following an unknown female. No injuries, no alcohol no drugs no weapons.

[21] The Court looked closely at the photograph taken by Ms. Anderson. It was taken from a distance, and shows the side view of a person walking on a path. The

person appears to be looking at a cell phone, he is wearing black bottoms and a grey hoodie. The hood is up, the person's face is not visible, but it appears he may be wearing a cap. The photograph encompasses a fairly large expanse of Acadia University property including grassy fields, trees, light poles, signs, a walking path, the football field across the street, and a campus driveway. One can also make out Main Street in the distance, and above that the football field and mountains beyond.

[22] What is not present in this photograph is a young woman walking in front of the man, despite a fairly sizable portion of property visible in front of him, and he is not walking toward Balcom Drive. Since there was no explanation offered as to why the woman was not in the picture, and the 911 call was made after the photograph was taken, it is available for the Court to conclude some unknown amount of time passed between the two events, and as a result the direction the man walked could have changed to the direction of Balcom Drive whereupon a woman was then observable walking ahead of him. The available evidence of timing at all stages of this case, I will address shortly.

[23] Ms. Anderson was not provided her 911 call details, and so could not address, or be reminded of, telling the 911 operator the man had a beard, and was wearing a Roots brand hoodie. She did not testify in Court or tell the operator the man was wearing a cap. Under these circumstances it is not surprising Ms. Anderson was

unable to recollect on direct examination the detailed report she provided to 911, which would be attributed to her by Cst. Leveille when he reviewed his *General Occurrence Report*.

[24] On cross-examination, Ms. Anderson denied Cst. Leveille showed her a photograph of the suspect taken by Cst. Fahie. As such, her testimony would not accord with that of Cst. Leveille's, which I will review shortly. Also, I cannot be sure when Cst. Fahie's photograph was sent to Cst. Leveille in relation to the latter's conversation with the witnesses.

[25] Overall Ms. Anderson was, as previously stated, a credible witness, I am convinced she believes she has recollected everything accurately. She did her civic duty and contacted police when she became concerned about the other young woman and described the man to the 911 operator.

[26] The Court is aware that credibility is not a proxy for reliability. Credible witnesses can provide unreliable testimony, and that is why a Court must always carefully consider the circumstances under which such evidence arose. Before doing so I will consider the evidence of the police officers.

Assessing the Testimony of Cst. Leveille:

[27] Cst. Leveille testified that he was at the Wolfville RCMP detachment when the dispatch of Ms. Anderson's 911 call came in. The report provided what he

described as a “good description of a suspect”, and he and Cst. Fahie got into their respective police cars. He attended the scene where the complainant, A.K., was waiting with Ms. Anderson. Meanwhile Cst. Fahie, would look for the suspect.

[28] Cst. Leveille spoke to A.K. first, and she told him what happened a few hundred meters from where they were standing. After a few minutes’ discussion, he asked her if she wanted police to talk to the man, or would she like to pursue charges. A.K. called her parents, and concluded she wished to pursue charges. There was no evidence with respect to how long any of the steps took. After receiving her decision, Cst. Leveille says he left Cst. Dunn on scene to take A.K.’s official witness statement.

[29] Cst. Leveille says he returned to the detachment where he understood Cst. Fahie had a suspect in custody. He was asked the rather leading question whether he received a photograph on his cell phone from Cst. Fahie advising “this is the man with me”. There was no objection taken to the question and after looking at what would be Exhibit 3, Cst. Leveille confirmed it was a photograph sent to him by Cst. Fahie.

[30] Cst. Leveille says he compared the photograph taken by Ms. Anderson to the photograph sent to him by the other officer, and concluded they matched. The hoodie stood out for him due to it being an unusual piece of clothing to be worn on a very

warm day. This would seem to suggest, that the constable was looking at Ms. Anderson's cellphone at the same time he was looking at his own, because there was no evidence to the contrary. That said, Cst. Leveille testified that he did not show the photograph taken by Cst. Fahie to either A.K. or Ms. Anderson. Challenged on cross-examination, he revised his evidence to say he may have shown it to Ms. Anderson, but not to A.K. Defence counsel reminded him of his email exchange with the Crown Prosecutor, and after reviewing it Cst. Leveille agreed he told the Crown that he showed the photograph to both A.K. and Ms. Anderson. Neither person agreed.

[31] A photo-identification lineup was not employed in this case and the officer accepts showing a single photograph to a complainant, in such circumstances, does not accord with proper police procedure for gathering identification evidence.

[32] Also on cross examination, Cst. Leveille agreed that it is important to keep good notes and was provided his *General Occurrence Report*, Exhibit 2, to which he included the 911 description of the suspect in bolded font at the top of the document. Asked if he was aware the 911 call reported the suspect was wearing a Roots hoodie, the officer said he did not know and testified "I'd have to look at the second picture to see if that was in fact what the fellow was wearing". Mr. Fidgen was not wearing a Roots hoodie, but instead a Coors hoodie.

[33] Finally, the officer agreed with defence counsel that it was likely students were present on the university campus in May.

[34] Cst. Leveille was not a careful witness. His testimony was inconsistent, not particularly balanced and his ability to recall and recollect appeared compromised. I do accept that he entered the 911 call details into his *General Occurrence Report*, however I am concerned about the majority of his evidence.

[35] While Cst. Leveille says he showed Cst. Fahie's photograph of Mr. Fidgen to Ms. Anderson, Ms. Anderson could not recall being shown such a photograph. The email correspondence strongly supports a conclusion he showed the photograph to the complainant, yet A.K. also had no recollection of same. These two points cause the Court concern with respect to the reliability of Cst. Leveille's evidence. Because I accept the testimony of A.K. and Ms. Anderson and do not believe they would forget seeing a photograph of a man apprehended and in custody, I find Cst. Leveille did not show the photograph to either person, instead he simply compared the photograph to that taken by Ms. Anderson and satisfied himself they were the same man.

Assessing the Testimony of Cst. Fahie:

[36] Cst. Fahie testified "we got a report of a 911 call, male was leaving area hoodie, beard, and black pants. I said I'd patrol in a police car to look for him on

Main Street". Just before the football field as "I headed west, I saw a man on the waterside of Main Street walking east. The man had facial hair and was wearing a grey hoodie and black pants. He was leaving the general area of the complaint, and so I pulled up on the sidewalk and cut him off. He kept walking I said stop, he did, and was identified as Cole Fidgen."

[37] After placing the man in the police car, the officer took a photograph of him and sent it to Cst. Leveille's cell phone. He identified Exhibit 2 as that photograph, and once again, was not asked to confirm whether the photograph was an accurate representation of what he saw that day and in particular with respect to colour of clothing. The man in the photograph is wearing grey pants and a grey Coors hoodie, has long reddish-brown hair in a ponytail, thin and wispy facial hair, and a bright red watch.

[38] Cst. Fahie detained Mr. Fidgen for sexual assault and took a brief statement from him. On the voluntariness *voir dire* the Court concluded the statement was inadmissible because Cst. Fahie provided the *Charter* rights from memory and in doing so failed to provide the 1-800 number and advise Mr. Fidgen of his right to duty counsel.

[39] On cross-examination defence entered a copy of Cst. Fahie's *Supplemental Occurrence Report*, Exhibit 4, and the officer testified the only description that came

"across the air" was of a hoodie, beard, black pants. The officer was shown the photograph taken by Ms. Anderson and asked if the man in the picture had a beard. He testified that he saw "facial hair". He was also asked whether the description mentioned height or race, or the colour of the hoodie, the officer said no. He agreed the description provided was vague, and also agreed that there were no other distinguishing features offered in the description of the suspect. He also agreed that he was not aware of any other efforts taken by police to look anywhere beyond the man he stopped and agreed that during the month of May there "should be" students walking around at Acadia University.

[40] Cst. Fahie's evidence lacked detail with respect to timing of events that caused the Court concern. Likewise, the Court is concerned that he did not prepare a photo lineup. One can never be sure that all the evidence collected will be admitted at trial. As a result, it was important for proper police procedures to be followed.

Analysis and Findings of Fact:

[41] In cases where identity is an issue, the Court must instruct itself on the frailties of such evidence and review it with that in mind. The Court must also, generally, consider any inappropriate police procedures that could affect identification evidence. (See: *R. v. Bigsky*, 2006 SKCA 145 and *R. v. Arseneault*, 2016 NBCA 47)

[42] Once Mr. Fidgen was apprehended, the next logical step was to prepare a photo lineup and show it to A.K. The suspect was not known to either witness, and such a step would go the distance to prevent a potential miscarriage of justice and ensure the fairness of this proceeding. It is unfortunate the police chose not to do so.

[43] Both A.K. and Ms. Anderson described the suspect, however their descriptions are different. A.K., the person closest to the suspect, says he was wearing a dark hoodie and khaki pants. The man photographed by Ms. Anderson was wearing a grey hoodie and black pants. A distinguishing feature was the employed hood.

[44] A.K.'s opportunity to observe the suspect was, at best, brief and fleeting when he passed her. Her next opportunity to observe him, while he was seated on the bench looking at his phone, was described by her as also brief. A.K.'s evidence suggests she was not singularly focused on the suspect either when he walked beside her or when he was on the bench. I say that because she explained that she was warning the other girls, and he was on his phone while she was scared and concerned about what had happened.

[45] Other than saying that the suspect was beside her when she saw him side on, A.K. did not provide evidence about the distance between them there or even when he was sitting on the bench. It was also not explored whether the man was looking

down while on the bench, she described him looking at the phone, or looking into her face.

[46] Ms. Anderson did not see the offence, and her evidence strongly suggests she was a distance away from the man whose face she did not see. As I said previously, their descriptions of the man's clothing differed. In addition, the detailed description provided to the 911 operator differed once again from the description Ms. Anderson provided at trial. I found the former more reliable as it was provided closer in time to her observation. That said, given my view of the photograph those observations must have been from afar, and they also included details that did not match Mr. Fidgen. For example, Mr. Fidgen was wearing a Coors brand hoodie and not a Roots brand hoodie and he did not have a beard, but instead light facial hair. As such, the witness accounts described a distinguishing feature of the suspect that was not shared by Mr. Fidgen.

[47] While the suspect was described as wearing a hoodie, he was not described as wearing a hat. Mr. Fidgen was wearing both. It seems somewhat odd that A.K. would not have noticed a hat when she observed the suspect sitting on the bench.

[48] Overall, the description of Mr. Fidgen was fairly generic and offered no information with respect to his facial features other than the possibility of a beard by

Ms. Anderson, but not by A.K. Despite that, A.K. said his facial features seen a year after the fact were what allowed her to identify him in the courtroom.

[49] Timing of all these events was unfortunately, not clear on the evidence. For example, it was not clear how much time elapsed between points, such as when A.K. was touched, when the man sat on the bench, when Ms. Anderson photographed the man, when she noticed the woman walking in front of the man, the length of her observation before she called 911, and when she made that call. Likewise, there was no evidence of what time the 911 call came in, what time the police officers reacted to it, when they met with the witnesses, and what time Mr. Fidgen was arrested.

[50] Another concern related to the 911 report that the was heading in a westerly direction toward Balcom Drive. Cst. Fahie stopped Mr. Fidgen walking in an easterly direction away from Balcom Drive. That combined with the fact that the description involved a Roots hoodie, and Mr. Fidgen was wearing a Coors hoodie, are factors the Court cannot overlook and strongly raises a doubt that the correct man was apprehended. Cst. Fahie looked no further than the first person he saw in a hoodie. While he says description received was brief, and did not include a Roots hoodie, the Court is left to wonder if perhaps the arresting officer simply did not recall all the details of the 911 description since the evidence of Cst. Leveille was that the 911 description was sent out on coms to which *they* responded.

[51] Finally, the concerns I have expressed were not obviated by the in-dock identification evidence provided by A.K. The Supreme Court of Canada firmly established in *R. v. Hibbert*, [2002] 2 SCR 445 per Arbour J. at para. 50 and *R. v. Trochym*, [2007] SCC 7 (SCC) per Deschamps J. at para. 32, that in-dock identification, by itself, is almost totally unreliable.

[52] In *R. v. Muise*, 2016 NSCA 34, our Court of Appeal addressed these concerns:

> **25** The unreliability of in-dock identification has been the subject of much discussion in the legal community. (See Harold Cox, Cox's *Criminal Evidence Handbook* (Toronto: Thomson Reuters Canada Limited, 2014) at 115; David Paciocco et al., *The Law of Evidence* (Toronto: Irwin Law Inc., 2015) at 574; Criminal Law Quarterly, 2006 52 C.L.Q. 175; Criminal Law Quarterly, 1982-1983 25 C.L.Q. 313; Criminal Law Quarterly, 2012 58 C.L.Q. 331 at 9.). It is notoriously weak evidence. A lot of the same weaknesses can exist with identification tools such as a police photo line-up.

Findings of Fact

[53] I find A.K. was touched on her buttock. Despite initially believing one of the girls walking behind her did so, she came to believe it was the man who passed her wearing a hoodie and looking at his phone. None of the other girls, at least eight according to the evidence of Ms. Anderson, were witnesses to the touching. A.K. was not clear as to why she reached the conclusion the passing man touched her, as compared to one of the other girls. She did not comment on how close the man was at a point that supported her conclusion. Likewise, she did not describe in any detail

the particulars of which side of her body was touched, how the touch felt or appeared to have been achieved- one hand, two, scoop, grab, slap, etc. However, the parties agree this is an identity case, so I will focus on that consideration.

[54] I find the description provided the 911 officer, and sent out over the dispatch, was that contained in bold font in the *General Occurrence Report*, as explained in the testimony of Cst. Leveille. I also find Ms. Anderson provided that 911 description since she was the only person who called 911, and the description was received prior to her meeting with police. There was no evidence A.K. helped Ms. Anderson describe the man, and she provided no evidence about the 911 call or the officer's photograph. As such, A.K.'s eventual description provided to police could not have been the one relayed by the 911 operator and provided to Cst. Fahie, who stopped Mr. Fidgen. In any event, I do not recall any evidence that Cst. Leveille passed along A.K.'s description to Cst. Fahie.

[55] Cst. Fahie recalled a brief description from the 911 report. The Court was not provided with the time when Cst. Fahie left in his vehicle and detained Mr. Fidgen. Nor was the Court provided evidence of how long Cst. Leveille spoke to the witnesses. In fact, there was no evidence as to the time when the 911 call was received, dispatched, or when the officers left the detachment, or met the witnesses. This evidence would have been very helpful for determining important issues such

as the likelihood the man detained was the same man photographed by Ms. Anderson, as I accept her evidence that she photographed the correct man pointed out by A.K. That said, it was difficult to reconcile that her description included the feature "with beard", when she testified at trial that she provided a clothing-based description of the man as she did not see his face.

[56] I find the man stopped by Cst. Fahie was, based on his evidence, the first person he saw walking in a hoodie. While Cst. Leveille thought the presence of a hoodie was an unusual identifier, the Court simply cannot agree that the sight of a person wearing a hoodie near a university campus in May is such an unusual sight as to stand out in general. I believe I can take judicial notice of the fact that young people wear hoodies throughout the summer and the winter. I can also take judicial notice of the fact that grey hoodies appear to be a standard piece of clothing worn on university campuses. I also find that the evidence of the officer supports a conclusion other people were present on the Acadia University campus in May. The Court is concerned that the officer did not appear to look beyond the man he stopped. Which would not be so troubling, but for the lack of evidence with regard to how much time passed between the 911 call and Mr. Fidgen's detention after being seen walking in a direction opposite the report.

[57] That brings me to another point, the Court is very familiar with the town of Wolfville and the Main Street that runs through along the university campus. The 911 caller reported the man was walking in the direction of Balcom Drive, and that by necessity means he walked in a westerly direction. Yet Cst. Fahie says he was driving his police car westerly when he spotted Mr. Fidgen walking toward him coming from the east. I recognize that counsel did not notice this, but in reviewing my notes, and considering the layout of the small town, I found this a point of interest. If incorrect, the Court was not provided sufficient evidence on the issue to reach an alternative conclusion. There were neither diagrams nor specific photographs taken of the area where A.K. interacted with the man who touched her, nor was there information to clarify where A.K. and Ms. Anderson were located when they spoke to police, and finally it was not particularly clear where Ms. Anderson was standing when she took a photograph of the man in the hoodie.

Conclusion:

[58] Having considered all of the evidence as a whole, the Court does not find it adds up to proof beyond a reasonable doubt. The Court is simply not satisfied that the Crown has proven the suspect and Mr. Fidgen are one and the same. While I am suspicious that may be the case, criminal cases must be proved beyond a reasonable doubt. The sought conclusion is not the only reasonable conclusion to be reached on

the evidence. It is a reasonable inference, available on the evidence, that the suspect walked in the direction of Balcom Drive while Mr. Fidgen was intercepted walking in the opposite direction.

[59] Many of my concerns could have been alleviated if the proper photo identification lineup tool had been engaged and if the witnesses had provided more detailed testimony. However, that was not the case before me, and I am left to conclude the Crown has not proven Mr. Fidgen committed the charged offence beyond a reasonable doubt.

[60] Judgment accordingly.

van der Hoek PCJ.