PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Roberts*, 2024 NSPC 2

Date: 20240109
Docket: 8510057 - 8510059
Registry: Bridgewater

Between:

His Majesty the King

v.

Robert Roberts

Restriction on Publication:
PURSUANT TO s. 486.4 Criminal Code of Canada

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	December 7, 2023, and January 9, 2024, in Bridgewater, Nova Scotia
Decision	January 9, 2024, in Bridgewater, Nova Scotia
Charge:	Section 172.1(1)(b) x 3 of the *Criminal Code of Canada*
Counsel:	Sharon Goodwin, for the Provincial Crown Pavel Boubnov, for the Defence

Order restricting publication — sexual offences

486.4 (1) 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 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

(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).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

REPORTING OF THIS PROCEEDING IN ANY MANNER THAT WOULD IDENTIFY THE NAME OF ANY INDIVIDUAL WHOSE NAME IS COVERED BY THE BAN IS STRICTLY PROHIBITED WITHOUT LEAVE OF THE COURT. THE INTENT OF THE FOREGOING IS TO PROTECT THE WELFARE OF ANY WITNESS OR VICTIMS REFERRED TO IN THE PROCEEDINGS, AND/OR AVOID PREJUDICE BY ANY PERSONS FACING CRIMINAL CHARGES.

By the Court:

Introduction

[1] Mr. Roberts is charged with three counts of luring a child contrary to s. 172.1(1)(b) of the *Criminal Code*. The Crown alleges he was present in an online group chat where he asked three girls to have sex with him. Last day the Court heard from three witnesses, two of the three complainants, and Mr. Roberts. Today in closing submissions the parties agreed identity is the sole issue for the Court's determination. These are my reasons for finding the Crown did not establish identity beyond reasonable doubt.

The law

The burden of proof in a criminal trial:

[2] A trial is not a credibility contest. The Crown's onus is proof beyond a reasonable doubt and that onus never shifts to Mr. Roberts asking him to instead prove he did not commit the offences with which he is charged. He benefits from the presumption of innocence. Only after considering all of the evidence in the context of the evidence as a whole does the Court reach a determination as to whether the Crown has met its onus. If the Court is not satisfied every element of the offence of luring has been proven, there is a reasonable doubt, and a conviction will not be entered against Mr. Roberts.

[3] A conclusion Mr. Roberts is probably or likely guilty does not meet the criminal standard. Instead, reasonable doubt lies much closer to absolute certainty than it does to the civil standard of proof on a balance of probabilities.

Elements of the offence of luring:

[4] There was no contest that the Crown proved most elements of the offence of luring, but it still useful to set out those elements according to the Supreme Court of Canada's decision in *R. v. Bertrand-Marchand*, 2023 SCC 26: (1) the accused must communicate intentionally by telecommunication; (2) with someone the accused knows or believes is under the designated age in the relevant subsection, and (3) for the specific purpose of facilitating the commission of a designated secondary offence listed in s. 172.1(1) with respect to the underage person.

[5] The evidence of the two complainants supports a conversation occurring via telecommunication between at least one of them and a man who they variously identified as Robert or Robert Roberts. They told the man they were twelve years old before he extended an invitation to have sex with him. Section 151 *Cr. C.* charges sexual interference, and it is an available designated secondary offence listed in s. 172.1(1) *Cr. C.* by virtue of the girls being under the age of sixteen years.

[6] If the Court accepts evidence that the complainants told Mr. Roberts they were under sixteen years, the Supreme Court of Canada's decision in *R. v. Levigne*, 2021

SCC 25, at para. 2 provides, "[i]n virtue of s. 172.1(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, he is presumed by law to have believed that he was communicating with an underage sexual target."

[7] After the defence closed its case, the Court granted a Crown application to adjourn closing submissions pending receipt of a cd or a transcript of the trial testimony. Today I heard closing submissions and, while I will not refer to all of the evidence of each witness, suffice to say I listened carefully to what each said at trial, overcame some challenges arising from the complainants' very low voices by listening to portions of the court record, took good notes, and considered the issues raised by the parties.

The evidence:

[8] As is the case in any trial, there was some uncontroverted evidence. Three young girls were gathered in Ms. A.'s bedroom when they received a message from Ms. A.'s friend T.L. inviting them to join a group chat. The girls, Ms. A. and Ms. S., testified that they joined the chat and initially observed only the Facebook messenger icons of the other chat participants including a man labelled as either Robert or Robert Roberts. Other than that person, all the other group chat participants were children. At some point during the chat the man's camera function was activated and

the girls saw, at the least, a portion of his face. The girls shared their ages, and the man on the call asked at least one of them to have sex with him.

Circumstantial case:

[9] Neither girl knows Mr. Roberts, although one says she met him briefly on an earlier occasion, the particulars of which were not well explored. Hearsay about Mr. Roberts cannot support identity and the girls have different accounts of what was written under the man's Facebook account icon - Robert or Robert Roberts. One girl says she asked the man his name and also says he was initially introduced to her by T.L. These two propositions appear at odds with one another. Despite being present throughout the chat and sitting next to the other testifying complainant, the second complainant provided no testimony about hearing the man being introduced to Ms. A. by name nor did she report her friend seeking the man's name. Instead, she learned a first name from viewing the Facebook icon.

[10] The test for drawing inferences in a circumstantial case was set out by our Court of Appeal in *R. v. MacDonald*, 2020 NSCA 69 referencing *Villaroman*:

> [37] Where proof beyond a reasonable doubt is based on circumstantial evidence, a trial judge must guard against "too readily drawing inferences of guilt". **An inference of guilt "drawn from circumstantial evidence should be the only reasonable inference that such evidence permits."** (*R. v. Villaroman*, at para. 30) Reasonable, alternative inferences other than guilt must not be overlooked. As established by the Supreme Court of Canada in *Villaroman*, "[i]f there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt". (at para. 35)

> [38] In assessing circumstantial evidence, a trial judge is to consider alternative plausible theories and reasonable alternative inferences inconsistent with guilt. Evidence or the lack of evidence may support a reasonable, alternative inference. *Villaroman* requires trial judges to conduct their analysis in accordance with the "basic question":
>
> > 38...whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

The evidence of the witnesses:

[11] Both Crown witnesses were children on January 13, 2021, and also when they testified almost three years later on December 7, 2023. As a result, I instructed myself to follow the direction of the Supreme Court of Canada when assessing the evidence of children. While the reasonable doubt standard is not lowered, a careful assessment of a child's credibility should account for them experiencing the world differently than adults. For example, a child may not find details such as time and date as important as an adult witness, and a flaw or contradiction in a child's testimony should not be treated as similar to the same flaw or inconsistency in the testimony of an adult. (*R. v. W. (R.),* 1992 CanLII 56 (SCC), [1992] S.C.J. No. 56 at para. 24 and 26 and *R. v. B. (G.),* 1990 CanLII 7308 (SCC), [1990] 2 S.C.R. 30 at para. 48).

Introduction and description of the man on the group chat:

[12] Ms. A. testified when she was fifteen years old about events alleged to have occurred when she was twelve years old and in grade six. Despite identity being the primary issue, the first question asked of her was whether she knows Robert Roberts.

She testified "Yes, because he was dating T.L.'s grandmother." This answer was not confirmed to be based on her personal knowledge, she did not testify that she knew T.L.'s grandmother, nor did she identify the source of her knowledge. Knowing somebody because they dated a named person suggests personal knowledge, but I find that was not the case. Instead, it became clear during the course of her testimony that Ms. A. obtained that information from a person who did not testify at the trial.

[13] Ms. A. testified that she also saw Robert Roberts once because he lived across the street from her father's former girlfriend. She recalled he came to her "stepmother's house", presumably the same former girlfriend, and asked if that person needed help with something. Asked how long she was around him, Ms. A. replied, "an hour" but not the whole hour. This situation occurred in August 2020 when Ms. A. was eleven years old. She provided no evidence whatsoever about what if anything she did in his company, nor did she describe him. On cross examination she said he offered to help the stepmother look for something. As such the contact did not appear focused on Ms. A. It was not a social call. She also failed to explain how or if she learned his name, did not compare how that man looked to the man on the cell phone screen, did not testify about her opportunity to observe the man at her stepmother's house or provide any defining details. Quite simply the testimony about the meeting was so sparse that I caution myself not to speculate about what occurred

there or reach a conclusion as to whether it resulted in her certain ability to later recognize the same man on a cell phone screen some months later.

[14] The means of questioning Ms. A. on identity also suggested facts not in evidence. For example, instead of asking her about the allegation and allowing her to identify the perpetrator, she was invited to accept the man was Robert Roberts. Introducing hearsay connecting T.L.'s grandmother to Mr. Roberts and not seeking descriptive details was also unproductive.

[15] Ms. A. testified that she next saw Robert Roberts on January 13, 2021, the date of the allegation before the Court, when her thirteen-year-old friend, T.L., messaged asking her to join a Facebook chat group. She did so and initially saw the names, not the faces, of the other group members including T.L. and her thirteen-year-old boyfriend, E.W. Ms. A. testified that the cameras were initially turned off when T.L said he wanted to make an introduction, and while there was no objection to the hearsay evidence that would follow, the Court is mindful of the issue. Suffice it to say the words spoken to Ms. A. by T.L., who was not called as a witness, cannot be admitted for the truth of their contents there being no suggestion they constituted an exception to the hearsay rule. As a result, the Court simply notes Ms. A. testified that T.L. introduced her to the man and told her something about him. However, I also note that later in her testimony she said she asked the man his name, which

seems to suggest she was not introduced. I will say more latter about what the other complainant, Ms. S., heard on this topic.

[16] Ms. A. explained that the man said “hi” to her and turned on his camera at which point she saw his face. Her own camera was off at this time. Ms. A. did not provide testimony about how the face she saw compared to that of the man she saw some months prior at her stepmother’s house. Nor did she describe the face she saw on the screen. Despite testifying on cross examination that she had an unobstructed and “clear view” of the man’s face, the only hallmark she identified was dark hair and that was in response questions about what could generally be see on her phone screen. Once again, on cross examination Ms. A. assured the Court nothing obscured her vision of the man, she was firm, “I seen his face clear”.

[17] Ms. A was asked to identify Robert Roberts in the courtroom. She chose one of the only two men seated there who she described as dark haired, with “grey and dark beard”, and glasses. She did not testify about how that man’s appearance accorded, if at all, with the man she saw on the call.

[18] Asked how old Mr. Roberts is, Ms. A. testified “I have no sweet clue” of his age, “maybe 46, in his 40’s at the time”. Later under cross examination she testified that she asked Mr. Roberts both his name and age, adding she told him she was twelve. It was not particularly clear when that conversation occurred other than a

suggestion it was early in the conversation chain. While unable to recall his exact words, she understood Mr. Roberts told her he was in his forties.

[19] Also under cross examination, Ms. A. described in detail the visual backgrounds of the three participants that led her to conclude they were all participating in the chat from different locations. T.L. was at his house in [place] based on the white bedroom walls, his bed, and his dogs; E.W. was in his bedroom which she had visited once before; and Mr. Roberts was in a room sitting on a greenish brown chair.

[20] Following the introduction, Ms. A. says she hung up, and the girls continued to listen to music. Despite doing so, Ms. A. explained that her involvement in the chat did not end because T.L. persistently called asking her to reconnect. For the first time, and on cross examination, she included Mr. Roberts in the effort to re-engage by calling her back, but appeared to resile from that comment. Ms. A. estimated T.L. called back five or six times during which she joined and left the call while repeatedly telling him to "leave us alone". She did not provide details about Mr. Roberts' purported efforts to re-engage.

[21] Ms. A. believes she inadvertently activated her phone camera function on the second call thus rendering her face and background visible to the other participants.

She believes the activation occurred when the third girl started charging her phone, presumably resulting in moving the other one from the bed.

The words of the offences:

[22] Ms. A. says while her camera was activated and directed at her face, she asked the group what they wanted. At that point, the third complainant was sitting next to Ms. A., and therefore "half" visible on the phone screen "for a second while she was plugging in her phone". Ms. S. was also visible on the phone screen and posed the same question. During the second or third call Mr. Roberts and the boys were visible, and she recalls Mr. Roberts saying she was pretty and beautiful, and that he wanted to have sex with her. Ms. A. clarified those comments were actually divided between the second and third calls. On the second call, Mr. Roberts said she was pretty, she said thank you, and hung up. On the next call, "perhaps" the third, Mr. Roberts said "[Ms. A.], I want to have sex with you" "kinda like that" and his video was on and "I seen his mouth when he said it". Asked if there was any other conversation with Mr. Roberts, Ms. A. added he also said, "come to my house and have sex with me". While she did not recall his exact words, his use of her name led her to conclude the comment was directed at her. She told him to leave her alone "she was not comfortable with that" and hung up the phone. My takeaway, all words related to sex were said at the same time.

[23] Overall Ms. A. says, “I did not really say anything to him other than ‘hi’, and asked who he was”. He answered, “Robert Roberts, and it was on his Facebook”, by which it appeared she meant his full name was visible under his Facebook icon. Or it is possible she meant part of his name, in any event, I was left unsure. Ms. A. also testified on cross examination that the man added her to Facebook, she deleted the addition, and made a new Facebook account.

[24] Ms. A. explained that her friend Ms. S. was present when Mr. Roberts made the offensive comments, and asked Ms. A. “‘What did he say?’ because she did not really hear it”. This did not seem to allow for the words being repeated by the man, and Ms. S. was not asked about being unsure of the words spoken when she testified.

[25] While E.W., T.L., and Ms. S. were all present when the luring comments were made, both Ms. A. and Ms. S. believe the third complainant had already left the bedroom. Neither the boys nor the third complainant testified at the trial.

[26] Ms. A. recalled Mr. Roberts making three more attempts at conversation, she told him “leave me alone”, and hung up the phone. The last time she simply let the phone ring. However, she appeared to agree with defence counsel that it was only T.L. who continuously called her.

[27] Finally, Ms. A. testified that she recalled Mr. Roberts telling Ms. S. “she was also pretty”, but otherwise agreed with defence counsel the man did not direct sexual comments to the other two girls.

Assessing the testimony of Ms. A.:

[28] Overall Ms. A. had a limited vocabulary and was repeatedly unsure or unable to understand the questions posed by the Cown. That said, while her answers were frequently unresponsive, I do not find she was attempting to deceive but simply failing to comprehend what she was being asked. For example, she was not sure what the word ‘obstruct’ meant, but answered the question in a strange manner only to provide a different answer once the word was clarified. She maintained there were no obstructions blocking her view of Mr. Roberts face on the call - “I seen him clear”.

[29] As is often the case with very young people, Ms. A.’s evidence was self concerned and very focused on how she perceived the interaction on the group chat. She testified that none of the impugned words were spoken to the other two complainants, and was clear that they were directed at her alone. That would not accord with the testimony of Ms. S. who said Robert wanted to have sex with “us”. Ms. A.’s testimony did not allow for such, and she specifically said that the only comment directed at Ms. S. was being pretty.

[30] Of course, the Court was very concerned about Ms. A.'s evidence of identity for the reasons noted above. Perhaps in a perfect world, T.L. would have testified in support of the hearsay evidence, but that was not the case. I find that Ms. A came to understand that the man on the phone was Robert Roberts. I cannot say that I accept her evidence that she asked him for his name, and he identified himself. That evidence did not accord with the other witness for the Crown, and it was provided in a less than reliable manner considering her evidence T.L. introduced him to Ms. A, in which case it seemed implausible she would ask the man his name when he had already been introduced to her. It is of course possible the imprecise language of Ms. A. has led me astray, but I am left to reach my conclusions based on hearing how she spoke, her intonation and the other sometimes imperceptible impressions a trial judge arrives at based on listening to and observing the witness testify.

[31] In that same spirit, her initial testimony that she "had no sweet clue how old Mr. Roberts" was, seemly contradicted her subsequent comments that she said hi to him and asked him his name as well as his age. I do not find Ms. A. to be a reliable historian of events. I am also concerned about her credibility. Despite the fact that she testified as a child, it is still important the Court base findings of fact on evidence and not speculation. I simply do not find that the evidence of Ms. A. with respect to the man at her stepmother's house being the same man she spoke with on the cell

phone. There was simply not enough detail elicited from her to allow the Court to reach that conclusion beyond a reasonable doubt.

The testimony of Ms. S:

[32] Ms. S. was a very soft-spoken witness. She used the words 'pretty sure' fairly often during her testimony. She says they started talking to T.L. about regular things for some time, and Robert joined in the conversation saying, "weird things". Ms. S. is "pretty sure he asked how old we were, or we told him for some reason. I can't recall." The girls' camera was not on at that time. She could not recall all of the conversation due to the passage of time, and asked the prosecutor if she could "think for a second".

[33] Ms. S. says she is "pretty sure" the cameras came on at some point, "Robert saw our faces" and he started "saying we were pretty and stuff like that". She says the girls left the call, and she is "pretty sure" Ms. A. ended it because "we were uncomfortable".

[34] Ms. S. does not believe T.L. ever turned his camera on and cannot recall his Facebook icon picture. She does however recall the man turned his camera on during the first call. But overall, the man's camera was on for only a very limited time.

[35] Ms. S. saw the name Robert under the man's Facebook icon of an "old man, all I remember, just an old man". She could not remember when asked if the name under his Facebook icon said more that the first name Robert.

[36] Ms. S. also described Robert's face when the camera function was activated, noting she only ever saw half of his face "and not even a full half" because he was holding the phone to his ear such that she could "almost see inside it". She concluded he was doing so in aid of hearing the other people on the chat. His background suggested he was in a living room, and he was an older man with a grey beard and hair that looked like that of her grandmother. She could not recall if he wore glasses and is unsure which side of his face she saw. She was however clear that she never saw Robert's full face on the cell phone screen.

[37] Ms. S. provided a weak in-dock identification when the Crown asked Mr. Roberts to come from behind the testimonial screen. Ms. S. pointed to Mr. Roberts and asked the Crown "is that him?". That may be the case because Ms. S. had never met Mr. Roberts before the date of the allegations, and neither she nor the other complainant was offered a police photograph array.

[38] Ms. S. testified that she later found out the man was T.L.'s grandmother's boyfriend. This testimony suggested she did not learn that information while on the group chat, and so does not accord with the hearsay testimony of Ms. A.

The video was off when the impugned words were spoken:

[39] Ms. S. confirmed that the man's camera was off while people were talking, when he said the girls were pretty, during which she saw only the profile picture and not his live face. She also testified that she saw only his profile picture when he said "come to his house and have sex with us. Things you should not say". She added, "we could see little bubbles" and "just an old man profile pic. from what I can remember".

[40] Ms. S. recalls providing her age and Ms. A. doing so as well, along with that of the third complainant. She also recalled the man saying, "we were pretty" and is "pretty sure" he said, "he wanted to sleep with all of us". She is also "pretty sure" he asked them to come to his house and to "send him nudes". Challenged on the latter point, Ms. S. clarified that Robert said, "can you send me some pictures or something", and while he did not say he was asking for nudes, it is "just what I thought". She was also unsure if his comments were directed at the third girl who was not in the bedroom at the time. While she initially testified that the comments were directed at her and Ms. A., she resiled adding she was actually unsure who the comments were directed at as the man's video was turned off at the time he spoke. She concluded he was speaking because his icon indicator bubbles were moving up and down. As a result, she did not testify that the man used Ms. A.'s name when he

made the comment about having sex. She explained that the girls' cell phone was laying on the bed and they could see the screen. My sense, Ms. S. and Ms. A. were at all times side by each during the group chat.

Assessing the testimony of Ms. S.:

[41] Ms. S. was a quiet nervous witness. She presented as quite young for her age. At times it appeared she and Ms. A. were on a different call. She ascribed words to Robert that Ms. A. did not. She did not mention significant words that Ms. A said were spoken. She exaggerated her testimony about nude pictures. She was less than reliable. To her credit, while initially ascribing the words spoken by Robert as directed at the girls, she considered her answer and said she was unsure if the comments about sex were directed to her, because she could not see his face when he spoke. It is also interesting that she did not testify that Ms. A.'s name preceded the words. She was quite firm that Robert's camera was not activated at the time he said any of the concerning words. Instead, her detailed description on that point, seeing the icon bubbles and only ever seeing half of his face, was plausible. Despite it making sense a camera image would change during a call, her evidence simply did not allow for it.

[42] Ms. S. does not know Mr. Roberts and her identification evidence added very little to the case. She simply had no point of reference, having never met him before.

She did not testify that he identified himself as Robert Roberts. She did not testify that Ms. A. asked him for his name, and he provided his full name, she did not testify that he was introduced to the girls. As a result, her evidence was less than helpful.

The testimony of Mr. Roberts:

[43] Mr. Roberts is an alcoholic. His life pattern, according to him, is to rise, buy alcohol, drink it until he goes to bed in the afternoon, then sleep until the next day and repeat. He resides in the community, knows T.L., dated his grandmother, once visited the house of Ms. A's stepmother to retrieve a cat located under the porch, and possesses a cell phone that he has used to communicate with an overseas friend. While he denies being on the group chat, he concluded his testimony saying anything is possible. His reliability suffers due to excessive consumption of alcohol, and I can say nothing about his credibility, other than it was fair of him to agree with the Crown's final point- "anything is possible". His evidence was a mess. I am not convinced he was completely sober at the trial such that on balance I can accept anything he said as true. His evidence was confused and rambling. While he acknowledged a relationship with T.L.'s grandmother, attending to search for a cat at the home of the name that matched that of Ms. A.'s father's former girlfriend, and acknowledging the identity of Ms. A.'s younger sister, I do not find any of this information served to offset the frailties in the Crown witness evidence, such that I

could find he must be the man on the call. Finally, because he was so unreliable and lacked credibility, I do not believe his denial and it does not raise a reasonable doubt.

Analysis:

[44] 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 or Crown questioning procedures that could affect identification evidence. (See: *R. v. Bigsky*, 2006 SKCA 145 and *R. v. Arseneault*, 2016 NBCA 47)

[45] Once Mr. Roberts was apprehended, the next logical step was to prepare a photographic array and show it to the girls. He was not personally 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.

[46] Finally, the concerns I have expressed were not obviated by the in-dock identification evidence provided by the girls. 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.

[47] 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.

[48] An outright rejection of Mr. Robert's evidence and finding it did not leave me in doubt, does not resolve the matter. I must consider the evidence I am prepared to accept.

[49] The complainants' evidence certainly was not on all fours. Ms. A. says the man was introduced as Robert and she saw that name below the Facebook icon of an old man. Ms. A. says she asked the man his name despite also testifying that she was introduced to him. She says the man told her his name was Robert Roberts and that was the name she saw displayed under his icon. Ms. A. says she saw the man's whole face and recognized him from a previous meeting. She also says his camera function was activated when he spoke the offending words. Ms. S. says it was not and she did not recall an introduction and the use of a full name. Ms. A. did not provide a description of the man she met once before, nor the man she saw on the phone screen. She provided a weak in-dock identification. While Ms. S. provided a description of the man- old, grey hair and beard - she did not provide an admissible in-dock identification.

[50] Ms. A. testified about the words spoken - “pretty” “beautiful”, “want to have sex with you”, her testimony in that regard did not match that of Ms. S. She testified the man told them they were pretty and the other words she recalled were peppered by “I am pretty sure he said”, and she alone testified that the man asked for nudes, but walked it back to ‘pictures’. Ms. A. provided no evidence at all about pictures. One girl says she was looking at him when he said the words and the other said only his icon bubbles were moving. The Court does not expect perfection, but on the point of what could be seen, the difference is very concerning.

[51] The Court accepts that the witnesses are children, I am not holding them to a standard of perfection. I am however unsure due to the weak vocabulary of the girls, what exactly was said. I strongly suspect the man said they were pretty, I am concerned that he also said he wanted to have sex with them, but Ms. A. says he directed the comment to her by name, Ms. S. did not. And Ms. S. was quite convincing that she could not see the man’s face when he spoke.

[52] While it is likely the offending words were spoken, I cannot accept beyond a reasonable doubt they were spoken by Mr. Robert Roberts, who I am not convinced beyond a reasonable doubt was the man on the call. Although it is very likely, perhaps even highly likely, it was not proven to the high criminal standard. More and better witnesses and a police photographic line up could all have alleviated my

concerns, but on the evidence before me I cannot say the Crown met the heavy burden to prove the charges beyond a reasonable doubt.

[53] That is because this is a circumstantial case. Mr. Roberts says it was not him on the group chat, and as a result it must have been somebody else. He was unrepresented so I conclude his argument for an alternative inference is simply: the introduction evidence was inadmissible hearsay, the identification evidence was weak - description of the man and name under the icon, and therefore unreliable. Anyone can open a Facebook account, post any image they wish for their icon, and as a result, in the absence of admissible evidence proving identity beyond a reasonable doubt, the man who spoke to the girls could be anyone. Without evidence from T.L., the evidence of the girls is weak and unreliable. One had never met Mr. Roberts and the other one time, months prior, without description or detail of the meeting, and she could not reliably match the identity of the man she met to the man on the small phone screen. The Court agrees, and finds I cannot too readily draw an inference of guilt because it is not the only reasonable inference to be drawn. The Court did not hear from T.L. the repeated instigator of the group chat conversation. His behavior, constantly calling girls who did not want to speak, was very odd. Did he set this situation up as a joke to torment the girls? Did suggesting a name serve to draw attention away from a different man on the phone who only ever showed

half his face? Was this a set up in aid of causing problems for Mr. Roberts? I have too many questions and simply cannot draw an inference from the unreliable testimony of the girls that the man they spoke to was Mr. Roberts to the high criminal standard of proof beyond a reasonable doubt.

[54] Judgment accordingly.

van der Hoek PCJ