SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. R.J.S.*, 2010 NSSC 253

Date: 20100204
Docket: CRH 310771
Registry: Halifax

Between:

Her Majesty the Queen

v.

R.J.S.

Restriction on publication: Section 486 C.C.C.

Judge:	The Honourable Justice M. Heather Robertson
Heard:	February 1, 2, and 4, 2010, in Halifax, Nova Scotia
Decision	February 4, 2010 **(Orally - Verdict)**
Written Release:	June 28, 2010
Counsel:	Craig Botterill, Q.C., for the Crown Ralph W. Ripley, for the Accused

Robertson, J.: (Orally)

[1] This is the verdict of RJS. We will edit this text so that the protection of the parties is protected by using initials and I have done so throughout.

[2] RJS was charged with unlawfully using a computer to communicate with a person believed to be under 14 years of age for the purpose of facilitating the commission of an offence under s. 152, invitation to sexual touching, contrary to s. 172.1(2)(a) of the *Criminal Code of Canada.*

[3] He was also charged with unlawfully obtaining directly or indirectly a computer service without colour of right to wit; internet access through a computer network owned by Aliant Inc. customer JB, contrary to s. 342.1(1)(a) of the *Criminal Code of Canada.*

[4] The offences are said to have occurred between January 1, 2008 and September 25, 2008. RJS plead not guilty.

[5] RJS testified at this trial and has advanced the defence with respect to the first count of the Indictment that he did not believe was communicating with a person under 14 years of age, but believed he was communicating with an adult posing as a 13-year-old and that their communications were in fact adults role playing as children in the explicit sexual scenarios that were logged and are now in evidence before the Court.

[6] RJS in respect to the second count of the Indictment advanced that he had no knowledge of the Aliant Inc. customer JB and believed he was in receipt of wireless internet service included in his rental agreement for the premises in which he lived.

[7] The identification of the accused, the place, date and time of the alleged offences have been proved and are not at issue.

[8] This was a sting operation conducted by the joint police forces, a unit known as the internet child exploitation unit, which are the combined forces of the RCMP and the Halifax Regional Police who regularly monitor internet chat rooms frequented by children.

[9] Constable CG testified that he went on-line undercover and posed as a 13-year-old boy whose internet name was “chris13." He testified that he frequented two chat rooms “teen” and “teens” and encountered the accused posing as “curiousM” who then engaged him in very explicit sexual conversations.

[10] The text conversations first began on March 24, 2008 on the IRC, which stands for Internet Relay Chat. They are logged as Exhibit 1 of the Crown’s case. The conversations between the accused and Constable G then moved to MSN Messenger on that date and continued on a frequent basis until May 5, 2008. The log on the MSN text conversation is a 50-page log and is Exhibit 5 to the Crown’s case. It shows that the chats occurred over 16 days during this period and could involve several hours of intermittent communication on any single day. “CuriousM” used the Hotmail address curiousMhalifax@hotmail.com and while on MSN Messenger, often used the name “gone to the gym.” In addition to the text conversations, certain photographs were displayed to Constable G during these communications. One photo, Exhibit 2, shows a small photo inset of the accused and a young boy. This is enlarged and also shown as Exhibit 11. Exhibit 2 also has a second small photo of a dirt bike, the subject mentioned in conversation between these two, as well as a photo of the accused dressed in a white T-shirt and sunglasses.

[11] Another photo depicting two naked men lying on lounge chairs, stroking each other’s penis, is Exhibit 3 of the Crown’s evidence and was also sent during the text communications Constable G testified. As well, a photo of a man wearing only white underwear (his head is not visible) was also sent on-line and is Exhibit 4 of the Crown’s evidence. Constable G testified that while sending the photos the accused engaged him in explicit conversation regarding masturbation.

[12] Although the accused first posed as a 12-year-old boy, when questioned by Constable G (“chris13"), he admitted he was not 12 but indeed a man “old enough to be your father.” From that time on the accused continued to chat as an adult with Constable G who maintained his pose as a 13-year-old boy. Constable G testified as to the investigative procedures he followed in obtaining search warrants served upon Aliant Inc. to trace the chat room conversations of “curiousM” to specified IP customer accounts and addresses. These included the IP address and account of Dr. JB of *, Nova Scotia and IP accounts that were internal to Aliant Inc. and used by the accused, then an employee of Aliant. The accused worked for

Aliant Inc. as a customer service technician in *, Nova Scotia at the time of these events. He resided at * Street, *.

[13] On September 25, 2008 a search warrant was executed at these premises and two laptop computers, one belonging to Aliant Inc. (Exhibit 10) and one owned by the accused (Exhibit 14), as well as two wireless rotors, Exhibits 12 & 13 of the Crown's evidence, were seized.

[14] The personal laptop was running when the police entered the premises and was connected to a wireless network that was later identified as that of JB, who lived very near on * Street and had not password protected his wireless network.

[15] I accept the evidence of Constable G as the chief investigative officer and the evidence of Constables D and L and the evidence of Staff Sergeant RL as to their investigation and the execution of these search warrants and the seizure of the physical evidence at * Street, *, linking the accused directly to the chat line text conversations that are the subject of these charges. I also accept the evidence of JBC of Aliant Inc., a security consultant who testified as to Aliant's response to the search warrants in providing the business records that achieve the same end.

[16] Indeed, defence counsel accepted the continuity of the Crown's seized evidence and waived the required attendance of Constable DS for this purpose. The preliminary hearing transcript evidence of Constable C as to the unique user name "curiousMhfx" linked directly to the hard drive of the seized computers owned and used by the accused, has been admitted with the consent of defence counsel and I accept that evidence as proof the accused is "curiousMhfx" and "gonetothegym" in the transcribed logged chat line conversations before the court.

[17] However, to succeed in the prosecution of this case, the Crown bears the burden to prove its case beyond a reasonable doubt. They must therefore convince the court that the evidence of the accused does not raise a reasonable doubt as to his guilt.

[18] The Crown must prove its case beyond a reasonable doubt and reasonable doubt has been defined by the Supreme Court of Canada in *R. v. Lifchus*, [1997] S.C.J. No. 77. The often used language characterizing reasonable doubt is that a reasonable doubt is not a doubt based on sympathy or prejudice; rather, it is based upon reason and common sense. It is logically connected to the evidence or

absence of evidence. It does not involve proof to an absolute certainty. It is not proof beyond any doubt, nor is it an imaginary or frivolous doubt. More is required than proof that the accused is probably guilty. A judge or a jury who concludes only that the accused is probably guilty must acquit. Proof beyond a reasonable doubt is closer to absolute certainty than it is to probable guilt.

[19] When the accused testifies the trial judge must instruct him or herself according to *R. v. W(D)* (1991), 63 C.C.C. (3d) 397. I will quote the often quoted three part test that I have borne in mind all throughout my deliberation of this proceeding:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[20] With respect to the offence often characterized as "internet luring," it is important to realize that the focus of s. 172(1) is on the accused's intention at the time of the communication by computer, and this intention must be determined subjectively.

[21] The accused need not meet or intend to meet the victim with a view to committing a specified secondary offence. The sexually explicit conversation may suffice to establish a criminal purpose of the accused, but the content of the accused's communication is not necessarily determinative.

[22] With respect to the requisite *mens rea* and *actus reus* under s. 172.1(1)(c), I accept the caution articulated by Fish, J., in the Supreme Court of Canada decision *R. v. Legare*, 2009 SCC 56, at paragraphs 38 and 39:

> In determining whether the Crown has discharged its burden under s. 172.1, it is neither necessary nor particularly helpful for trial judges to recast every element of the offence in terms of its *actus reus*, or "act" component, and its *mens rea*, or requisite mental element. As in the case of attempt, s. 172.1 criminalizes otherwise lawful conduct when its specific purpose is to facilitate the

> commission of a specified secondary offence with respect to an underage person. Separately considered, neither the conduct itself nor the purpose alone is sufficient to establish guilt: It is not an offence under s. 172.1 to communicate by computer with an underage person, nor is it an offence under s. 172.1 to facilitate the commission of a specified secondary offence in respect of that person without communicating by computer.
>
> In this unusual context, determining whether each of the essential elements I have set out constitutes all or part of the *actus reus* or *mens rea* of s. 172.1(1)(c) is of no assistance in reaching the appropriate verdict on a charge under that provision. More specifically, forcibly compartmentalizing the underage requirement of s. 172.1(1)(c) — "a person who is, or who the accused believes is, under the age of fourteen years" — as either part of the *actus reus* or part of the mens rea, may well introduce an element of confusion in respect of both concepts.

The Court also cautioned in paragraph 35 that:

> The application of a subjective standard of fault is appropriate as well in light of the broad nature of the act component of s. 172.1. Requiring the Crown to prove that the accused communicated by computer with the specific intent mandated by the plain language of the provision helps to ensure that innocent communication will not be unintentionally captured by the *Code*.

[23] Ultimately, what matters is the evidence as a whole establishes, beyond a reasonable doubt, that the accused communicated by computer with an underage person for the purpose of facilitating the commission of the specified secondary offence.

[24] The accused has characterized his communication as sexually explicit communication between himself and a person he assumed to be an adult, roleplaying a 13-year-old child. It is obvious that the conversation he had was lewd and counselled the specified secondary offence, sexual touching, i.e., masturbation. But does his evidence raise a reasonable doubt that he did not intend to communicate with an underage person for this purpose?

[25] The accused testified as follows: The accused is 49 years of age and resides in *. He grew up in a family of 11 children. He is the third youngest. His mother died when he was eight years old. His father was physically and mentally abusive, who singled out the accused for abuse, which included daily beatings and other

cruelties such as submerging him in cold water, once to the point where he felt he was drowning. The almost daily spankings occurred even before his mother died and the accused testified that she was powerless to stop him. After her death the father's abuse was more severe.

[26] Further, the accused was the victim of sexual assaults by his uncle, who lived next door and began fondling the accused when he was just five years of age. This continued until the accused's family moved house, when he was about age nine or ten.

[27] The accused continued to live with his father until he was 27 years of age. He testified that he then moved into his girlfriend's family home and had no further contact with his father, who died in 1998.

[28] The accused testified that he would characterize himself as a bisexual, who by the Kinsey scale was 60% gay and 40% straight, having done some personal research on this topic.

[29] The accused testified that his computer use for sexual purposes began in 1996 when a friend introduced him to the Internet. He talked to men online, using the IRC network. His Internet use almost immediately became addictive and he would remain online in chats with men long through the night, sometimes all night and seven days a week. Apart from the hours he spent at work, he went online.

[30] He frequented gay chat rooms where one could meet someone online and then go to a private conversation. He testified the computer became his social life. He had been a radio announcer in *, but stations automated so he moved to * and changed careers and began working for Aliant Inc. in 1999.

[31] He described for the court his living arrangements and relationships, which were often of short duration with male friends. He also lived with co-workers and testified that there were times when his Internet use was restricted to late night hours when a shared computer was available after a room mate had retired for the evening. He continued his Internet use of IRC which he testified was the most popular service for online sexual conversation between 1996 and 2005. He testified that after 2005, younger kids went to text-messaging and the use of Facebook.

[32] When living alone in a * apartment from 2003 to 2004, he testified that his Internet use became more of an addiction and his communications were still for the purpose of intimate sex talk. By using the search command / who “Halifax” he described how he could see which Internet users in the Halifax area were available for an online chat, still using the IRC Undernet. He also chatted on line to speak to members of his family.

[33] The accused testified about the nature of these conversations. He said he had “daddy issues.” When talking to men, he would often be asked of his sexual experience when he was young. He would relate that his uncle fondled him and that he was a child and how his uncle was erect when he sat on his uncle’s lap. This, he testified, was a turn-on for the man he would be chatting with. He would tell the accused he was a good boy and that this comforted the accused. He said that he then became accustomed to the role playing of a young boy. This began around 2005.

[34] His addiction grew and he testified that all he wanted to do was role play. For a brief time in 2007, the accused lived in a house he bought in * and described how he lived with his stepson, then 14 years old and his mother, although they maintained a platonic relationship. Again, while living with others, his Internet use was restricted, but he continued to enter into the Internet chat rooms using his laptop once he had gone to bed and remained on the Internet into the early hours of the morning.

[35] In 2008 he changed jobs at Aliant, moving from a call centre worker’s position to a customer service technician in the field. He moved to *, * to assume this position in 2008. He testified that he used the following Internet chat rooms for sexual contact with men: jack-off straight; bi curious men; phone sex; gay phone sex and occasionally went to a chat room called gay dads and sons. He reiterated that he often assumed the role of a 12-year-old boy. He testified he often used the nicknames “Josh12" or “Ricky12" as well as “curiousM” depending if the name or a similar was then in use by others on line at the time.

[36] With respect to the chat room “teen” or “teens” frequented most by youngsters, the accused testified that he was familiar with them and often “popped in and out of these rooms.” He testified he felt uncomfortable in these rooms. The accused’s evidence was that he was not actually in one of these chat rooms when

he contacted “chris13,” but found him as a result of a more generic /who search to see what local users from * were then online.

[37] The accused agreed however that, as Constable G was contacted by him, Constable G’s log shows that he queried himself immediately so that the log showed that Constable G was in the “teen” and “teens” chat room, as Constable G was contacted by the accused. This was the testimony of Constable G.

[38] I accept that the accused is now very sophisticated as a chat line user and would have known that “chris13" was in the “teen” or “teens” online chat room when the accused made the first contact.

[39] The accused testified that he had talked to thousands of men over the years and when he was first arrested on September 25, 2008, he had no idea what the arresting officers were talking about when they referenced Constable G’s “Chris 13" chats. The text of the chats did refresh his memory.

[40] The accused testified that in his experience if a person did not want to role play they would simply get off line, or block receipt of the accused’s message indicating that the person was younger.

[41] The accused testified that it was very rare that he met children on line and that IRC was not often used by children. Texting and Facebook are now more popular uses by children since 2008, he testified. He reiterated that IRC was to his knowledge used more by adults for conversations of a sexual nature.

[42] With respect to the chats he had with “chris13" the accused testified that he had a sixth sense “chris13” was an adult. When Constable G suggested to the accused that he was older and not 12, the accused testified this suggested that “chris13” wanted him to play an older person. He testified that they had first chatted teen to teen, a role play scenario, but then “chris13” wanted him to be older. He testified that it was very rare a man wanted me to be an adult. They wanted me to be a teen or a younger person, a role the accused said he was more comfortable with. He testified he felt a need to please men, so he did this.

[43] The accused testified about his review of the logged conversations. He said:

> I see several instances where I tested the person (chris13). I wanted to play the younger person and I also sensed they were adults. I questioned chris13 about his age after I came clean about my own age.

[44] The accused testified that on an occasion “chris13" mentioned he had an uncle and then later that he did not, indicating to the accused he was an adult who could not keep his story straight.

[45] The accused testified that he often went into a chat room to meet a man and would sometimes ask “anyone want to role play” and then would go to a private room with that contact or to private messaging. He also testified that he had multiple encounters of this sort on a daily basis. The accused reviewed the logs and was asked by counsel what certain comments made on line meant to him. At 19:33 entry (Exhibit 1, page 1 of 6) the accused queries: “what do u like most?” The accused says that was an invitation to role play. At 19:36 entry on the same page, the accused says: “do u have sleepovers?” The accused said that suggested a role play of two teens sleeping over. Chris13 then asked if the accused used MSN Messenger and they switched to that service, which the accused said was more private – one on one. By this invitation he again testified that it suggested to him an invitation to role play. The accused testified that in these chats, logged for 50 pages as Exhibit 5, he wanted chris13 to be the adult so he could reverse roles and be the child. He queried chris13 “u really 13?” and he said “its ok if ure not.” The accused queried his grade. Chris13 replied “8.” He queried if chris13 was on Facebook. Chris13 replied “my mom wont let me on it.” He queried chris13 about his mom. “is your Mom hot?” The answer: “Uh no” shes my mom.” He texted: “maybe ill date her ... and then ill be your step-Dad.” Then the accused queries about Chris’ real dad. Chris13 replies: “lives out west.” The accused: “u ever see him? talk to him?” Chris13: “no.” Accused: “when was last time Bud?” Chris13: “I dunt ever remember.” The accused “u serious?” Chris13: “Ya” “Whateva, i dunt care.” Accused: “every boy needs a Dad.” Chris13: “Ok.” Accused: “wish i was your step Dad ... I can be your step-dad if you want.” Accused: “whenever u feel like you need a Dad ill be there – sound good?”

[46] The accused testified that these chats are indicative of his desire to role play and the willingness at this point to role play the adult. The accused testified that he tested chris13 again, when chris13 referred to his mom returning. The accused: “Back from where? Thought she was home?” Chris13: “She was. She went to my aunt’s.”

[47] The accused testified that this encounter was indicative of chris13 as an adult who couldn't keep his story straight. The accused: "maybe talk on the phone someday." Chris13: "ya, maybe." The accused: "then id really know if youre 13." The accused testified that he was testing chris13. He testified that he was not comfortable playing the adult role and wanted chris13 to take over the adult role so he could be the teen, a role he was more comfortable with. Yet these queries are on page 12 of a 50-page log and the accused goes on to provide explicit instructions to chris13 on masturbation, continuing to play the role of his adult mentor. Chris13 continues and never varies purporting to be an underage victim.

[48] The accused points out instances in his testimony where he suggests again he tests chris13. One instance is stating his pop music favourite and then a query on a fine sunny day: "Why are you not outside on your dirt bike on * Street?" The accused says these are indicators that chris13 was an adult.

[49] On cross-examination the accused agreed that to frequent teen chat rooms and engage in explicit sexual talk would be morally wrong and criminal. He explained his popping in and out of "teen" or "teens" because there might be men in the teen rooms who would have a private chat with him.

[50] With respect to the accused's use of a wireless internet service in *, he at first testified he turned on his computer and that he was automatically connected to the web. After vigorous cross-examination he agreed that he was aware of how a computer must search for the source of a wireless connection and that initially a pop-up box appears listing the wireless networks available, from which you then click to choose to connect. It was agreed that an automatic connection can be selected after that point.

[51] The accused testified that the pop-up box only referred to Aliant and not to JB and that he thought the wireless service emanated from a rotor in his landlady's utility room in his apartment building. When cross-examined on the real motivation for testing chris13, the Crown suggested that as a sophisticated user of online sexual chat rooms he feared the presence of undercover police and knew from the outset that what he was doing was wrong.

[52] The accused maintained that he made these queries merely to get chris13 to come clean and be an adult: "to let me reverse and be a teen." The accused did not

agree that much of his conversation was intended to put chris13 at ease about masturbation. The accused agreed that he chatted about being an online dad, but then immediately turned the chat to being hard and inviting chris13 to think about the accused and masturbate himself.

[53] In explanation why the conversation is completely one sided with all of the lewd sexual talk texted by the accused and not chris13, the accused testified that it was role playing and how men would talk to me if I were a teenage boy. The accused testified that the sex part of the role playing is part of the sexual addiction. The accused denied he had any attraction to pubescent boys. He testified that he did not choose to have any psychometric testing in this regard, but had been told by a psychologist whom he saw that he may have a borderline personality of a 12-year-old boy.

[54] The accused asked if he might make a few closing remarks in his testimony. He testified that the Internet had ruined his life, that he had been an addict and was not proud of his sexual chats. At first he testified he did not want to review the chat logs his lawyer gave him, but he did however look at them a couple of weeks ago and "It made me sick. It is what it is." He testified that the arrest in 2008 was very traumatic and that he now suffers from post-traumatic stress syndrome and feels a sense of relief now being away from the Internet.

[55] The accused's counsel tendered as evidence, by agreement, a report written by Dr. Kimberly Young, a professor of psychology with an extensive CV relating to online Internet addiction. In a one hour telephone interview with the accused she accepted the accused's assertion about his Internet use: "He was very clear and explicit about his intentions to role play sexual fantasies." She offered that questions about prior sexual experience within the first few minutes of a virtual meeting suggested that he believed he was talking with a fellow adult. It is clear from her writing that she was addressing the American legal concept of Internet luring, wherein the perpetrator grooms a child online for the purpose of meeting in real life to further perpetuate sexual offences and wanted to ensure that the accused was not this sort of person.

[56] With respect of the role playing, Dr. Young offered: "For those curious about a particular sexual fantasy, cyberspace and the abundance of sexually explicit adult chat rooms offers a private and anonymous way to explore and indulge in those fantasies." Frankly, Dr. Young's opinion, though interesting,

cannot be given much weight due to the brief contact she had with the accused by telephone, not in a clinical setting where one would expect a battery of tests be performed before an opinion was offered.

[57] I must review all of the evidence before me, having instructed myself according to *R. v. W(D)*. It is not for the accused to prove his is innocent. The burden always rests with the Crown to prove that the whole of the evidence establishes beyond a reasonable doubt that the accused communicated by computer with an underage person for the purpose of facilitating the commission of the specified secondary offence, the invitation to touching, i.e., the mentoring of chris13 in masturbating.

[58] If I believe the evidence of the accused that he did not believe he was online with a minor having these sexually explicit conversations that included an invitation to touching, I must acquit the accused. That is not the case. I do not accept the evidence of the accused. His explanation of these lewd, coarse and explicit instructions as adult role playing is, in my view, his creation of a defence after the shock of his arrest in an attempt to explain away what he knew to be unlawful and morally wrong behaviour. His explanation simply flies in the face of the weight of the evidence – Exhibits 1 and 5. By any subjective determination of the intention of the accused, it is clear from the 50 pages of online chat that he believed he had found a young person, age 13, a pubescent youth and that these one-sided explicit conversations were sexually stimulating for him. His evidence is not only not believable, but does not leave me with a reasonable doubt.

[59] Indeed, after continually testifying that he wanted to pay the role of a child and have chris13 come clean and reverse roles, I reread all of the chat logs with this in mind to determine if there was even a hint that he indicated this wish. There is none. It is important to grasp the evidence in its entirety. The text conversations speak for themselves. They are plain and explicit. They are the conversations of an admitted adult counselling an underage victim in sexual activity. I believe the accused knew his activity was wrongful, but due to his addiction he could not resist this conduct. I am not left with a reasonable doubt as to his intentions. Although there are a few instances where the accused may have “tested” or queried chris13's age, he did this early on and not, in my view, to determine that he was an adult for the purposes of role playing. His queries more obviously reflect a fear he will be caught engaging in illegal activity.

[60] Once he assured himself that chris13 was a young person, all of the conversation betrays a specific intent to engage in these lewd conversations, pass on sexually explicit photos and invite chris13 to perform acts of sexual touching, while thinking of him.

[61] The Crown has made its case and proved the elements of this offence beyond a reasonable doubt.

[62] I will next deal with the second count on the Indictment, an offence contrary to s. 342.1(1)(a) of the *Criminal Code*. The accused was an Aliant customer service technician at the time of these events. He was, however, being trained in Internet service. I believe he certainly knew that when he and colleagues scanned for a wireless network to make their work laptop computers communicate faster, they did so without colour of right, but it was a usual practise in rural Nova Scotia where the internet service is often a dial-up service or even unavailable. He knows about computer services. Yet, the accused has created a reasonable doubt in my mind that he believed the wireless service he connected to at * Street, in * was from a rotor within the apartment building in which he lived, located in the utility room of the landlady used as a small office and included service in his rental arrangements.

[63] I say I have this doubt because, notwithstanding the landlady JT' evidence that the apartment only had a wired service for which the tenants were required to apply to Eastlink to activate, there is confused evidence or a lack of evidence about what service was included in the accused's weekly rental before moving to the two bedroom apartment, for which there was in fact no lease. At best, perhaps there was a letter which is not in evidence that could have described the included service. And I cannot say that there is any evidence that Ms. T actually met with the accused to discuss these services. She does not often attend these premises, so I am left with a reasonable doubt that the accused knowingly obtained these services knowingly and without colour of right.

[64] Accordingly, the Crown has not proved this offence and I acquit the accused on this second count of the Indictment.