SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Collyer*, 2019 NSSC 318

Date: 20191024
Docket: 475258
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

John William Collyer

LIBRARY HEADING

Restriction on Publication: s. 486.4(1)

Judge:	The Honourable Justice Mona M. Lynch
Heard:	July 8, 9, 10, 11, 12 and 15, 2019 September 9, 10 and 11, 2019 in Bridgewater, Nova Scotia
Written Decision:	October 24, 2019
Subject:	Sexual Assault, Sexual Exploitation
Summary:	The accused is charged with sexual assault and sexual exploitation of the complainant. The complainant testified that the accused touched her vagina and placed his fingers in her vagina while the complainant and the accused were in an automobile driving. The accused sent the complainant sexually explicit Facebook messages a few months before the date of the alleged events. The accused denied any sexual contact with the complainant.
Issues:	Has the Crown proven each of the elements of the offences beyond a reasonable doubt?

Result: The Crown proved the elements of sexual assault and sexual exploitation beyond a reasonable doubt. A conviction was entered for sexual exploitation and a conditional stay was entered on the sexual assault charge.

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Judge:	The Honourable Justice Mona M. Lynch
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Counsel:	Roland Levesque, Crown David J. Bright, Q.C., Defence

RESTRICTION ON PUBLICATION

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 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
- **(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).

By the Court:

Background

[1] John Collyer is charged with committing a sexual assault on the complainant contrary to Section 271 of the *Criminal Code* between May 1, 2016 and July 31, 2016 at or near Bridgewater, Lunenburg County, Nova Scotia. He is also charged at the same time and place, being in a position of trust or authority towards the complainant, a young person, did, for a sexual purpose, touch directly the body of the complainant, a young person, with a part of his body, to wit, his hand, contrary to Section 153(1)(a) of the *Criminal Code.* The Crown offered no evidence in relation to a charge under s. 153(1)(b) of the *Criminal Code* and that charge was dismissed on July 8, 2019.

[2] The complainant and her family moved to the Bridgewater area in 2009. They had no support network in Bridgewater. The children in the family were enrolled in mentoring and supportive programs which John Collyer participated in as a mentor, leader, etc. John Collyer was the Deputy Chief of the Bridgewater Police and then he became Chief of Police in Bridgewater. Both John Collyer and his spouse, Sheri Collyer, were very involved with the complainant's family. The Collyers provided support to the complainant's family in many ways, including emotional support and financial support. The Collyers were very involved with the children in the complainant's family. The Collyers were invited to important family events for the complainant's family such as birthday parties, meeting with visiting relatives and around holidays.

[3] Both John Collyer and his spouse spent one-on-one time with the complainant from at least the time that the complainant was 12 years old. John Collyer attended the complainant's medical appointments with the complainant and her mother, and, on at least one occasion, John Collyer took the complainant to a walk-in clinic without the complainant's mother being present. John Collyer took the complainant shopping and out for breakfast. He took her to the beach and swimming at a swimming hole close to his home.

[4] John Collyer and the complainant communicated by Facebook messages and text messages. While there were no text messages placed in evidence between John Collyer and the complainant, the Facebook messages which were put in evidence referred to text messages between the two.

[5] In July of 2016 the complainant, aged 17, was missing for a short period of time. Her mother was very concerned and was trying to ascertain the complainant's whereabouts. The complainant's mother knew the complainant's Facebook password and she, along with a friend, S.F., had been monitoring the complainant's Facebook activity. The complainant's mother had provided John Collyer with the complainant's Facebook password in the fall of 2015.

[6] S.F. called the complainant's mother after she read, what she described as messages of a sexual nature, from John Collyer to the complainant in Facebook messages. S.F. asked the complainant's mother to come to her home to see the messages. S.F. took screen shots of the messages and provided the screen shots to the complainant's mother. S.F. and the complainant's mother then discussed what they were going to do with the messages. They did not know what to do because the messages were from John Collyer, the Chief of Police where they lived. The complainant's mother decided to show the messages to her family doctor as she had an upcoming appointment. The family doctor called the RCMP which resulted in contact between the complainant's mother and the RCMP.

[7] After speaking with the RCMP and showing an officer the Facebook messages, the complainant's mother called Sheri Collyer and asked her to come over to her residence. The complainant's mother and Sheri Collyer went into the backyard and Sheri Collyer was shown the Facebook messages. Sheri Collyer said something about John Collyer having an inappropriate sense of humour and changed the subject. Following this, Sheri Collyer contacted the complainant's mother to set up a meeting with John and Sheri Collyer. The Collyers arranged for the meeting to be held at the headquarters of the Bridgewater Police but the complainant's mother cancelled the meeting and it was not rescheduled.

[8] Not long after speaking with Sheri Collyer, the complainant's mother received text messages from John Collyer apologizing for the inappropriate messages sent to the complainant which said, "the only excuse I can offer is that I was drinking when I did it". John Collyer said in the text messages that he was ashamed and embarrassed by his behaviour and he understood that he had destroyed any trust in him.

[9] The Serious Incident Response Team (SIRT) became involved when contacted by the RCMP on August 4, 2016. Sergeant Gordon Vail of SIRT met the complainant's mother at S.F.'s home on August 5, 2016. He received copies of the Facebook and text messages.

[10] On that same day, August 5, 2016, Sergeant Vail called John Collyer, met with him at the Bridgewater Police Department, and served him with a notice that he was the subject of an investigation concerning inappropriate communication, Facebook messaging and possible sexual interference.

[11] On August 8, 2016 Sergeant Vail and a senior member of the RCMP trained in sexual assault investigations interviewed the complainant.

[12] On August 10, 2016 John Collyer arrived at the office of the information technology specialist for the Bridgewater Police service to indicate that he had lost his Blackberry phone which had been issued by the police service. The technology specialist went to the Blackberry website to determine the current location of the phone through location services, which updates the device's location. The last known location was on August 6, 2016, four days prior, at the Bridgewater Police service or within an approximate 40 metre area of 45 Exhibition Drive where the Bridgewater Police headquarters is located. The technology specialist was never able to get another location reading from John Collyer's Blackberry. The technology specialist had helped John Collyer set up his office computer and hooked him into the system to send and receive emails. The technology specialist did not recall any other police officer losing their cell phone but did know that there had been lost cell phones within the town of Bridgewater. SIRT was notified on August 11, 2016 that John Collyer had lost his cell phone.

[13] On August 15, 2016 SIRT searched John Collyer's office and home pursuant to search warrants and seized a number of thumb drives, computers, cell phones, and tablets. The analysis on all of the electronic devices did not produce any evidence.

[14] On the same day, John Collyer was served with a second notice to a subject officer, this time in relation to sexual exploitation, sexual assault and obstruction. Further documents were prepared to obtain the data from the lost cell phone and for the Facebook records of the complainant and John Collyer through the Mutual Legal Assistance Treaty (MLAT).

[15] On December 20, 2016, John Collyer was interviewed by members of the RCMP at the Chester Detachment and he denied the allegations. The statement of John Collyer was admitted into evidence by consent without the necessity of a *voir dire*.

[16] The complainant was interviewed again in April 2017.

[17] On April 27, 2017, Sergeant Vail received the MLAT results of the Facebook records of John Collyer and the complainant. The data showed that between April 14, 2015 and August 7, 2016 John Collyer's Facebook account contained 596 messages between John Collyer and the complainant and 536 of those messages had been deleted, with 60 messages remaining. The analysis did not show when the messages were deleted or by whom. The remaining 60 messages between John Collyer and the complainant were innocuous, nothing in them was inappropriate. The Facebook messages which were placed in evidence at the trial were not among the 60 remaining messages obtained from Facebook. There were no messages between John Collyer and the complainant found in the complainant's Facebook account.

[18] On May 4, 2017, John Collyer was charged with the offences outlined above, sexual assault and two counts of sexual exploitation. He was released on an undertaking given to a peace officer. He was committed to stand trial on April 10, 2018, and the trial proceeded on the Indictment dated August 8, 2018. The trial was held on July 8, 9, 10, 11, 12, 15 and September 9, 10, 11, 2019.

Issues:

[19]

1. Has the Crown proven beyond a reasonable doubt that John Collyer between May 1, 2016 and July 31, 2016 at or near Bridgewater, Lunenburg County, Nova Scotia did commit a sexual assault on the complainant, contrary to Section 271 of the *Criminal Code*?*;*

2. Has the Crown proven beyond a reasonable doubt that John Collyer, between May 1, 2016 and July 31, 2016 at or near Bridgewater, Lunenburg County, Nova Scotia, being in a position of trust or authority towards the complainant, a young person, did, for a sexual purpose, touch directly the body of the complainant, a young person, with a part of his body, to wit, his hand, contrary to Section 153(1)(a) of the *Criminal Code*?.

Evidence:

[20] Many issues are not in dispute. John Collyer, his spouse, the complainant and the complainant's mother described the same history of the relationship

between the Collyers and the complainant's family. All agreed that the families were very close and that the Collyers were very involved in the lives of the members of the complainant's family. All agreed that the complainant considered the Collyers second parents and that she looked to John Collyer as a father figure.

[21] In the fall of 2015 the complainant's mother went to see John Collyer at the Bridgewater Police Department to express concern about the complainant talking to older men on the Internet. The complainant's mother gave John Collyer the complainant's Facebook password in the fall of 2015 and the complainant's mother and John Collyer looked at some of the complainant's activity on Facebook at that time. John Collyer made arrangements through the Deputy Chief of Police to have an officer from the Bridgewater Police speak to the complainant about Internet safety. John Collyer also spoke to the complainant about masturbation in relation to Internet activity.

[22] At the trial, the Crown sought to introduce medical evidence in relation to the complainant. A hearing under s. 278.3 of the *Criminal Code* was held. The complainant had counsel for the hearing. The complainant agreed that the medical records could be produced and that the psychiatrist who saw the complainant as a patient in 2015 and 2016 could testify at the trial.

[23] The psychiatrist testified that the complainant was referred by her family doctor. The complainant was 16.5 years old when the psychiatrist first met her. The complainant had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), and Obsessive Compulsive Disorder (OCD). The psychiatrist described ADHD characteristics as hyperactivity, inability to sit still and focus, very impulsive, cannot wait their turn, blurts out answers and struggles with being focused. ODD characteristics were described as having trouble hearing and accepting the word "no" and having a disregard for authority figures. OCD characteristics were described as stuck, rigid in thinking, having unwanted intrusive thoughts and having to do something to get rid of the unwanted thoughts. The psychiatrist was asked to review the complainant's diagnoses and to review her medication.

[24] During the first meeting with the complainant the psychiatrist described the complainant as pleasant and trying to cooperate, but the complainant was distracted by the toys in the psychiatrist's office. The complainant was attracted to the play sand (a bucket of sand with rollers) which was usually something younger children played with to make themselves at ease. The complainant played with the play sand the whole time the psychiatrist chatted with her. The complainant did not

think she had any significant challenges, but the complainant's mother was concerned with the complainant's behaviour. The psychiatrist prescribed a new medication and referred the complainant for an assessment to see if she was on the autism spectrum. When tested, the complainant did not meet the cut off to have a diagnosis of Autism Spectrum Disorder. The psychiatrist did diagnose the complainant with complex trauma.

[25] The psychiatrist saw the complainant on three more occasions, December 2015, March and May 2016, to check on the challenges and to see if the new medication was helping. The psychiatrist saw the complainant again in May 2017 when the complainant was referred to her again and the complainant refused further psychiatric help.

[26] Based on her observations of the complainant, the psychiatrist provided the opinion that the complainant's chronological age was older than her actual functioning. The complainant would have had an intellectual and emotional age of between 10 and 12 years at the time she was being seen by the psychiatrist in 2015 and 2016. The psychiatrist also testified that, in relation to sexual maturity, the complainant would be much more vulnerable to experiences that might put her in harm's way and she was not as sexually mature as others of the same chronological age. The psychiatrist said that over the time she saw the complainant that she had increased in maturity but not to the point where she caught up to her chronological age. The psychiatrist testified that brain development and maturity would be a slower and longer process for someone like the complainant than for a youth without her challenges.

[27] The psychiatrist testified that the use of marihuana would be a problem with an adolescent brain. Use of marihuana can also make symptoms worse and interfere with medications. The psychiatrist described the complainant as having no filter in that she says whatever comes into her head.

[28] The psychiatrist testified that the mental health disorders the complainant was diagnosed with would not prevent her from being manipulative and, as with 99% of adolescents, the complainant could be untruthful. The complainant's mother expressed concern about the complainant lying. The diagnoses would not stop the complainant from making up stories and pretending they were true.

[29] John Collyer and the complainant agree on much of what happened on the day that the complainant alleges that she was sexually touched by John Collyer.

John Collyer picked the complainant up at her house in his convertible, two-seater Pontiac Solstice. They were going to wash the car. They both agree that:

- this occurred in 2016 sometime in the spring or summer and that it was before the complainants 17th birthday which was on May 28;
- they went to the drive-through car wash and that the water came through the material on the car's top and they used rags to try to stop the water from entering the car;
- because the top of the car was wet, they went for a drive for it to dry;
- the complainant asked to go to a nearby cemetery to visit a grave and she provided directions to the cemetery; and
- they visited the cemetery and John Collyer drove the complainant home.

[30] In relation to the day in question, the complainant did not remember going for a treat at a fast food restaurant as John Collyer said they did. The complainant did not remember, but said it was possible, that they had gone to the ATM when he took her home that day. John Collyer was clear they had gone to the ATM and they met the complainant's mother walking up the street. The complainant and her mother were clear that the complainant's mother was not walking up the street and the complainant's mother did not meet John Collyer and the complainant on the way to the ATM. John Collyer said that he and the complainant had gone to the Police Department to hand-wash the car on the date in question, but they were unable to use that space on that day. The complainant said that did not happen. These discrepancies between the two versions are minor.

[31] The complainant testified that on the way to the cemetery John Collyer asked her if she had been able to make herself orgasm and the complainant responded "no". John Collyer then put his hand between her legs, pushed aside the skort and panties and stuck his fingers in her vagina. He then pulled his hand out, stuck his fingers in his mouth, licked them, and said "you taste sweet". She did not agree to John Collyer putting his fingers in her vagina and he was someone she trusted and looked up to as a father figure.

[32] John Collyer, clearly and repeatedly denied that anything such as the complainant described occurred. He denied that he had ever touched the complainant's vagina. He denied that he had he put his fingers in his mouth and

said that the complainant tasted sweet. He did not say that such actions would be impossible in his Pontiac Solstice.

[33] The complainant and the accused clearly disagree whether the acts alleged by the complainant occurred. Credibility is in issue.

Position of the Parties:

[34] The Crown's position is that John Collyer was a father figure to the complainant but his feelings for the complainant shifted as she got older and matured physically. John Collyer's focus shifted from a father figure to having sexual feelings for the complainant.

[35] The Defence position is that the events said to have occurred in the Pontiac Solstice on the way to the cemetery did not occur. While the Facebook messages were inappropriate there is a big difference between inappropriate messages and sexual assault. John Collyer denied any sexual interest in the complainant. The Defence position is that there was no time for John Collyer to concoct a story on the day he was arrested and gave a statement to the RCMP. The Defence says it would be odd for the events to occur while driving down the highway in a sports car.

Analysis:

[36] John Collyer has pleaded not guilty and he is presumed to be innocent of the charges against him. The Crown must prove each element of an offence beyond a reasonable doubt, which is a high standard. If the Crown fails to do that John Collyer must be acquitted. It is not enough that I find that John Collyer is probably guilty but beyond a reasonable doubt is not a finding of absolute certainty. When assessing credibility, I cannot just prefer or choose the Crown's evidence over the evidence of John Collyer and other evidence. I have to consider the evidence of John Collyer in the context of all of the evidence. I can accept all, some or none of the evidence of the witnesses. Even if I do not believe John Collyer's evidence, if it leaves me with a reasonable doubt I must acquit him. If I reject John Collyer's evidence I must determine whether the rest of the evidence led at the trial convinces me of his guilt beyond a reasonable doubt.

[37] Facebook messages from John Collyer to the complainant and the apology text messages to the complainant's mother were both admitted into evidence and found to be relevant to the issues of motive, *mens rea*, and credibility. That 536 of

the 596 Facebook messages between John Collyer and the complainant were deleted, and that he reported his cell phone lost on August 10, 2016 were admitted into evidence and found to be relevant to credibility, intent and motive. After hearing all of the evidence, it is necessary to determine what, if any, inference is accepted and what weight is to be given to that evidence.

(a) Facebook Messages and Apology Text Messages:

[38] This evidence cannot be used to show propensity or to find that because the accused is a bad person, he would have the tendency to commit the offences charged.

[39] The Facebook messages that were admitted into evidence were between John Collyer and the complainant. John Collyer admitted that he sent the messages to the complainant and admitted that many of them were inappropriate.

[40] There is a Facebook message which appears to be sent on March 27, 2016 from John Collyer to the complainant which attaches a video of a little dog tugging on the bikini strap on a young woman. The young woman is trying to cover her breasts. Both the complainant and John Collyer indicated that they did not watch the video. The video is described by the RCMP in John Collyer's statement as the dog tugging on the strap and the young woman's breasts are exposed. Along with the video, John Collyer sent the message "Guess which little dog I am rooting for to win the tug of war!" to which the complainant responds "Idk" (I don't know). Collyer's response is "The one on the beach with the pretty girl, Silly!!!". The complainant responds "Lol" (laugh out loud). John Collyer responds "I wonder if I could train yours to do that? Bahahahahah".

[41] The conversation following the video has Collyer asking the complainant to let him know if she minds him sharing stuff with her and that he is bored. The complainant says she is bored too and that she is making a ham. Collyer says that Sheri is making a ham as well as Sheri's parents are coming over for supper later. There is more conversation about the menu for supper.

[42] The conversation about the ham continues with John Collyer asking the complainant if she is doing anything with her family and the complainant answers that just her mother's boyfriend is at home. Collyer responds, "That sucks!" and "Makes me want to come over there and steal u away". Later in the conversation string Collyer writes "Hanging out in your room? If I was alone, I would get in trouble".

[43] Collyer then asks the complainant if she had tried texting him yet. The complainant says that she forgot, and John Collyer asks: "Can u try it now so I can send u dirty limricks (sic)?" Collyer then indicates that he is going to get the car washed and the complainant says she will text him in a bit. Collyer says that he would have asked her to come along but she was watching the ham. Collyer sends her encouraging messages about being anything she wants to be and that "I know it gets hard…call me when it does and I will be there for you."

[44] On March 28, 2016 John Collyer continues with Facebook messages to the complainant. He indicated that Sheri Collyer went shopping and he ended up at a friend's and might be "liquored up! Sorry". He then writes:

> Love you kiddo, seriously!!!! Wish u had been with (sic) me today. Sorry…I love you and your brother…..OK…you are hot! Love you a bit more! When u find a music group u wan:t (sic). To see…let me know…I will be happy to take you

Later, John Collyer says he plunged his finger thru his dad's cake and then says: "Serioy (sic) fucked up? Best time for truth or dare!", then: "Oopps….sorry! Truth or dare might be dangerous In present condition". Then John Collyer says: "Well, I apparently lost bidding war for you to your mom…apparently you give awesome foot rubs! Guess I will never know. Farewell, my sweet…". There is another attachment removed in a message where Collyer says "Wow! Really…got your attention now, don't i!".

[45] On March 29, 2019 Collyer mentions that he saw the complainant that day at school and he will check on her tablet. Collyer says he has the tablet and makes reference to naughty photos on it. The complainant says there was nothing like that on her tablet.

[46] On April 2, 2016 Collyer sends a message with a photo showing a man and woman sitting on the ground which says, "Relationships last longer when nobody knows your business".

[47] There are other Facebook messages from Collyer with more inspirational messages to the complainant.

[48] John Collyer's explanation for these messages to the complainant is that he was drinking and when he is drinking his filter is gone and sexual innuendo come out but generally only to family and friends -- people he is comfortable with. He indicated that he did not drink and drive and that he did not drink around the complainant and her family. In relation to the video of the dog tugging on the strap

of the bikini top, John Collyer says he thought it was funny, it reminded him of the Coppertone ad. He testified that he knew that the complainant had a little white dog at home and that he and the complainant had gone to the beach. He says that when he saw the inappropriate messages when sober he deleted all the Facebook messages between himself and the complainant.

[49] The Defence position is that while these and other messages from John Collyer were inappropriate that should not lead to the conclusion that because he sent inappropriate messages that he committed the offences charged.

[50] The Crown submits that the inference to be drawn from the Facebook messages is that John Collyer had sexual feelings for the complainant. The Crown's position is that John Collyer's feelings for the complainant shifted to sexual and he expressed his sexual feelings to the complainant within two months of when the complainant says that he touched her vagina.

[51] The evidence of the Facebook messages, text messages, deletion of the Facebook messages and lost cellphone is circumstantial evidence. In *R. v. Calnen*, 2019 SCC 6, Justice Martin is dealing with after-the-fact conduct, circumstantial evidence, from which the trier of fact can draw inferences (para. 111). Justice Martin distinguishes between the admissibility of the evidence and the use to be made of the evidence after it is admitted. She notes that after-the-fact conduct, circumstantial evidence, is not a secondary form of evidence:

> [134] Not only is it an error to relegate after-the-fact conduct evidence to a supporting or secondary role, there is also a need to maintain the distinction between the threshold admissibility of evidence and the separate issue of whether the Crown has met its ultimate burden of establishing the guilt of the accused beyond a reasonable doubt. The test for the admission of evidence is first focussed on relevance, and the tendency of the evidence, as a matter of logic, common sense and human experience, to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence. After-the-fact conduct evidence, when admitted, simply adds that piece of evidence as a building block in the Crown or Defence case. It is at the end of the case, when all the evidence has been heard, that the fact finder is required to determine how much, if any, weight they will place on this evidence, how it fits with other evidence, and whether, based on the totality of the evidence, the Crown has proved the charges beyond a reasonable doubt. Conflating these standards means that those charged with the difficult task of weighing evidence and determining innocence or guilt may be deprived of relevant evidence.

And later in relation to inferences to be drawn, Justice Martin says:

> [145] Whether an inference is available is measured against what is reasonable and rational according to logic, human experience, and common sense. It is this combination which informs the determination of whether the impugned evidence makes the proposition more or less likely. This is an evaluative assessment, which is not defeated simply by listing alternative explanations. As long as the evidence is more capable of supporting the inference sought than the alternative inferences, then it is up to the fact finder, after considering all explanations, to determine what, if any, inference is accepted, and the weight, if any, to be provided to a piece of circumstantial evidence.

[52] Looking at the messages and the inferences to be drawn from them I will consider some of the individual messages and then the Facebook messages as a whole. John Collyer knew that the complainant had a white dog. John Collyer had been to the beach with the complainant. He sent her a video of a dog taking off the bikini top of a young, fully developed woman, exposing her breasts, and wondered if he could teach the complainant's dog to do that. The only reasonable inference that can be drawn from those messages, photo and video is that John Collyer had an interest in seeing the complainant's breasts. John Collyer's suggestion that he did not play the video and therefore did not really know what it was about is not believable. The still photo itself shows the dog pulling on the strap of the bikini top and the young woman trying to cover her breasts. To compare that video or photo with the Coppertone ad which showed the buttocks of a very young little girl is neither reasonable nor believable.

[53] That he would get in trouble if alone with the complainant in her room is explained by John Collyer as referring to the fact that it would be inappropriate for him to be in a young woman's room when the family is not at home. That might be a reasonable inference if it was not on the same day that he sent the video of the dog tugging on the bikini top and wondered if he could train the complainant's dog to show her breasts. In light of the prior messages, I find the reasonable inference to draw from his message about getting in trouble if alone with the complainant in her room is that something sexual would happen.

[54] John Collyer says that when he sent these messages on March 27, 2016 he was drinking, and he deleted the messages when he saw them. He also said that he did not drink around the complainant. After the messages with the dog and bikini strap, steal you away, if alone he would get in trouble and the reference to dirty limericks, John Collyer sent a message that he was going to head in to get the car washed and he would ask her to come along but she had to watch the ham. The inference is that he was driving his car to get it washed and would have picked up the complainant if she was not watching the ham.

[55] John Collyer's explanation for the "you are hot" message is that the complainant was worried about her appearance and that he was saying she was physically not sexually attractive. A common sense inference from a man telling a young woman that she is "hot" is that he is telling her that she is sexy. Also, the hot comment comes the day after the dog tugging on the strap and he would be in trouble if alone in her room message. It cannot be viewed in isolation. The same for the dirty limericks message and that truth or dare might be dangerous.

[56] The totality of these messages leaves no other reasonable inference than John Collyer was telling the complainant that he found her sexy, that he would do something that would get him in trouble if he was alone with her, that he loved her not in a platonic way but that he found her hot. These are not messages you would expect from a man who says he is a father figure to the teenage recipient.

[57] John Collyer explains the "Relationships last longer when nobody knows your business" as a message to the complainant not to tell everyone her business as she had a tendency to do. That would make sense if the message was about not sharing everything, but the message was about relationships and showed a man and woman in a romantic setting.

[58] John Collyer knew that the complainant suffered from some mental health disorders. He had gone to medical appointments with the complainant. The messages are sexually suggestive, and they lead to an inference of an older man grooming a young girl to have sexual contact. This was not sexual banter between adults. I do not believe John Collyer's evidence that he did not have a sexual interest in the complainant. The messages clearly show that he had a sexual interest in her.

[59] The complainant testified that the messages made her very uncomfortable, he was a grown man and a father figure to her. The psychiatrist testified that the complainant was functioning at an intellectual and emotional age of between 10 and 12 years at the time of these messages.

[60] The apology text messages to the complainant's mother show that John Collyer knew that the messages were inappropriate and wrong.

(b) Deleted Facebook Messages and Lost Cellphone:

[61] There is no evidence to show when the Facebook messages were deleted. John Collyer said that he deleted them not long after the inappropriate messages

from March 27 to April 2, 2016. The MLAT results do not say when they were deleted only that they were deleted. With no evidence that they were deleted around the time that John Collyer became aware of the SIRT investigation, I cannot draw the inference that they were deleted at that time.

[62] In relation to the cell phone, John Collyer was served with the first Notice to Subject Officer on August 5, 2016. He reported his phone missing on August 10, 2016. In his statement to the RCMP, John Collyer says (p. 215) that he usually stays away from his phone when he is drinking but that he always had the phone beside him and he was always monitoring social media for work related reasons. John Collyer agreed that the phone was a lifeline with other police officers, and it had a high degree of importance to him. John Collyer testified that after meeting with Sergeant Vail on August 5, 2016 he was off for a few days and on Wednesday, August 10, 2016 he went to the Halifax Regional Municipality (HRM) to run some work-related errands. His recollection was that he took the Blackberry to HRM. He said he had the phone for the entire weekend after meeting with Sergeant Vail and that he had used it constantly. He was in a business in Dartmouth and another in Halifax on August 10, 2016. He realized that his phone was missing and went back to one business, searched his car and then called the other business to try to find his phone.

[63] When he returned to Bridgewater he went into the office of the information technology specialist to report the phone lost. John Collyer testified that there would be no benefit to him to deliberately get rid of his Blackberry because all of the information on the Blackberry was also on his laptop.

[64] The explanation from the information technology specialist was that all smartphones have location services which updates the device's location using GPS. As a result, a service can be used to find the phone. On August 10, 2016 when he ran a check for John Collyer's Blackberry it came back showing the last location was four days prior at the Bridgewater Police station.

[65] John Collyer's explanation that he had the phone for the five days after being served with the Subject Officer Notice does not make sense. If he had the phone, as he testified, the last location would show at his home where he had and used it on the weekend or in HRM where he said he had it on August 10, 2016. The last location would not be four days before he said he lost it.

[66] John Collyer testified that he was aware from his work as a police officer that when a cell phone is analyzed deleted information can be recovered.

[67] The reasonable inference to be drawn from the Blackberry not being able to be located after August 6, 2016 is that it was disposed of by John Collyer on that day to avoid recovery of any information on the phone. I do not believe John Collyer's evidence in relation to the cell phone, however, it is not a central finding to the outcome I have reached.

Credibility:

[68] When assessing credibility, I must use the test set out in *R. v. W.(D.)*, [1991], 1 S.C.R. 742 as modified in *R. v. J.H.S.*, 2008 SCC 30. If I believe the evidence of the accused, I must acquit. If I do not know whether to believe the accused or the complainant, I must acquit. If I do not believe the evidence of the accused but I am left with a reasonable doubt by his evidence, I must acquit. Even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence that the accused is guilty.

[69] When assessing credibility, I must also assess the reliability of the witnesses. Reliability relates to the ability of the witness to observe, remember and communicate while credibility relates to whether the witness is being truthful.

(a) Evidence of John Collyer:

[70] John Collyer testified that the events of the day up to when the complainant says that he placed his fingers in her vagina without her consent were much as the complainant described. John Collyer picked up the complainant in his sports car. They went to the car wash. The water in the car wash leaked through the material of his convertible. John Collyer and the complainant went for a drive to dry the roof. They went to the cemetery and he drove the complainant back to her home.

[71] John Collyer denies that he touched the complainant's vagina and put his fingers in his mouth and said, "you taste sweet".

[72] As I stated above, some of John Collyer's evidence defies logic. His explanation for the Facebook messages was that he was drinking. The Facebook messages span several days. Some of the Facebook messages individually, but certainly the Facebook messages together, show that John Collyer had a sexual interest in the complainant. He denies that.

[73] The complainant's reaction to the Facebook messages was that they were gross as John Collyer was a father figure to her. He agrees that he was a father figure to her. The complainant did not respond to his sexual messages in a sexual manner. The messages show that John Collyer was trying to engage the complainant in a conversation of a sexual nature, and she was not engaging. Despite that he persisted. John Collyer used sexual messages, comments about her being "hot", and appeared to be trying to lead her toward a sexual conversation and then a sexual relationship. John Collyer's explanation that he can say silly things, sometimes inappropriate things, when he is drinking, does not make sense. These messages were not silly, and they were more than inappropriate.

[74] In the statement John Collyer gave to Sergeant Richardson, he said that he did not have romantic feelings for or romantic delusions about the complainant. John Collyer said he did not remember what was behind the messages and that Sergeant Richardson was asking him to remember something when he was drinking. John Collyer said: "You're asking me to – to recall something that happened months and months ago, probably late at night or maybe in the – I don't know, I'd have to look at the date. And you're asking me to say what – what was behind it." (p. 205). This explanation, again, defies logic. John Collyer was expressing a sexual interest in a young person to whom he was a father figure and he says that he would have to look at the date to explain what was behind it. In his statement to Sergeant Richardson, John Collyer repeatedly says that he did not recall the messages, but he also says when he saw the messages he immediately deleted them as he was worried about a *Police Act* complaint. John Collyer told Sergeant Richardson that it was only one occasion when he was drinking that the messages were sent but the messages were sent on a number of days.

[75] The Defence submission was that he quickly apologized for the messages, but the evidence shows that he did not apologize for the messages until the complainant's mother read the messages and showed some of them to Sheri Collyer. The messages were sent in late March, early April and the apology texts were sent in early August.

[76] John Collyer's explanation for the messages is not believable. John Collyer described the messages as sexual innuendo. This "sexual innuendo" was in messages to an adolescent who he knew had mental health disorders. This sexual innuendo was in messages to a person functioning between the ages of 10 and 12 years old. These messages were to someone who thought of him as a father figure.

[77] The Defence position is that John Collyer did not have time to concoct a story in December 2016 when he was arrested and taken to the RCMP station to be interviewed. However, John Collyer had known that there were allegations against him in relation to the complainant since August of 2016. He was a trained police officer.

[78] The Defence inferred that the touching described by the complainant could not have occurred or would have been difficult in a two-seater sports car driving on the highway. In cross-examination John Collyer agreed that it was not impossible. The car is a two-seater sports car with a manual transmission. A manual transmission requires the driver to have one hand on the wheel while shifting gears. The suggestion that two hands were required to drive the car or that it was impossible for the events as described by the complainant to occur in the car is rejected.

[79] The complainant testified that John Collyer asked her to delete the Facebook messages and that she told him that she did. John Collyer said he did not ask her to delete the messages but that the complainant told him that she did delete them. In his statement, John Collyer was told that the complainant said he asked her to delete the messages so he would not get in trouble. First, he said "Didn't happen", then "Not that I recall, no," then "I don't recall having that conversation with her, no; then "When I say no, I – I'm pretty certain I would not say that". (pp. 269-270). It does not make sense that the complainant would tell John Collyer that she deleted the messages unless there was a discussion about the messages. John Collyer was not clear during the police interview whether he asked the complainant to delete the messages. I would expect that would be something that he would remember.

[80] I have some major concerns about John Collyer's credibility.

(b) Evidence of the Complainant:

[81] There were some contradictions in the complainant's evidence regarding a problem she had with her bank account when she was living in Halifax after the trip to the cemetery. The complainant did not tell police, when interviewed, that John Collyer put his fingers in his mouth and told her she tasted sweet. Her explanation was that she did not want to talk about it. The complainant admitted she did not tell the truth when she testified that the Crown Attorney and Sergeant Vail told her she could delete the Facebook messages. Her explanation was that

she found the messages upsetting and she did not want to look at them. The complainant tried to protect the identity of friends or former friends.

[82] The complainant's demeanour when testifying was not typical. She became combative with Defence counsel during cross-examination. She became upset and cried. She became very enthusiastic when describing the car wash and the water leaking through the roof. The testimony of the psychiatrist helped explain the presentation of the complainant. She appeared to be functioning at an age younger than her chronological age. The characteristics of the mental disorders with which she was diagnosed also explain her behaviour and demeanour.

[83] I have to assess the complainant's evidence in light of the evidence from the psychiatrist regarding her impulsivity, defiance, and level of maturity. In *R. v. W. (R.)*, [1992] 2 S.C.R. 122 McLachlin J. (as she then was) discussed children's evidence and warns that contradictions, inability to recount precise details and communicate the when and where of an event with exactitude, does not mean they have misconceived what happened to them and who did it. Justice McLachlin says that the standard of a reasonable adult is not necessarily appropriate when assessing the credibility of young children. The evidence of children must be approached on a common sense basis. While the complainant was 20 years old when she testified, I have to remember both that she was testifying about events when she was functioning at an age of between 10 and 12 years old and that the events were three years before her testimony.

[84] The complainant was clear and did not waiver in relation to the details of the events in the car on the way to the cemetery. The question about her ability to bring herself to orgasm, the touching of her vagina, the pushing aside of her skort and panties, the fingers in her vagina, the removal of the fingers from her vagina, the placing of the fingers in his mouth, and speaking the words that she tasted sweet were all very clear. The complainant said that she remembered what happened in the car "plain as day". I believe the complainant's evidence as to what occurred that day.

(c) Conclusion on Credibility:

[85] I do not believe John Collyer's evidence that he did not do the acts described by the complainant. I do believe the evidence of the complainant and her description of what occurred in John Collyer's two-seater, convertible on the way to the cemetery. The evidence of John Collyer does not leave me with a

reasonable doubt about his guilt or about an essential element of the offences. The evidence that I do believe and accept from the complainant proves the guilt of John Collyer beyond a reasonable doubt.

Elements of the Offences:

[86] To find John Collyer guilty of sexual exploitation contrary to s. 153(1)(a) of the *Criminal Code* the Crown must prove each of these elements beyond a reasonable doubt:

(a) That the complainant was a young person at the time John Collyer touched her;

(b) That John Collyer touched the complainant;

(c) That the touching was for a sexual purpose; and

(d) That John Collyer was in a position of trust or authority toward the complainant.

Under s. 153(2) of the *Criminal Code* a young person is defined as 16 years of age or more but under the age of 18 years. The evidence is that the complainant was born on May 28, 1999. The offence is alleged to have been committed between May 1, 2016 and July 31, 2016, therefore the complainant would have been aged 16 or 17 during that time period. John Collyer touched the complainant with his hand on her vagina, put his fingers in her vagina and licked his fingers and told her she tasted sweet. The touching was for a sexual purpose. All of the evidence showed that the complainant considered John Collyer to be a father figure and a second parent to the complainant. This was a relationship that evolved over time. All witnesses, including the complainant and John Collyer, described John Collyer as a father figure and second parent to the complainant. John Collyer was in a position of trust or authority towards the complainant. The evidence from John Collyer and the complainant was that the drive to the cemetery occurred between May 1, 2016 and July 31, 2016 at or near Bridgewater, Lunenburg County, Nova Scotia.

[87] In order for John Collyer to be found guilty of sexual assault contrary to s. 271 of the *Criminal Code* on the complainant the Crown must prove each the following beyond a reasonable doubt:

(a) That John Collyer intentionally applied force to the complainant;

(b) That the complainant did not consent to the force that John Collyer intentionally applied;

(c) That John Collyer knew that the complainant did not consent to the force applied; and

(d) That the force that John Collyer intentionally applied took place in circumstances of a sexual nature.

By touching the complainant's vagina and by placing his fingers in her vagina John Collyer applied force to the complainant. The complainant clearly said that she did not consent to John Collyer touching her vagina or putting his fingers in her vagina. John Collyer knew that the complainant did not consent to him touching her vagina and placing his fingers in her vagina. The touching of the complainant's vagina, the placing of his fingers in the complainant's vagina, and placing his fingers in his mouth and telling the complainant that she tasted sweet were of a sexual nature. As above, I am satisfied that the offence occurred between May 1, 2016 and July 31, 2016 at or near Bridgewater, Lunenburg County Nova Scotia. I find John Collyer guilty of sexual assault on the complainant contrary to section 271 of the *Criminal Code.*

[88] I find that all of the essential elements of both offences have been proven beyond a reasonable doubt.

[89] With the principle of *res judicata* can John Collyer be convicted of both sexual assault and sexual exploitation? In *R. v. Mair,* [1998] 106 O.A.C. 191 (ONCA), Rosenburg J.A. said:

> 18 At the beginning of these reasons I have set out the seven charges upon which the appellant was convicted. As indicated there are two sets of charges. Each of the charges within one of the two sets covers the same time period. It does not seem to have been argued that any particular charge within the time period related to any particular act of abuse. Moreover, the counts in the indictment are drafted in the most general of terms and could not fairly be interpreted as relating to any particular act. In my view, the rule against multiple convictions as explained in *R. v. Prince*, [1986] 2 S.C.R. 480 (S.C.C.) applies in this case and I would enter conditional stays with respect to the charges of sexual assault. The appellant remains convicted of two counts of sexual interference, two counts of sexual exploitation and one count of invitation to sexual touching. As indicated above, the trial judge imposed concurrent three year sentences for each of the offences.

Also, in *R. v. J.(R.A.)*, 2010 BCCA 304, Bennett J.A. found that convictions for both s. 271 and s. 153 could not stand.

[90] I will enter a conviction on the sexual exploitation charge (s. 153(1)(a)) and conditionally stay the sexual assault charge (s. 271).

Conclusion:

[91] I find John Collyer guilty of sexual exploitation of the complainant between May 1, 2016 and July 31, 2016. A conditional stay will be entered on the charge of sexual assault.

Lynch, J.