

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. G.P.W.*, 2021 NSSC 28

Date: 20210128

Docket: CRP No. 474710

Registry: Pictou

Between:

HER MAJESTY THE QUEEN

v.

G.P.W.

DECISION

Restriction on Publication: Sections 486.4 & 486.5 of the Criminal Code

Judge: The Honourable Justice N.M. Scaravelli
Heard: December 15, 16, 17, 18, 2020, in Pictou, Nova Scotia
Final Written Submissions: December 21, 2020
Final Oral Submissions: December 23, 2020
Decision: January 28, 2021
Counsel: Peter Dostal and Robert Kennedy, for the Crown
Robert Sutherland, for the Accused

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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

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.

Victim under 18 — other offences

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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that

constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Offences

(2.1) The offences for the purposes of subsection (2) are

- (a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
- (b) a terrorism offence;
- (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
- (d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

Limitation

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

Application and notice

(4) An applicant for an order shall

- (a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and
- (b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Hearing may be held

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

Factors to be considered

(7) In determining whether to make an order, the judge or justice shall consider

- (a)** the right to a fair and public hearing;
- (b)** whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
- (c)** whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
- (d)** society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
- (e)** whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
- (f)** the salutary and deleterious effects of the proposed order;
- (g)** the impact of the proposed order on the freedom of expression of those affected by it; and
- (h)** any other factor that the judge or justice considers relevant.

Conditions

(8) An order may be subject to any conditions that the judge or justice thinks fit.

Publication prohibited

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

- (a)** the contents of an application;
- (b)** any evidence taken, information given or submissions made at a hearing under subsection (6); or
- (c)** any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

By the Court:

[1] At trial, GPW faced a ten count Indictment. Prior to the commencement of the Crown's case, the Crown advised the Court it was not proceeding on Counts 9 and 10 in the Indictment. At the conclusion of the Crown's case, the Crown entered a stay in relation to Counts 1 and 2 of the Indictment that dealt with a different complainant.

[2] As a result, GPW faces Counts 3 to 8 in the Indictment: that between the 29th day of April, 2014 and the 30th day of May, 2014 at or near West River Station, Nova Scotia, he did commit sexual assault on BD2 contrary to Section 271 of the *Criminal Code* and at the same time did, for a sexual purpose, touch BD2, a person under the age of 16 years contrary to 151 of the *Criminal Code* and at the same time did make child pornography to wit: photographic images contrary to Section 163.1(2) of the *Criminal Code*. GPW is further charged with the same three offences regarding BD2 alleged to have occurred between the 5th day of July, 2015 and the 31st day of July, 2015 at or near, Abercrombie, Nova Scotia.

Background

[3] This case arises from an investigation involving the Edmonton Police Service, Internet Child Exploitation Unit (“ICE”). ICE received two Cyber Tipline reports from the United States National Centre for Missing and Exploited Children that were initially sent to and forwarded from Ottawa. These reports were received by Detective McFatrige with the sexual assault section of the Edmonton Police Service on March 14, 2017. One report contained eight uploaded files to a Flickr account containing eight photos depicting child pornography as well as sexual acts. The IP address of the user or person being reported was identified as an address in the city of Edmonton, Alberta. The internet service provider on the computer device was Shaw Communications. The IP was registered to a person named CC. However, all uploads on the computer device occurred on July 11, 2015 from a Nova Scotia IP address.

[4] The other report contained six uploaded files containing photographs depicting child pornography and a sexual act. The username or person being reported is shown as GPW. A listed phone number is the cell phone of the accused, GPW. The IP address is registered to CC. The accused was married to and resided with CC at their Edmonton address at the time of the uploads in both reports. The six files were uploaded on January 30, 2017, February 1 and 26, 2017 respectively.

[5] On March 21, 2017, a Search Warrant was executed by the Edmonton Police. In the course of executing the search, GPW was arrested at his residence in Edmonton, Alberta. Subsequent investigation identified BD2 as the person in the relevant photographs that were taken in Nova Scotia. BD2 is GPW's niece.

[6] As a result of the investigation, GPW was charged with the subject offences.

Admissions

[7] Prior to commencement of the trial, the Crown and Defence filed an Agreed Statement of Facts pursuant to Section 655 of the *Criminal Code*, a copy of which is attached.

[8] At the conclusion of the evidence and following submissions, the Crown and Defence agreed that the central issue in this trial is identification of the perpetrator of the photographic images and sexual acts depicted, based upon circumstantial evidence.

[9] Further, during submissions, Defence acknowledged the following:

- The photos from the Cyber Tipline report depict child pornography;
- Certain photos depict sexual acts involving BD2;
- At all relevant times set out in the Indictment, BD2 was under the age of 16 years.

[10] The Crown bears the burden of proving the elements of the offences charged, including that GPW was the perpetrator of the offences set out in the Indictment, beyond a reasonable doubt. GPW does not have to prove his innocence. As stated, the Crown's case is based upon circumstantial evidence.

Evidence

[11] **Detective Ian McFatridge** is with the sexual assault section of the Edmonton Police Service. He testified via video from Edmonton, Alberta.

[12] On March 14, 2017, he was assigned to investigate child exploitation material regarding online photo sharing through Yahoo. Detective McFatridge digitally received and viewed two Cyber Tipline reports received from the United States National Centre for Missing and Exploited Children. One report refers to six photographs uploaded on January 30, February 1 and February 26, 2017. One of these photos relate to the offences alleged to have occurred between April 29, 2014 and May 30, 2014 at West River Station, Nova Scotia.

[13] The service provider is shown as Yahoo Inc. The website is a Flickr account; Detective McFatridge testified Flickr is owned by Yahoo. Flickr is a photo sharing

website. The user must have an account with Yahoo that requires the applicant to provide name, phone number and e-mail address. The report submitted by Yahoo shows the registered username as GPW. The phone number provided is GPW's cell phone number. The e-mail address peppers-girls2 [at] yahoo.com and alternate e-mail peppers-girls [at] hotmail.com both belong to GPW. The IP address is registered in the name of CC (also known as CB) who was, at the time, the spouse of GPW. The registered address is the residence where GPW and CC resided together at the time.

[14] The second Cyber Tipline report contains eight photographs, all uploaded in sequence on July 11, 2015. All of these photos relate to the offences alleged to have occurred between July 5, 2015 and July 25, 2015 at Abercrombie, Nova Scotia.

[15] In this report, a Flickr account username or phone number was not provided. The e-mail address is listed as legal-cpr@yahoo-inc.com. Detective McFatridge testified that Yahoo listed their own address which is highly unusual as, in effect, it makes it look like Yahoo is reporting on itself. However, the IP address refers to the same Edmonton address registered to CC where she and GPW resided at the time.

[16] On March 21, 2017, after executing a Search Warrant and seizing GPW's eyeglasses, Detective McFatridge arrested GPW. Later on the same date, he

conducted an interview. After showing him the pictures, GPW identified BD2 in the photos. Detective McFatridge then contacted GPW's sister, CD, residing in Pictou County, Nova Scotia. CD was shown vetted copies of the same photographs and identified the girl as her daughter, BD2. Detective McFatridge then contacted the RCMP in Pictou, Nova Scotia and shared the information.

[17] Under cross-examination, Detective McFatridge testified that he did not recall receiving a request from Constable Bent of the Pictou RCMP after September 20, 2020 requesting that he investigate AC who was the son of CC and the former step-son of GPW. He further stated that AC was not a suspect in the investigation.

[18] Under re-direct examination, Detective McFatridge testified that he had met with AC "multiple times". He made observations of his physical appearance as related to the images of the male person in the photographs. He eliminated AC who was 14-15 years old at the time of their interactions by comparing his build, face, hands, arms, hair, eyebrows and eyeglasses to the male image in the offending photographs.

April 29-May 30, 2014 (Counts 3-5)

[19] CD is the mother of BD2, who was born on November [...], 2003. CD, her husband KD, and their three children, including BD2, resided at [...], West River

Station, Nova Scotia until December 14, 2014 when they moved to [...], Abercrombie, Nova Scotia.

[20] CD testified that GPW is her oldest brother who resided in Edmonton, Alberta. GPW was in the Canadian Military. During his leave, he would usually make annual trips to visit her family in Nova Scotia. With the exception of his 2015 visit, CD would book all his flights to Nova Scotia for him. CD had a record of his visits to Nova Scotia from 2009 to 2015. She recalled GPW's visit to her home on [...], West River Station in the Spring of 2014 around Easter. She recalled they celebrated BD2's sister's birthday on May 2, 2014.

[21] GPW brought his infant son with him, who was approximately six to nine months old at the time. GPW would sleep on the purple couch in the living room. He and his son stayed with CD's family on [...], West River Station for about 7-10 days.

[22] CD was shown two vetted photographic images of her daughter BD2. Both of these photos show her daughter lying on her back in a sleeping state. She testified that BD2 was a sound sleeper. For purposes of her testimony, CD was shown the vetted photos to enable CD to identify her daughter, BD2, and to establish the location and approximate time the photographs would have been taken.

[23] Looking at the first vetted photo of BD2 (Image 1) and the background in the photo, CD testified that the photo would have been taken at the West River Station residence prior to their move to Abercrombie in December 2014. She was able to determine this based on the colour of the wall in the background of the photo.

[24] The unvetted photo of Image 1 (Ex 4, Tab 1, #5) is a full body image of BD2 lying on her back on the couch, naked and in a sleeping state. Her top is pulled up to her chin exposing her breasts. She is fully exposed from the waist down, exposing her genitals, pre-puberty.

[25] CD was shown the second vetted photo of BD2 (Image 2). CD was able to identify the descriptive surroundings of BD2 sleeping in her bed on her back. She testified that this photograph was taken at their residence located at Abercrombie. CD was able to compare Image 2 to Image 1. CD testified that Image 2 would have been taken one to one and a half years later than Image 1. There are notable changes in BD2's body makeup. She is slightly heavier and more developed. CD also referenced BD2's change in hairstyle between the two images. BD2's hair is shorter in Image 1. In terms of timeline, CD testified that BD2's hair was dyed towards the end of their residency at West River Station in 2014. The dye remained for approximately one year. CD testified that the second image depicts the hair dye at

the end of that timeframe given how little of the dye was left and the brown hair roots that are exposed.

[26] The unvetted photo of Image 2 (Ex 4, Tab 2, #1) depicts BD2 in her bed lying on her back in a sleeping state. She is completely naked. BD2 is more mature in body size. Her breasts and genitals are fully exposed. Her genital area depicts signs of puberty.

[27] Image 1 and Image 2 are two of the six images uploaded on a Flickr account as contained in the Cyber Tipline Report dated March 1, 2017. The images were uploaded on January 30, 2016, February 1 and 6, 2017 respectively. In addition to the two images of BD2, there are four other images of a pornographic nature depicting other young females.

[28] The Cyber Tipline Report describes the username on the Flickr account as GPW. The phone number listed is the cell phone belonging to GPW. The IP address is registered as the Edmonton address where GPW and his spouse at the time, CC, resided. The IP account was registered in the name of CC. There are two e-mail addresses listed for the account, both identified as belonging to GPW.

July 5, 2015 – July 31, 2015 (Counts 6-8)

[29] CD testified that GPW visited Nova Scotia on July 5, 2015 for a period of eight days. He had with him his two children ages one year and three to four months as well as his step-son, AC, who turned 13 years of age during the visit. It was the first time AC visited. CD stated that GPW and his family stayed at her residence at [...], Abercrombie for three days and the rest of the time at their mother's residence in West River Station. GPW had his laptop and cell phone with him. As part of the visit, GPW and his family went sight-seeing, taking pictures. CD testified that AC had his own cell phone and that the July 2015 visit was his first and only visit to Nova Scotia.

[30] CD again referred to Images 1 and 2 and confirmed the locations of the photographs as well as the timelines being 2014-2015 respectively.

[31] The unvetted photo of Image 2 was one of eight photos contained in the separate Cyber Tipline Report dated February 28, 2017. All of the images were taken in BD2's bedroom at Abercrombie while she was naked and asleep. CD, viewing the vetted photographs, was able to use identifiers such as bedding, walls, etc. to indicate the location where the photographs were taken.

[32] The unvetted images range from full body naked image of BD2 lying on her back on her bed in a sleeping state as depicted in Image 2, to close up images of her genitals. Three of the close up images depict a male left hand both touching and digitally penetrating BD2's vagina with his finger. The hand is relatively thick with relatively thick fingers. Hair is visible on both the hands and the fingers. There are spots on the hand as well as wrinkles. In one of the photos, a sports watch with a black strap and grey face is depicted on the wrist of the left hand. The watch has an orange accent insert on the face of the watch. Another photo taken from above looking down is a close up depicting a portion of a hairless male face wearing glasses touching BD2's vagina with his lips. The top frame of the glasses appears as shiny silver. Another close up photo depicts a smaller portion of the face looking down with lips touching BD2's pubic hair.

[33] CD testified that on July 11, 2015 during the visit to Pictou County, the family, including GPW, AC and the children, gathered at the home of BW in Westville prior to attending the Pictou Lobster Carnival parade. BW is the brother of CD and GPW. These eight images were uploaded in Westville, Nova Scotia to GPW's Flickr account on the same date.

[34] It is apparent from the images that they would have been created during the same timeframe given the common physical features of BD2 and the background

features in each subsequent image. Each image appears to connect back to the previous image. They were all uploaded on July 11, 2015 during a 19 minute period from the same IP address in Westville. Further, the file names for the images are sequential.

[35] Under cross-examination, CD stated that she was not certain but could not recall AC staying overnight at her residence without GPW and his kids.

[36] **BW** is CD's brother and has resided in Westville for the past 15 years. **BW** presented with facial hair he described as a goatee that he has had since he was 16 years of age. He stated he has never worn eyeglasses or a watch.

[37] **BW** confirmed that GPW would visit Pictou County on an annual basis and would stay at CD's residence for periods of time. **BW** testified that GPW's stepson, AC, visited once for his 13th birthday. He could not recall the month or year of the visit. He recalled there was a parade.

[38] **BW** testified that he had internet service at his Westville residence since 2012. GPW, on his visits to Westville, would use his internet service "for programming". He would have his laptop and cell phone with him. **BW** stated that he did not own a computer as he did not have the skills. GPW would at times use the internet with **KD**, his sister's husband. **BW** recalled that AC was at his house in Westville with

GPW during the summer visit. He stated that free wi-fi was also available in several locations in the Town of Westville.

[39] Under cross-examination, BW confirmed that AC had a cell phone with him when he visited in Westville. He then recalled GPW and AC attended the Lobster Carnival parade in July 2015. When pressed on how many times AC would have visited Nova Scotia, BW stated it could be two times or one time.

[40] **KD** is the father of BD2 and was residing with CD and his family in 2014 and 2015 at both West River Station and Abercrombie. KD presented with facial hair and shoulder length hair. He testified that in 2014-2015, his facial hair consisted of a goatee and sideburns. He stated that he has never worn glasses or a watch.

[41] KD testified that GPW did not have facial hair and wore glasses during his visits to their residence in 2014-2015. GPW always had his iPhone and his laptop with him in a case.

[42] KD testified that GPW wore an Ironman or sports watch. He stated that GPW had numerous Ironman watches. KD was shown a photograph of an Ironman watch and a Fitbit. KD identified the Ironman watch with an orange accent insert as GPW's watch. He stated that he was with GPW when he purchased that watch at Wal-Mart in New Glasgow. The watch in the picture has a multi-coloured strap attached that

KD described as homemade. There is a separate black strap beside the watch which he indicated was the original strap. KD stated that he remembered this watch because of the orange accent on the face as distinct from GPW's other watches. He recalled that the other Ironman watches that GPW owned over the years had blue and silver accents.

[43] The photograph of the watches was part of a series of photographs taken by Police in Edmonton when they attended GPW's residence as part of their investigation in 2017.

[44] The Crown tendered a number of other photographs into evidence. There are a number of photographs of GPW and others including his step-son, AC, taken during his visit to Nova Scotia in July 2015. All are mobile uploads posted to GPW's Facebook. In the pictures, GPW is without facial hair, wearing glasses. The arms of the glasses are distinct in that they have a waved pattern. He also is wearing an Ironman or sports watch on his left wrist. Specifically, in the photo taken outside the Halifax Airport in July 2015, an orange accent insert in the face of the watch on GPW's left wrist is depicted.

[45] The photos of GPW's face wearing glasses at the time of his arrest were not helpful in identifying the perpetrator as the photos did not replicate the angles of the position of the face of the perpetrator of the assaults in the offending photos.

[46] The Crown also tendered into evidence the eyeglasses seized by Police in Edmonton, Alberta as part of their investigation. The frame of the glasses are metal type. The top of the frame is silver/shiny in colour. The arms of the glasses have a waved pattern. There is no dispute that these are the same glasses that GPW was wearing during his visit to Nova Scotia in July 2015.

[47] The accused, **GPW**, testified in his defence. In considering GPW's evidence, I am mindful that the burden of proof remains with the Crown throughout and does not shift to GPW to prove his innocence. The so-called W(D) principle describes how the assessment of credibility relates to reasonable doubt. It requires the Court to refrain from merely choosing between two alternatives.

[48] GPW began his evidence by stating that he suffers from PTSD following his tour in Afghanistan as a member of the Canadian military. He stated that he has 47% mental capacity and that he has a poor memory when under stress but otherwise okay when there is no stress.

[49] GPW denied all charges against him. He acknowledged that he gave two cautioned statements to Police in Edmonton, Alberta in 2017 without a lawyer. That after talking to his legal counsel in Nova Scotia he had “an epiphany” and believes that AC, the son of his former spouse, CC, committed the offences in 2014 and 2015.

[50] Crown and defence counsel acknowledged on the record that in September 2020, GPW through his counsel, requested the authorities investigate AC as a suspect in the charges against GPW. This request was not acted on by the authorities.

[51] GPW, in his direct evidence, was focused on pointing to AC as the person who took the photographs, committed the sexual acts, and uploaded them onto GPW’s Flickr account.

[52] With respect to the 2014 charges, GPW in direct examination stated “I believe I took AC to Nova Scotia on two occasions”, being 2014 and 2015. He acknowledged visiting and staying at CD’s residence on [...], West River Station during the 2014 visit. However, he testified that he slept at his mother’s house next door with his infant son because he was crying. GPW stated that AC “could” have stayed at his mother’s house with the kids.

[53] During the 2015 summer visit, GPW testified he tried staying at CD’s with his two children and AC but went to his mother’s for the rest of the visit as the kids

would not settle down. He testified that AC also stayed at his mother's residence but also stayed at CD's house one or two nights.

[54] GPW described himself as a "tech junky". He stated that he gave AC and CD's two daughters his old cell phones. AC's phone did not have a SIM card but was capable of taking pictures. GPW stated that AC wanted his mother's password to use the internet but CD refused to allow all the children to use the internet. GPW further stated that he left his own cell phone with AC while GPW was staying at his mother's residence because she had a landline. He stated he received calls from AC including requests for pizza.

[55] Under cross-examination, GPW was shown the photos of BD2 uploaded on July 11, 2015. When asked if he could see spotting on the left hand as possible liver spots, GPW responded that it could be someone playing in the sand at the beach getting their hand "roughed up", that it was a bruise. When shown the pictures of the hand touching and penetrating the vagina, GPW denied both that it was his hand and wrist watch. He stated that he bought his entire family "triathlon" watches, including AC. GPW described the watch in the photo as AC's watch and stated there was model paint on the screws from building models and that he helped AC clean it before travelling to Nova Scotia.

[56] GPW was shown a picture of he and AC during the 2015 summer visit sitting beside each other outdoors in red chairs. This picture depicts AC as a tall, slim boy wearing glasses. GPW is depicted as shorter and heavier set wearing glasses. Following questioning regarding the obvious physical differences, GPW initially stated he weighed 190 pounds, then stated he weighed 160 pounds. He eventually changed his opinion that he and AC did not have similar builds. AC turned 13 years old when he visited Nova Scotia. When asked to look at AC's left hand in the photo, GPW was asked if he saw any hair on the hand. His first response was "yes, slight hair". He then said "I can't see". He then said that AC was "probably getting hair on his hand". When pressed further, GPW agreed he could not see hair on AC's hand.

[57] Looking at the same photo, GPW acknowledged that AC was not wearing a wrist watch. His first answer was that it was because AC was out swimming. When pointed out that AC was dressed and sitting in a red chair, GPW then stated that AC wanted to get a tan so he did not wear his wrist watch. GPW was then shown a further photo taken of the 2015 trip. This photo shows both GPW and AC sitting on a couch inside a residence with strawberries. Although AC is not wearing a wrist watch, GPW continued to maintain that it was because AC wanted to tan.

[58] GPW stated that the glasses worn by AC in the picture were silver. GPW disagreed when asked to observe that the glasses appeared to be brown in colour. Later he agreed that the sides might be brown but the top was silver. GPW denied that the top of his glasses at the time appeared silver in colour. When presented with the glasses at trial, GPW was asked to confirm whether the top of the glasses appeared to be silver. GPW replied that there's no shiny reflection but that he did not disagree with what Crown counsel saw.

[59] GPW acknowledged that the wrist watch he is wearing in that photo has a black wrist band and that the face of the watch shows grey colouration. GPW was shown the photo of him at the Halifax airport in July wearing the wrist watch. When pointed to the orange edgings on the face of the watch, GPW replied that it was "pink or orange".

[60] GPW acknowledged that AC would have attended school during a regular school year ending in June. When it was pointed out that the uploads from his home in Edmonton, Alberta in 2017 occurred during the day and time of the week when AC would have been in school, GPW's response was that he agreed but that CC was there and had access to his laptop and cell phone.

[61] When shown the pictures depicting only a portion of the male face, both close to and touching BD2's vagina, GPW denied it was him. He stated that the eyeglasses in the photo belong to AC, not him. He again denied that the top of his glasses at the time were silver but that AC's glasses were silver. Further, GPW testified that a dark area near the left eye of the male person in one of the photos was AC's eye socket where AC would not have had his artificial eye in and that AC takes his eye out when he goes swimming.

[62] GPW acknowledged that the Flickr account containing all of the uploaded pictures was his account. He stated that CC set it up, not him. GPW stated that he was unaware that the pictures were on his cell phone. He stated that AC must have taken the pictures on his phone and connected them to the internet in Westville where the pictures would have "automatically uploaded".

[63] On cross-examination, GPW was questioned on his knowledge of computers. He acknowledged that he has the knowledge to assemble computers. He is familiar with internet terminology. He is familiar with metadata, Facebook and Flickr. He stated that Flickr is an image sharing device. When questioned about his Flickr account, GPW stated that CC set up the account, that he did not have the capacity to open a Flickr account. He stated that "I rely on other people". He later

acknowledged that setting up a Flickr account only required a username, address and phone number.

[64] When questioned about his initial apparent uncertainty in direct examination as to whether AC was with him and his infant son during the 2014 Spring visit, GPW stated that he was definitely sure once the Crown reminded him of the dates in April/May. Regarding his direct evidence that he did not stay overnight with CD during the 2014 visit, GPW was shown a picture of him asleep, shirtless under a blanket on the couch with his sleeping infant son at CD's West River Station address during his 2014 visit. GPW responded that he slept there "but not overnight". It was just to settle his infant son down.

[65] GPW denied taking the photo (Image 1) of BD2 in 2014. He disagreed with CD that the photograph of BD2 lying on the couch naked with her top pulled up over her breasts was taken at the West River Station address. He agreed that she wore night clothing at bedtime. It was his view that the wall in the background depicted in the picture was purple, which is the colour of the living room wall in CD's Abercrombie residence. GPW also stated that when comparing Image 1 and Image 2, BD2 looked approximately the same age. GPW was asked to estimate how close in time the photos Image 1 and Image 2 would have been apart. GPW answered "four weeks, a year, two days". When the obvious differences in the body

development of BD2 were pointed out when comparing both pictures, GPW replied that he could not tell because of the angle.

[66] Regarding the 2014 trip to Nova Scotia in April/May, GPW maintained he was positive that AC was on that trip even though school would not have ended.

[67] Regarding the naming of AC as an alternate suspect in 2020, GPW acknowledged that he was interviewed two times by the Police in Edmonton, Alberta following his arrest, March 21, 2017 and eight months later on August 31, 2017. Both of these interviews lasted in excess of 7 hours.

[68] In the March 21, 2017 interview, GPW was shown the images of BD2 that were uploaded from his account. GPW acknowledged in response to the question of how there could be closure for BD2 regarding the photos, he responded to the investigator that he would need to find out “why I am the way I am”. When asked under cross-examination why he would give those responses, GPW stated that it was because he did not have all the facts and that he didn’t have a lawyer. GPW later stated he did not have a memory of the March 2017 interview because he was under stress.

[69] GPW acknowledged that in the August 2017 interview, he named others as possible suspects, namely KD, because he is BD2’s father; then CC, because she

took his laptop to the investigator; then unknown persons because there were people coming into his house and using his computer.

[70] Regarding GPW's "epiphany" in 2020 that AC was the perpetrator of the offences, GPW stated this occurred after consulting with his lawyer and reviewing disclosure. GPW acknowledged that in 2019, AC testified in a trial against him, that he was convicted of the charges because of AC's evidence. GPW stated that he did not agree with AC's evidence and that blaming AC for these charges was not a pay back.

Analysis

Making Child Pornography

[71] The offence of child pornography is found in Section 163.1(2) of the **Code**. It applies to "everyone who, makes, prints, publishes or possesses child pornography for the purpose of publication". To sustain a conviction, the Crown must prove that GPW knowingly committed one of the specified forms of *actus reus* in relation to the material that meets the statutory definition for child pornography within the meaning of Section 163.1(1), in this case specifically Section 163.1(a):

163.1 (1) In this section, *child pornography* means

(a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

(i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

(ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

...

Sexual Assault/Interference

[72] In order to sustain a conviction of sexual assault/interference, the Crown must prove that GPW knowingly touched BD2, a person under the age of 16 years, in circumstances of a sexual nature that the integrity of BD2 was violated.

[73] There is no dispute that the 14 images introduced by the Crown emanating from the two Cyber Tipline Reports depict images of child pornography of BD2 as well as others. The 2015 images depict sexual touching and digital penetration of BD2's vagina, constituting sexual assault/interference.

[74] As mentioned earlier, the Crown bears the burden of proving beyond a reasonable doubt, based on circumstantial evidence that GPW is the person who made the pornographic images and who committed acts of sexual assault/interference on BD2 spanning two time frames between April 29-May 30,

2014 and between July 5-July 31, 2015. BD2 was 10 years of age during the 2014 period and 11 years of age during the 2015 period.

Circumstantial Evidence

[75] In *R. v. Lola*, 2020 SKCA 103, the Court of Appeal discussed drawing up inferences as it relates to circumstantial evidence as follows:

[25] In *R v Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000 [*Villaroman*], the Supreme Court of Canada clarified the law of circumstantial evidence and reiterated a number of key points about circumstantial evidence and how that type of evidence must be assessed. These points have been conveniently summarised in *Learning* as follows:

[24] Importantly, the Court in *R v Villaroman* had earlier commented on the reasoning process in cases of circumstantial evidence, noting:

(a) “The inferences that may be drawn from [an] observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense” (at para 30).

(b) “In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts” (at para 35).

(c) “The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If 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).

(d) “[A] reasonable doubt, or theory alternative to guilt, is not rendered ‘speculative’ by the mere fact that it arises from a lack of evidence. As stated by this Court in [*R v Lifchus*, 1997 CanLII 319 (SCC), [1997] 3 SCR 320], a reasonable doubt ‘is a doubt based on

reason and common sense which must be logically based upon the evidence *or lack of evidence*': para. 30 (emphasis added [in *Learning*]). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense" (at para 36).

(e) "When assessing circumstantial evidence, the trier of fact should consider 'other plausible theor[ies]' and 'other reasonable possibilities' which are inconsistent with guilt" (at para 37).

(f) "[T]he Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to 'negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused'. ... '[O]ther plausible theories' or 'other reasonable possibilities' must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation" (at para 37; emphasis in original).

Drawing on all of this, the Court said (at para 38) that the "basic question" in such cases is "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".

[76] Succinctly stated by the Nova Scotia Court of Appeal in *R. v. Roberts*, 2020

NSCA 20:

[25] If reasonable inferences other than guilt can be drawn from circumstantial evidence the Crown has not met the standard of proof beyond a reasonable doubt. Reasonable doubt can be logically based on the evidence or lack of evidence, must be reasonable given that evidence or lack thereof, and assessed logically in light of human experience and common sense.

[77] The theory of the Crown is that based on the totality of the evidence, the only reasonable inference, assessed logically, is that GPW sexually assaulted his niece BD2 and made child pornography with her as a subject on the 2014 and 2015 dates

and further that GPW is not a credible witness and his evidence does not raise a reasonable doubt.

[78] The theory of the defence is that:

1. AC is “the elephant in the room”. That the male person in the offending photographs is more consistent with AC as the perpetrator than GPW. The failure of the Police to investigate AC resulted in the Crown being unable to prove GPW’s guilt beyond a reasonable doubt.
2. That AC took the eight photos of BD2 in July 2015 using GPW’s cell phone and uploaded them to GPW’s Flickr account in Westville without GPW’s knowledge that the photos were on his cell phone.
3. That AC took the 2014 photo of BD2 on the couch with her shirt up over her breasts and bottom exposed and ultimately uploaded the photo on GPW’s Flickr account.

[79] Credibility is an issue in this trial. The victim, BD2, did not testify at trial. All images of BD2 uploaded on GPW’s Flickr account depict her in a sleeping state.

[80] I found CD to be a credible witness. She gave her testimony in a balanced and straight forward manner. She was not impeached in cross-examination. I accept her evidence that only GPW and his infant son visited her family in the Spring of

2014 at West River Station, Nova Scotia. CD booked the flights. AC did not visit Nova Scotia until 2015. Further, GPW and his infant son stayed at her residence during the 2014 period. CD's estimates of timelines and location of Image 1 and Image 2 being approximately one to one and a half years apart in 2014-2015 are supported by the images admitted into evidence. I accept her evidence that Image 1 of BD2 was taken at her West River Station residence.

[81] After listening to and observing GPW in direct and cross-examination and after considering the other evidence, I find that GPW is not a credible witness.

[82] It became evident throughout his testimony that the accused was not a person lacking memory loss that he sought to portray at the beginning of his testimony. He was very detailed in his testimony.

[83] GPW's evidence was presented in a strategic manner. He was incapable of making admissions against his interests. His dishonesty is highlighted by a number of illogical and non-evidence based responses to evidence including photographic evidence that clearly showed otherwise. When his direct evidence was contradicted on cross-examination, he was quick to provide an alternative explanation. In particular, his cross-examination responses regarding the hand, watch, glasses and descriptions of AC were not credible. His statements to Police on two separate

occasions pointing to possible perpetrators in 2017 were not only inconsistent with each other but inconsistent with his evidence at trial.

[84] The allegations against AC lack credibility. Despite his numerous other allegations of possible offenders in 2017, GPW's "epiphany" regarding AC did not occur until September 2020, which not only followed his 2019 trial and conviction based on AC's testimony but also after his original trial date of June 22, 2020 which was adjourned the same date due to COVID-19. GPW's evidence that he had "an epiphany" only after full disclosure and meetings with his counsel lacks credibility.

[85] I do not accept the evidence of GPW nor does his evidence create a reasonable doubt. As a result, I must consider the totality of the evidence I do accept to determine whether the Crown has proven the charges beyond a reasonable doubt.

July 2015 Offences

[86] These charges relate to the eight uploaded pornographic images of BD2 that include sexual assault/interference referred to in one of the Cyber Tipline Reports.

- BD2 was 11 years of age in July 2015.
- Given the sequencing and the background descriptions, these images were taken in July 2015 during the same incident.
- The images were taken at [...], Abercrombie, Nova Scotia based upon evidence of CD and background descriptors.

- GPW was visiting CD and her family in July 2015 for a period of eight days and stayed at her residence for a maximum of three nights.
- GPW visited BW's home in Westville on July 11, 2015. The eight images were uploaded from the same IP address in Westville, Nova Scotia to GPW's Flickr account as the January/February 2017 uploads on July 11, 2015 from GPW's cell phone.
- GPW would use BW's internet during his visits.
- The left hand depicted in the images are that of an adult male.
- The wrist watch worn by the adult male in the images is an Ironman Sports watch with a black strap and grey face with orange accent. GPW wore an Ironman Sports watch with a black strap, grey face with an orange accent during his visit in July 2015.
- GPW's eyeglasses seized by Police in 2017 consist of a metal frame. The arms of the glasses depict a wavy pattern. The top of the glasses are silver/shiny with a circle protrusion close to where the arms meet the frame on each side. These are the same glasses worn by GPW during the 2015 visit. The top of the glasses depicted in the offending images have a silver/shiny finish with circle protrusions on each side of the frame.
- The offending images depict an adult male with brown hair on the head, eyebrows and eyelashes. The photographs of GPW during the 2015 trip depict him with brown hair and brown eyebrows.
- The photos of AC taken during the 2015 visit do not match the profile depicted in the offending images.

[87] Based on the totality of the evidence, I am satisfied there is no logical inference other than GPW as the perpetrator of the sexual assault/interference on BD2 and the making of child pornography. I reject GPW's theory regarding AC as

an alternative suspect. The evidence is inconsistent with AC as the possible offender.

April/May 2014 Offences

[88] These charges relate to the six uploaded pornographic images contained in the other Cyber Tipline Report, two of which depict BD2, Image 1 and Image 2, uploaded February 1, 2017.

- The image relating to the 2014 offences (Image 1) depict BD2 lying on her back on a couch in a sleeping, naked state. Her top is pulled up to her shoulders, exposing her breasts. Her bottom half is unclothed, fully exposing her genitals pre-puberty.
- The image was taken at CD's residence on [...], West River Station, Nova Scotia.
- The image of BD2 was taken in 2014, approximately one to one and a half years prior to Image 2 taken in July of 2015 based on physical comparatives and the evidence of BD2's mother.
- BD2 was 10 years of age in April/May 2014.
- GPW and his infant son visited BD2's family home on [...], West River Station in April/May 2014 for a period of 7-10 days. GPW stayed at BD2's residence during that period.
- GPW's step-son at the time, AC, did not visit Nova Scotia in 2014.
- The images were uploaded to GPW's Flickr account containing his e-mail address, his alternate e-mail address and his cell phone number.

- Both the 2014 Image 1 and the 2015 Image 2 of BD2 were uploaded at GPW's residence in Edmonton, Alberta on February 1, 2017. AC would have been in school and not at home at the time.
- The other four child pornographic images were uploaded in sequence to GPW's Flickr account.

[89] Based upon the totality of the evidence, the only reasonable inference is that GPW took the picture of BD2 in 2014 during his visit and uploaded it to his Flickr account along with Image 2 which was also uploaded to his Flickr account in July 2015. As a result, the logical inference is that GPW did make child pornography for the purpose of publication in his 2014 visit.

[90] BD2's bottom clothing is removed in Image 1. Her top is pulled up over her breasts. She is in a sleeping state. Given this context, it is reasonable to infer that the person who took the photo removed her clothing. The motive for taking the photo is sexual in nature. The touching required to take the photo committed in circumstances of a sexual nature is indicative of sexual assault and sexual interference. The logical inference is that GPW committed the sexual assault/interference on BD2 on the same date.

[91] As a result, I find GPW guilty of counts 3 to 8 of the Indictment as charged.

Scaravelli, J.

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

HER MAJESTY THE QUEEN

- and -

[GPW]

Agreed Statement of Facts
[Pursuant to Section 655]

Cst STEVEN HORCHUK

1. Cst. Steven Horchuk is a peace officer with the Edmonton police force, Internet Child Exploitation (ICE) unit.
2. On March 21, 2017 he participated in the judicially authorized search of the residence owned by [GPW], at [...] Edmonton, Alberta.
3. In the course of executing the search, [GPW] was arrested on the property while inside a White Dodge Ram parked in the driveway. Horchuk searched the vehicle and seized a Moto Phone (BC01). The phone was located facedown on the centre console. The phone is depicted in image file IMG_20170321_095851.jpg (see "Photos of Residences" Book of Exhibits, Tab 4, page 2) and IMG_20170321_095931.jpg (Tab 4, page 3). The vehicle is depicted in image file IMG_20170321_101115.jpg (Tab 4, page 4) in its location at the time of search.
4. Horchuk identified the watch depicted in photograph "orange watches" (Tab 4, page 7) is one of the items observed at [...] , Edmonton at the time of the search.

JEFF CAMPBELL

5. Cpl. Jeffrey Campbell is a forensic examiner with the Alberta law enforcement response team. His duties include the examination of digital evidence and generating reports. From 2005 to the present he has held numerous positions relating to computer forensics in the field of law enforcement.

6. After its seizure on March 21, 2017, Campbell retrieved the Moto phone (BC01) from Edmonton police evidence locker.

7. Campbell performed a forensic extraction of data from the phone. This extraction included photographs, videos and related metadata. The extraction process followed the usual and ordinary protocol for forensic-grade analysis. Based on his training and experience the resulting data extracted appeared to him to be reliable. Nothing occurring during the process gave him any concern as to the reliability of the extracted data. His examination of the phone revealed that the phone was operating properly and there was nothing wrong with the device that would render the integrity of the extraction unreliable.

8. From his review of the extraction data using forensic software, he generated a report showing select relevant records from the phone. He believes these reports are authentic and reliable representations of the records stored on the phone.

9. The contents of the extraction are found in the Exhibit Book entitled "Photos Extracted From Moto Cellphone" (redactions to images for privacy reasons were made after the extraction). The creation dates associated with the photographs represent the time and date that the photographs were put on the phone either by the taking of a photograph or of receipt of the file from another source.

EXHIBIT BOOKS (Photos)

13. The following exhibit books of photos are agreed to be fair and accurate photographs of what they appear to depict and there is no intent to mislead:

1. "Photos of Residences"
2. [...] "Residence Exhibits"
3. "Alternate Suspect Photos"

EXHIBIT BOOKS (Business Records)

14. The following exhibit books of records are agreed to be business records that are made in the usual and ordinary course of business:

1. "Military Leave Records"
2. "CyberTipline Report 18257453"
3. "CyberTipline Report 18251589"

ALL OF WHICH IS AGREED UPON



Peter Dostal
Crown Counsel



Robert Sutherland
Counsel for [GPW]