IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *R. v. Mills*, 2017 NLCA 12
Date: February 10, 2017
Docket: 201501H0025 & 201501H0033

BETWEEN:

HER MAJESTY THE QUEEN	APPELLANT/RESPONDENT BY CROSS APPEAL

AND:

SEAN PATRICK MILLS	RESPONDENT/APPELLANT BY CROSS APPEAL

Coram: Welsh, Harrington and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
2013 NLPC 0113PA00551; 0113PA00937;
2014 NLPC 0112A01710

Appeal Heard: November 9, 2016
Judgment Rendered: February 10, 2017

Reasons for Judgment by Welsh J.A.
Concurred in by Harrington and Hoegg JJ.A.

Counsel for the Appellant/Respondent by Cross Appeal: Lloyd M. Strickland
Counsel for the Respondent/Appellant by Cross Appeal: Rosellen Sullivan

Welsh J.A.:

[1] Sean Patrick Mills was convicted of communicating by means of a computer with a person he believed to be under the age of sixteen years for a sexual purpose contrary to section 172.1(1)(b) of the *Criminal Code*. The person with whom he was communicating was, in fact, a police officer posing as a fourteen year old girl. He was sentenced to twelve months imprisonment and one year on probation. The Crown seeks leave to appeal and, if granted, appeals against the sentence. Mr. Mills cross-appeals against his conviction. The appeal and cross-appeal both engage questions as to the undercover use of electronic communications by the police.

BACKGROUND

[2] On February 28, 2012, Constable Hobbs created a Hotmail account for a fictitious fourteen year old girl, "Leann", together with a Facebook page and profile containing background information including that she was a high school student. He attached a picture that he had obtained on the internet. The officer did not make any "friend" requests. On March 20, 2012, he received a Facebook message from Mr. Mills. There was an exchange of emails over approximately two months, during which Mr. Mills stated that he was twenty-three years of age, though, in fact, he was thirty-two. A meeting at a park was arranged for May 22, 2012, at which time Mr. Mills was arrested.

[3] The trial judge explained the manner in which Mr. Mills' emails were retained by the officer ((2014), 359 Nfld. & P.E.I.R. 336):

> [6] … In order to ensure that he had captured all the information on the screen, Constable Hobbs employed a program called "Snagit" which allows the computer user to capture and copy the information on the screen. Snagit is a screen shot program that captures video display and audio output. Constable Hobbs employed the Snagit program on each of his communications with Mr. Mills.
>
> [7] The "Snagit" program is a program that is available to the public and commonly used. …
>
> …
>
> [26] In this case, Constable Hobbs and Constable Follett were able to identify the documents produced by the "Snagit" screen captures and testify that they were accurate. The screen capture itself is more akin to a photo or real evidence than it

> is to notes. It is not a particularly clean document as it does produce a printed document which includes irrelevant additional items around the border of the page, including photographs and advertisements. Notwithstanding this, the documents do meet the first three *Wigmore* criteria. The fourth criteria (*sic*), production of the original document, is fulfilled in the sense that the printed page is the best evidence as it has been identified as accurate by the officer who produced it. I find that the screen captures are admissible and that section 30(10) does not apply. I would note that even if the documents were not admissible pursuant to the *Canada Evidence Act*, following *R. v. Fliss*, *supra*, the *viva voce* evidence of Constables Hobbs and Follett on the content of the messages is clearly admissible.

[4] In convicting Mr. Mills under section 172.1(1)(b), the trial judge concluded:

> [45] … I do not accept the accused's explanation as to why he was at the park to meet Leann. The evidence obtained from his computer hard drive coupled with his attendance at the park establishes that he sent the messages to Constable Hobbs. The content of the messages establishes the offences. … I am satisfied that the accused believed the victim's age was fourteen, consequently a conviction should be entered on count 2 … .

[5] At trial, the judge concluded that Mr. Mills' right "to be secure against unreasonable search or seizure" under section 8 of the *Canadian Charter of Rights and Freedoms* was infringed and that the officer failed to meet requirements under the *Criminal Code* to obtain authorizations related to the electronic communications. On March 20, 2015, Mr. Mills was sentenced to fourteen months imprisonment, reduced by two months to compensate for the infringement of his *Charter* rights. Giving reasons, the judge rejected Mr. Mills' request for a conditional sentence.

ISSUES

[6] In addition to leave to appeal against sentence, the appeal and cross-appeal require consideration of (1) the application of Part VI of the *Criminal Code* and section 184.2 in particular, (2) the use of the Snagit computer software program, and (3) section 8 of the *Charter*.

ANALYSIS

Leave to Appeal

[7] Leave to appeal is required because this is an appeal by the Crown as to sentence only (section 676(1)(d) of the *Criminal Code*). The test to be

applied is whether the appeal is frivolous in the sense of having no arguable basis or sufficient merit (*R. v. Blok-Andersen*, 2016 NLCA 9, 376 Nfld. & P.E.I.R. 130, at paragraph 8).

[8] The interaction between section 8 of the *Charter* and Part VI of the *Criminal Code*, the use of electronic communications by the police, and the effect on the sentence imposed meet the requirement for an arguable basis for this appeal. Accordingly, I would grant leave to appeal.

The Appeal and Cross-Appeal

[9] The appeal against sentence is based on the Crown's submission that the trial judge erred in finding that Part VI of the *Criminal Code* was engaged and that Mr. Mills' rights under section 8 of the *Charter* were infringed. The issues relate to the sentence rather than the conviction because the remedy granted was a reduction in sentence. Mr. Mills raises similar issues in his cross-appeal against conviction.

Interception of Communications – Application of the Criminal Code

[10] The Crown submits that the trial judge erred in concluding that Part VI of the *Criminal Code*, which deals with the "Invasion of Privacy", applies in these circumstances and that the police officer was required to obtain specified authorizations. Section 184(1) provides:

> Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
>
> (Emphasis added.)

[11] Section 184.2 deals with an interception where there is consent, application for judicial authorization, the basis for an authorization, the contents and limitations of an authorization, and the issuance of related warrants. Subsection (1) permits the interception of a communication, but requires judicial authorization:

> A person may intercept, by means of any electro-magnetic, acoustic, mechanical or other devise, a private communication where either the originator of the private

> communication or the person intended by the originator to receive it has consented to the interception and an authorization has been obtained pursuant to subsection (3).
>
> (Emphasis added.)

[12] The definition of "Intercept" in section 183 clarifies the various ways in which an interception may be made. It does not provide a dictionary-style definition of the word. Section 183 states:

> "Intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;

[13] That language does not alter the ordinary meaning of an interception which requires the involvement of a third party. Where there is direct communication between two people, the intended recipient cannot be characterized as having "intercepted" a communication meant for that person.

[14] Further, the fact, unknown to the sender, that the recipient is a police officer cannot change the nature of the communication or transform a receipt by the intended recipient into an interception. Viewed from another perspective, if "Leann" had, in fact, been a fourteen year old girl, it could not be said that her receipt of the communications from Mr. Mills constituted an interception.

[15] Electronic communications in the modern world involve a degree of anonymity and easily permit either the sender or recipient of a message to give misleading or false information. In this case, the recipient purported to be a fourteen year old girl while the sender purported to be a twenty-three year old male. Neither was true.

[16] Sections 184 and 184.2 of the *Criminal Code* apply only where there is an "intercept". That criterion was not satisfied on the facts of this case. It follows that Part VI of the *Code* does not apply. The trial judge erred in concluding that authorizations under section 184.2 were required.

Use of "Snagit" Computer Software

[17] The Crown further submits that the use of the Snagit computer software does not alter the conclusion that the officer did not intercept Mr.

Mills' communications. The contrary view is the basis for Mr. Mills' cross-appeal.

[18] As explained by the trial judge, the Snagit program did not affect the manner in which Mr. Mills' communications came into the officer's possession. The program is simply a means to retain a record of the communications. As stated in the Crown's factum, "There is no practical difference between printing a copy of a communication and taking an electronic copy using Snagit." I agree that making a copy of a received message, either on paper or electronically, could not, on that basis, be characterized as an interception. The trial judge accepted the officers' testimony that they "were able to identify the documents produced by the "Snagit" screen captures and testify that they were accurate" (paragraph 3, above). There is no basis on which to conclude that the judge erred in his analysis of the effect and use of the Snagit software program. Making a record of a received electronic communication using a software program for that purpose does not constitute an interception of the communication.

Section 8 of the Charter

[19] In finding that Mr. Mills' rights under section 8 of the *Charter* were infringed, the trial judge relied on his conclusion that authorizations were required under section 184.2 of the *Criminal Code* and that these were not obtained ((2013) 343 Nfld. & P.E.I.R. 128, at paragraph 44). As set out above, this constituted an error. It follows that this rationale could not be relied upon to establish an infringement of section 8 of the *Charter*. It is necessary, then, to consider whether there is another basis on which Mr. Mills could establish an infringement of section 8.

[20] Section 8 of the *Charter* states:

> Everyone has the right to be secure against unreasonable search or seizure.
>
> (Underlining added.)

[21] Determining whether a search is unreasonable involves a consideration of whether, in the circumstances, there is a reasonable expectation of privacy. It is that expectation that triggers the application of section 8. This fundamental proposition is outlined in *Hunter v. Southam*, [1984] 2 S.C.R. 145, where Dickson J., for the Court, wrote that the right guaranteed by section 8 may be "expressed negatively as freedom from

"unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy", and that the "guarantee of security from unreasonable search and seizure only protects a reasonable expectation" (page 159, underlining in original).

[22] In *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, Cromwell J., for the Court, discussed factors relevant to the analysis under section 8:

> [18] The wide variety and number of factors that may be considered in assessing the reasonable expectation of privacy can be grouped under four main headings for analytical convenience: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances: [citations omitted]. However, this is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: *Tessling* [2004 SCC 67, [2004] 3 S.C.R. 432], at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": *Patrick* [2009 SCC 17, [2009] 1 S.C.R. 579], at para. 14 … .

[23] In this case, the analysis focuses on the third and fourth headings identified in *Spencer*; that is, Mr. Mills' subjective expectation of privacy in his communications with "Leann" and whether that subjective expectation was objectively reasonable in the circumstances. Mr. Mills was using electronic social media to communicate and share information with a person he did not know and whose identity he could not confirm. On an objective analysis, as the sender of such communications, Mr. Mills must have known that he lost control over any expectation of confidentiality that he appears to have hoped would be exercised by the recipient of the messages. He took a risk when he voluntarily communicated with someone he did not know, a person he was not in a position to trust. Any subjective expectation of privacy Mr. Mills may have had was not objectively reasonable. In the absence of a reasonable expectation of privacy, section 8 of the *Charter* was not engaged.

[24] I hasten to add that the nature of communications between Mr. Mills and "Leann", which took place using social media such as Facebook, must be distinguished from communications in which there would, in fact, be a reasonable expectation of privacy. For example, privacy could be expected if the recipient of a communication is the sender's bank. Such a

communication is sent for a particular purpose, using a means of communication that is represented to be secure, that clearly engages objectively reasonable privacy interests.

SUMMARY AND DISPOSITION

[25] In summary, the procedure used by the police, resulting in evidence of criminal conduct by Mr. Mills, did not require authorization under section 184.2 of the *Criminal Code*. Nor were Mr. Mills' rights under section 8 of the *Charter* infringed.

[26] Accordingly, I would grant leave to appeal, allow the appeal and dismiss the cross-appeal. The reduction in sentence of two months imprisonment based on the infringement of Mr. Mills' *Charter* rights must be set aside. The sentence of fourteen months imprisonment was not otherwise challenged and is affirmed. However, in the circumstances, as requested by the Crown, I would stay service of the additional two months imprisonment.

_____

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

L. R. Hoegg J.A.